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

REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF WISCONSIN

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ARGUMENT

I. The circuit court erroneously exercised its discretion in suppressing the other-acts evidence here because it misapplied greater latitude and the *Sullivan* analysis.

The State met its low burden of identifying permissible purposes and showing that Jane's allegations are relevant and probative to facts of consequence in this case. The circuit court's decision that the State failed step one of *Sullivan* was contrary to *Sullivan* and the greater latitude rule, Wis. Stat. § 904.04(2)(b). Accordingly, the circuit court erroneously exercised its discretion in suppressing the other-acts evidence.

A. This Court reverses a circuit court's discretionary decision based on a misapplication of legal standards.

Seaton first complains that the State is elevating a discretionary issue to de novo review. (Seaton's Br. 18.) He does not discuss cases noting that review of a circuit court's evidentiary decision includes whether the circuit court "applied the proper legal standards," and its decision "comports with legal principles," which are questions of law reviewed de novo. *Pinczkowski v. Milwaukee Cnty.*, 2005 WI 161, ¶ 15, 286 Wis. 2d 339, 706 N.W.2d 642; *State v. Sarnowski*, 2005 WI App 48, ¶ 11, 280 Wis. 2d 243, 694 N.W.2d 498.

B. The court incorrectly applied legal principles when it suppressed evidence of Jane's allegations.

The circuit court's decision excluding the other-acts evidence was not a reasonable exercise of discretion. The State identified permissible purposes. (State's Br. 16–18.) Given the stark similarities between Anna's and Jane's

accusations, the other-acts are relevant and highly probative to establish Seaton's mode of operation showing plan, identity, motive, and intent, and to bolster Anna's credibility and challenge Seaton's. (State's Br. 18–22.) There is no reasonable basis to determine that the risk of unfair prejudice substantially outweighs the significant probative value. (State's Br. 23–25.)

Seaton asserts that the circuit court here *applied* the proper legal standards because it identified the applicable factors in *Sullivan* and Wis. Stat. § 904.04(2) and it stated that the greater latitude rule applied. (Seaton's Br. 18.) Identifying the correct legal framework is not the same as correctly applying it. Similarly, while the circuit court *identified* relevant facts, (Seaton's Br. 20), it did not correctly apply the legal standards to them.

1. The State identified multiple permissible purposes.

All step one of *Sullivan* requires is that the proponent identify permissible purposes to guide the relevance analysis. *State v. Hurley*, 2015 WI 35, ¶ 62, 361 Wis. 2d 529, 861 N.W.2d 174. The State did that here, listing the statutory purposes of Wis. Stat. § 904.04(2)(a) of motive, identity, plan, intent, and modus operandi, and bolstering Anna's credibility. (R. 21:3, 6; 46:15.) The circuit court incorrectly applied the first *Sullivan* step by ruling that those were not permissible purposes. (R. 46:27.)

Seaton identifies no case law under which a court could simply reject the proponent's offered purposes as not permissible under the first *Sullivan* step. Nor does he address controlling case law explaining that this first step is "hardly demanding." *State v. Dorsey*, 2018 WI 10, ¶ 42, 379 Wis. 2d 386, 906 N.W.2d 158 (citation omitted).

2. Jane's accusations were relevant to those purposes.

Relevance is also an undemanding step. *State v. Marinez*, 2011 WI 12, ¶ 33, 331 Wis. 2d 568, 797 N.W.2d 399. Other-acts evidence is relevant if it "relates to a fact or proposition that is of consequence." *Hurley*, 361 Wis. 2d 529, ¶ 77 (quoting *State v. Sullivan*, 216 Wis. 2d 768, 785–86, 576 N.W.2d 30 (1998)). Here, the State met its burden because Jane's accusations are relevant to modus operandi as to plan, identity, motive, intent, and to Anna's and Seaton's credibility.[1]

Mode of operation. Mode of operation relates to issues of non-consent when the other-acts are similar to the charged acts. *See State v. Ziebart*, 2003 WI App 258, ¶ 20, 268 Wis. 2d 468, 673 N.W.2d 369. Here, the two assaults are markedly similar (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) and show a relevant mode of operation.

Seaton argues that mode of operation is not a permissible purpose because it is not relevant to plan and identity, which he says are also not permissible purposes here. (Seaton's Br. 23–24.) He is wrong: Seaton's mode of operation tends to establish facts of consequence as to plan and identity, as well as motive, intent, and credibility.

Plan. Jane's claim supports a pattern by Seaton to isolate and press sexual intercourse on younger, impaired acquaintances. This is relevant information for the jury in considering intent, motive, and credibility. *See State v. Evers*, 139 Wis. 2d 424, 443, 407 N.W.2d 256 (1987) ("[I]f a like

[1] The State also argued opportunity below and in its opening brief. Its argument in support of that purpose more appropriately goes to mode of operation and plan.

occurrence takes place enough times, it can no longer be attributed to mere coincidence.").

Seaton incorrectly argues that "plan" means that the other act is "a step in a [scheme] leading to the [current] offense." (Seaton's Br. 23.) The "plan" purpose is not that narrow. Rather, it is akin to mode of operation and shows "a concurrence of common elements between the two incidents." *State v. Davidson*, 2000 WI 91, ¶ 60, 236 Wis. 2d 537, 613 N.W.2d 606); *see also Hurley*, 361 Wis. 2d 529, ¶ 83.

Identity. Though Seaton is correct that identity is not a contested element here, (Seaton's Br. 22), it is still a fact of consequence regardless of whether Seaton disputes it. *State v. Payano*, 2009 WI 86, ¶ 69 n.15, 320 Wis. 2d 348, 768 N.W.2d 832 (evidence that bears on an undisputed element of the crime is still relevant).

Motive and intent. Seaton asserts that the State did not raise these purposes below and that an appellate court reviewing a *Sullivan* analysis "may not consider acceptable purposes other than those contemplated by the circuit court." (Seaton's Br. 15 (invoking *Dorsey*)). In *Dorsey*, this Court chose to limit its review "to the arguments presented to the circuit court at the time the circuit court made its admissibility determination." *Dorsey*, 379 Wis. 2d 386, ¶ 36. *Dorsey* did not overrule long-standing law permitting reviewing courts to review purposes additional to what the circuit court considered. *See, e.g.*, *Hurley*, 361 Wis. 2d 529, ¶ 29; *Sullivan*, 216 Wis. at 784–85.

And here, the State argued (and did not forfeit) motive and intent as permissible purposes in its arguments below. (R. 21:3, 6; 46:15, 25.) Seaton and the circuit court were aware

that the State was relying on those purposes.[2] The circuit court's summary dismissal of them without discussion was unsound. (R. 46:25.)

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. Here, third-degree sexual assault requires the State to prove that Seaton had sexual intercourse without Anna's consent. Wis. Stat. § 940.225(3)(a). Sexual assault involving sexual intercourse "requires an intentional or volitional act by the perpetrator." *Hurley*, 361 Wis. 2d 529, ¶ 73 (citation omitted). Accordingly, motive, purpose, and intent are part of the crime that the State must prove. *State v. Hunt*, 2003 WI 81, ¶ 60, 263 Wis. 2d 1, 666 N.W.2d 771 ("purpose is an element of sexual assault, and motive [is] relevant to purpose").

Seaton incorrectly asserts that intent, motive, and purpose are only facts at issue in cases involving assault by sexual contact, not intercourse. (Seaton's Br. 28–29.) This Court rejected that argument long ago. *See State v. Dodson*, 219 Wis. 2d 65, 79, 580 N.W.2d 181 (1998) ("sexual intercourse" necessarily involves "sexual contact").

Credibility. Witness credibility is always "consequential" under Wis. Stat. § 904.01, and especially so in sexual-assault credibility contests. *Dorsey*, 379 Wis. 2d 386, ¶ 50. Here, evidence that Seaton allegedly assaulted Jane in a similar manner to what Anna claimed is relevant to Anna's and Seaton's credibility, which indisputably are propositions of consequence.

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[2] Seaton misrepresents that the State did not identify motive and intent as permissible purposes. (Seaton's Br. 20–21.) The State listed motive in its filing. (R. 21:3, 6.) At the hearing, the State said that the other-acts were also relevant to intent, (R. 46:25); it did not "concede" otherwise.

Seaton seems to agree that the other-acts could be relevant to Anna's or Seaton's credibility; he instead argues that credibility is not a permissible purpose. (Seaton's Br. 24–26.) He worries that holding otherwise here would mean that *all* other-acts would come in, Wis. Stat. § 904.04(2)(a) would become meaningless, and propensity evidence would flood all criminal prosecutions. (Seaton's Br. 24–25.)

Other-acts will nearly always be admissible in sexual assault cases. Suppression is—and should be—rare. The other-acts analysis leans toward admission, and even more so when greater latitude applies. That our case law and greater latitude pave a smoother path to allow other-acts in sexual assault cases is appropriate.[3] And it does not render the *Sullivan* analysis pointless. Courts still must determine the purposes, relevance, and probative value of the other-acts, conduct the balancing test, and craft appropriate limiting instructions for the jury. And Seaton's floodgates argument is meritless: sexual assault cases are the *only* cases courts and parties ever refer to as credibility contests.

Seaton attempts to distinguish and limit *Hunt* and *Martinez* to rebutting a witness's recantation or providing context to the witness's accusations. (Seaton's Br. 25–26.)

Hunt and *Martinez* should not be read so narrowly. The common thread in those cases was that the other-acts came in to rebut evidence that could undercut the victim's credibility. Here, Anna's credibility is at issue because she is alleging assault, but that's not the only reason. Seaton is challenging Anna's credibility by claiming consent. There also is evidence that could undercut Anna's credibility, such as her delayed reporting and her sister's opinion of the events. Finally, the other-acts lend credence to Anna's description of

[3] Federal rules are even more liberal than Wisconsin's in this regard: Fed. R. Evidence 413 permits similar other-acts in sexual assault cases to be admitted solely for propensity purposes.

the events leading up to and following the assault, which bears on both her and Seaton's credibility.

Nor does *Dorsey* assist Seaton. That decision teaches that treating other-acts as relevant to credibility does not transform them into pure propensity evidence:

> [T]o the extent that [the other-acts] operated to bolster [the victim's] credibility, we have held that "[a] witness's credibility is always 'consequential' within the meaning of Wis. Stat. § 904.01." And we have held that credibility is particularly probative in cases that come down to [a credibility contest]. Moreover, the difficult proof issues in [credibility contests] "provide the rationale behind the greater latitude rule[,] . . . [which] allows for the more liberal admission of other-acts evidence that has a tendency to assist the jury in assessing [credibility]."

Dorsey, 379 Wis. 2d 386, ¶ 50 (final alteration in original) (citations omitted).

Finally, Seaton suggests that greater latitude exists primarily to combat the average person's disbelief that anyone other than a degenerate could exploit a young child, and hence, that the rule should not apply in cases involving "older teenagers." (Seaton's Br. 26.) Wisconsin Stat. § 904.04(2)(b) does not condition its applicability on the victim's age. Moreover, the "monster myth"—the stereotype that only a depraved individual is capable of sexual assault—and others are prevalent in "adult" sexual assault prosecutions. *See* Dr. JoAnne Sweeny, *"Brock Turner Is Not a Rapist": The Danger of Rape Myths in Character Letters in Sexual Assault Cases*, 89 UMKC L. Rev. 121, 140–48 (2020) (discussing common misconceptions in adult rape cases, including "monster," "we-were-both-drunk," and "real-rape-causes-physical-injury" myths).

Even so, the other-acts here are not offered "solely" to support Anna's credibility. They are demonstrably relevant to mode of operation, plan, identity, motive, and intent.

3. The other-acts here are probative.

Evidence is probative if it tends "to make a consequential fact [or proposition] more probable or less probable than" without it. *Hurley*, 361 Wis. 2d 529, ¶ 77 (quoting *Sullivan*, 216 Wis. 2d at 785–86). As argued, (State's Br. 20–21), Jane's accusations (that Seaton, whom she knew, isolated her after she had been drinking and forced intercourse with her) aligned closely to Anna's (that Seaton, whom she knew, isolated her after she had been drinking, and forced intercourse with her) in time, complexity, distinctiveness, manner, and circumstances.

Seaton defends the circuit court's noted differences between the alleged assaults; whether Seaton was a friend or acquaintance to the teen, (R. 46:22–23); whether the teen had invited Seaton to hang out or just encountered him, (R. 46:26–27); whether Seaton used "a different type of force" (with no explanation how) in the assaults, (R. 46:23); or, primarily in the court's view, the indoor or outdoor setting of the assault, (R. 46:23–24, 26 ("Where I sort of struggle . . . [is] the nature of the assaults, one being inside, one being outside.")).

None of these details, either individually or collectively, detract from the probative value of Jane's allegations. The point of admitting Jane's allegations is to show Seaton's mode of operation in assaulting Anna without securing consent. That Anna knew Seaton better than Jane did, or that she invited him into her house does not undercut those similarities. Nor was the "force" used dissimilar. Both teens described some manner of restraint: Jane said that Seaton pushed her down and held her hands. (R. 21:2.) Anna recalled Seaton pushing her and having her hands on a wall. (R. 21:1.)

Seaton asserts that probative value requires features that are uncommon or unique. (Seaton's Br. 34–35.) But probative value does not turn on whether the incidents share individually unusual circumstances. Rather, it is the

convergence of similar features occurring together. *See Sullivan*, 216 Wis. 2d at 786–87 ("The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence."). Again, Jane's and Anna's accusations are markedly similar and make it less probable that the two events repeated "by mere chance or coincidence."

4. Seaton cannot show that the probative value is substantially outweighed by the risk of unfair prejudice.

Seaton argues that there is significant danger of unfair prejudice to Seaton if the jury hears Jane's allegations. (Seaton's Br. 35–36.) He calls Jane's allegations "arguably more serious than the charged offense, due to the alleged degree of force." (Seaton's Br. 36.) Those arguments are unpersuasive. Neither Jane nor Anna alleged violence beyond some restraint and painful intercourse. Further, Jane will be available for cross-examination, the uncharged nature of her allegations is inherently less prejudicial, and the jury would be instructed on the limited purposes for which they could consider Jane's allegations. (State's Br. 23–25.)

5. Greater latitude applies to each step and requires admission.

Under the *Sullivan* analysis alone, there is no reasonable basis to suppress the other-acts here. Application of the greater-latitude rule to each step in the analysis further galvanizes that conclusion.

Seaton suggests that greater-latitude should be limited to child sexual assault cases where "the need to corroborate a child victim's testimony can be an important consideration." (Seaton's Br. 34.) Disregarding that Anna was 17 years old at the time of her assault and still legally a child, his assertion flies in the face of Wis. Stat. § 904.04(2)(b), which provides

that greater latitude applies to all sexual assault prosecutions, and case law holding the same. *See, e.g.*, *Davidson*, 236 Wis. 2d 537, ¶ 44.

II. This Court should clarify that *Alsteen* and *Cofield* are no longer good law.

Alsteen and *Cofield* have no practical viability for the other-acts analysis in light of the greater latitude rule and this Court's decision in *Dorsey*. (State's Br. 31–38.)

Seaton's defense of *Alsteen* hangs on false notions that a consent defense to sexual assault (1) makes consent the "only issue," and (2) precludes the admission of other-acts evidence involving the defendant's past nonconsensual sexual misconduct. (Seaton's Br. 32–33.)

On Seaton's first point, the idea that consent is *ever* the only issue in a sexual assault trial is archaic. *Alsteen*'s language to that effect comes from a 75-year-old Fourth Circuit case reflecting hostility toward admitting other-acts evidence in rape cases. *Lovely v. United States*, 169 F.2d 386, 389–90 (4th Cir. 1948). *Alsteen*'s language misleadingly narrows the evidentiary focus to the victim, when both the accused's and the victim's credibility are at issue. By raising consent as a defense, the defendant is saying, *she's lying or mistaken*, and also, *I would have stopped if she did not consent*. Accordingly, similar acts, like those here, are probative of the defendant's credibility on those assertions. *See Ziebart*, 268 Wis. 2d 468, ¶ 24 (holding other-acts evidence of similar past sexual assault relevant to rebut a consent defense).

Second, *Alsteen* does not bar the admission of other-acts in sexual assault cases involving a consent defense. Rather, *Alsteen* permits admitting other-acts of nonconsensual sexual conduct when they are relevant and probative to permissible purposes. *Ziebart*, 268 Wis. 2d 468, ¶ 19.

Finally, *Cofield*'s reasoning is wrong, and neither *Cofield* nor *Alsteen* applied greater latitude, which put their holdings at odds with that rule and with virtually every other-acts case from the last two decades. Because *Alsteen* and *Cofield* create unnecessary confusion and conflict on these evidentiary questions, this Court should overrule them.

In sum, a defendant's chosen defense does not direct the exclusion of other-acts evidence that is subject to greater latitude and that objectively satisfies *Sullivan*.

CONCLUSION

The 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 21st day of August 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 2988 words.

Dated this 21st day of August 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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 21st day of August 2023.

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