STATE OF WISCONSIN

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

DISTRICT II

Case No. 2021AP1399-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MORRIS V. SEATON,

Defendant-Respondent.

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

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

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

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

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

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

This Court should say no and reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the briefs adequately set forth the facts and legal principles. Publication of this Court's decision is warranted. Questions about the admissibility of other acts in sexual assault cases where consent is the defense have arisen with some frequency in the circuit courts, suggesting that published guidance would be beneficial.

INTRODUCTION

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

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

Here, the State satisfied its low burdens of showing multiple permissible purposes, relevance to those purposes, and strong probative value in the proposed other-acts evidence, and Seaton cannot show that that probative value is substantially outweighed by an unfair risk of prejudice under the circumstances. The circuit court unreasonably and unsoundly declined to admit the strikingly similar other-acts evidence of Seaton's assault of Jane. This Court should reverse.

STATEMENT OF THE CASE

Anna's allegations.

In September 2019, "Anna" told Brookfield police that on June 13, 2019, while her mother was working a night shift, she and her older sister invited two male friends to their home, where they all drank alcohol. (R. 2:1–2; A-App. 53.) 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-App. 52–53.)

After the four of them had been drinking in the apartment "for some time," Anna felt tired and drunk and got into her bed; her sister joined her in their shared bedroom. (R. 2:2; A-App. 53.) Anna's sister texted Dayveon telling him that he and Seaton could stay as long as they wanted and asking them to lock the door when they left. (R. 2:2; A-App. 53.)

At some point later, Anna noticed that Dayveon and Seaton had come into her bedroom. (R. 2:2; A-App. 53.) Dayveon—who previously had an intimate relationship with her sister—got into her sister's bed, while Seaton got into Anna's bed with her. (R. 2:2; A-App. 53.)

Anna said that her sister and Dayveon left the bedroom. (R. 2:2; A-App. 53.) After they left, Seaton remained and touched Anna's thigh, put his fingers inside her, took off her clothes, and then penetrated her with his penis. (R. 2:2; A-App. 53.) 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; A-App. 53.) Anna said that she "began to sober up and pushed [Seaton] off of her." (R. 2:2; A-App. 53.) Anna said that Seaton then tried to cuddle, but Anna didn't want to be touched and she asked Seaton when he was going to leave. (R. 2:2; A-App. 53.) Anna claimed that Seaton asked her why she was so nervous and told her that he "didn't need to have sex again." (R. 2:2; A-App. 53.) She said that "[s]ometime later, a girl picked [Seaton] up from the apartment." (R. 2:2; A-App. 53.)

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; A-App. 53.) 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; A-App. 53–54.) Anna also told two friends and her current boyfriend about the assault. (R. 2:3; A-App. 54.)

According to the criminal complaint, within a few days of talking to police, Anna also spoke with a forensic interviewer for the Brookfield Police Department. (R. 2:3; A-App. 54.) A summary of that interview in the criminal complaint reflects that Anna reported facts consistent with what she told police a few days earlier. (R. 2:3–4; A-App. 54–55.)

The charge and "Jane's" allegations

The State charged Seaton with third-degree sexual assault. *See* Wis. Stat. § 940.225(3); (R. 2:1; 10; A-App. 52). The State filed a pretrial motion to admit other-acts evidence of allegations that Seaton had sexually assaulted 17-year-old "Jane" in Whitewater in September 2018, less than a year before Anna was assaulted. (R. 21:2; A-App. 25.) Jane, who was a Brookfield East student at the time of the alleged assault, was in Whitewater helping her sister on college move-in day. (R. 21:2; A-App. 25.) 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 he had already graduated. (R. 21:2; A-App. 25.)

Jane said that at around 10 p.m., she decided to leave the gathering to look for her cousin. (R. 21:2; A-App. 25.) Seaton offered to help her, and the two left on foot. (R. 21:2; A-App. 25.) Seaton suggested that they go to a backyard a few houses from Jane's sister's house, where the two sat and talked on the grass "for some time." (R. 21:2; A-App. 25.) According to Jane, Seaton then pushed her back onto the grass, held her hands above her head with one hand, and pulled down her pants with the other. (R. 21:2; A-App. 25.) Seaton forced intercourse with her despite Jane's telling him to stop; according to Jane, he put his arm over her mouth and

told her "that it was fine and to be quiet." (R. 21:2; A-App. 25.) When Seaton finished, he got up and walked away. (R. 21:2; A-App. 25.) Jane said "that the intercourse was painful and she continued to feel pain [from it] for about a week." (R. 21:2; A-App. 25.)

Jane, like Anna, did not immediately report the assault; rather, she reported it in May 2019 when she saw that Seaton "was still coming around the high school" and she "came to realize how much the assault was affecting her." (R. 21:2; A-App. 25.)

The State, in its motion, offered the other-acts evidence to show Seaton's "motive, identity, plan, opportunity, and modus operandi," through his pattern of choosing younger victims he knew from Brookfield East, in situations where the victim had been drinking, where the victim is isolated from friends or family; initiating intercourse; and refusing to stop when asked. (R. 21:6; A-App. 29.) 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; A-App. 29–30.) It argued that the greater latitude rule applied and supported admission. (R. 21:7–8; A-App. 30–31.) Finally, it argued that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. (R. 21:8–9; A-App. 31–32.)

Seaton's counsel, in response, wrote that Jane's allegations were unsupported and "in serious dispute" and that introduction of her allegations would cause the jury to try Seaton on Jane's claims in addition to Anna's. (R. 36:2.) Seaton argued that other acts should be admitted sparingly, and argued that even if the State was offering the Whitewater incident for a permissible purpose here, it was not relevant, and its probative value was substantially outweighed by the

risk of unfair prejudice. (R. 36:2–4.) 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 argument, the circuit court denied the State's motion. The court stated multiple times that admission of other acts "is an exception to the general rule" of exclusion. (R. 46:19–20; A-App. 15–16.) It rejected all of the State's proposed permissible purposes. In doing so, it noted that 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 to or probative of a permissible purpose, even with greater latitude applying. (R. 46:22–27; A-App. 18–23.)

Subsequent appellate proceedings

The circuit court memorialized its decision in a final order. (R. 53; A-App. 4.) The State appealed from that order as a matter of right under Wis. Stat. § 974.05(1)(d)2. (R. 54.)

After the parties filed briefs and the case was submitted, this Court certified the case to the Wisconsin Supreme Court. (A-App. 33–48.) In that certification, this Court identified the following potential additional issue: whether past precedent,[1] indicating that other acts were not relevant to prove whether the victim consented in sexual assault cases where consent was an issue, was still controlling law in light of the codification of the greater latitude rule and *State v. Dorsey*, 2018 WI 10, ¶¶ 23–25, 379 Wis. 2d 386, 906 N.W.2d 158. (A-App. 33–34.) This Court also asked the supreme court to clarify whether bolstering a victim's

[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.

credibility is a permissible purpose under the *Sullivan* analysis. (A-App. 48.)

The Wisconsin Supreme Court granted review. (A-App. 50.) Following briefing and oral argument, the Court stated that it was equally divided on whether to affirm or reverse the circuit court's decision, and it remanded to this Court for it to decide the matter. (A-App. 50–51.) On remand, this Court ordered the parties to file replacement briefs.

STANDARD OF REVIEW

This Court "will uphold a circuit court's evidentiary rulings if it examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." *Pinczkowski v. Milwaukee 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)).

ARGUMENT

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

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

To determine whether to admit evidence of other acts, courts employ the three-step analytical framework outlined in *State v. Sullivan*, 216 Wis. 2d 768, 771–72, 783, 576 N.W.2d

30 (1998). The first step asks whether the party has offered the evidence for a permissible purpose under Wis. Stat. § 904.04(2). *Sullivan*, 216 Wis. 2d at 772. The next step asks whether the evidence is relevant. *Id.*

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

Courts have described the first sentence of section 904.04 as stating a "general rule . . . of exclusion" because it generally bars other-acts evidence offered *only* to prove propensity, i.e., "to prove the criminal disposition of the defendant." *State v. Speer*, 176 Wis. 2d 1101, 1114–15, 501 N.W.2d 429 (1993) (citation omitted). But that statement is merely descriptive; it does not reflect a bias or presumption against admitting other-acts evidence: "The case law in no way indicates that a circuit court should predispose itself against the admission of other crimes evidence." *Id.* at 1115. Far from discouraging admissibility of other acts, section 904.04(2) "favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *Id.*

In addition, admissibility is especially favored when the greater latitude rule applies. Greater latitude is a "longstanding principle that in sexual assault cases . . . courts permit a 'greater latitude of proof as to other like occurrences.'" *State v. Davidson*, 2000 WI 91, ¶ 36, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted). This evidentiary rule is codified in Wis. Stat. § 904.04(2)(b)1. and applies when the charges involve a "serious sex offense."

Dorsey, 379 Wis. 2d 386, ¶¶ 31–33. The rule "applies to each prong of the *Sullivan* analysis." *Marinez*, 331 Wis. 2d 568, ¶ 20.

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

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

Second, the elements that the State must prove at trial inform the *Sullivan* analysis. To prove third-degree sexual assault, the State must establish beyond a reasonable doubt that: (1) Seaton had sexual intercourse with Anna; and (2) Anna did not consent to the intercourse. *See* Wis. Stat. § 940.225(3)(a); *see also* Wis. JI-Criminal 1218A (2018). Though the statute does not make intent an express element of the crime, it is implicit within the first element to prove sexual intercourse. "There is no doubt that sexual assault, involving either sexual contact or sexual intercourse, requires an intentional or volitional act by the perpetrator." *State v. Hunt*, 2003 WI 81, ¶ 60, 263 Wis. 2d 1, 666 N.W.2d 771.

Against that backdrop, and as discussed below, there is no reasonable basis to exclude the State's proposed other-acts evidence. Jane's allegations satisfy all three prongs of *Sullivan*, especially when greater latitude applies.

1. The identified permissible purposes (step one of *Sullivan*) guides the relevance analysis (part one of step two).

The first prong of the *Sullivan* analysis is a low bar for the proponent to overcome. *Marinez*, 331 Wis. 2d 568, ¶ 25. "The purposes for which other-acts evidence may be admitted are 'almost infinite' with the prohibition against drawing the propensity inference being the main limiting factor." *Id.* This first step is "largely meant to develop the framework for the relevancy examination." *State v. Hurley*, 2015 WI 35, ¶ 62, 361 Wis. 2d 529, 861 N.W.2d 174. "The proponent need only identify a relevant proposition that does not depend upon the forbidden inference of character as circumstantial evidence of conduct." *Id.* (citation omitted). In addition, the greater latitude rule operates to increase the ease with which the State satisfies the first prong of the *Sullivan* test. *See Dorsey* 379 Wis. 2d 386, ¶¶ 32–33.

Permissible purposes include, but are not limited to, "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2)(a). Other permissible purposes include providing the jury additional context and information to assess witness credibility. *Marinez*, 331 Wis. 2d 568, ¶ 26.

The point of the permissible-purpose step is to guide the second step of *Sullivan*. Accordingly, below, the State groups the proposed purposes with their relevance, which is the first part of the second step of the *Sullivan* analysis. While proving relevance is "significantly more demanding than the first" step of identifying permissible purposes, establishing relevance "still does not present a high hurdle for the proponent." *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.

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). Put simply, "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). To determine relevance, the court focuses "on the pleadings and contested issues in the case." *Payano*, 320 Wis. 2d 348, ¶ 69.

2. The other acts are relevant to multiple permissible purposes.

a. Motive, intent, and purpose

A defendant's motive, intent, and purpose 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. And "[t]here is no doubt that sexual assault, involving either sexual contact or sexual intercourse, requires an intentional or volitional act by the perpetrator." *Hurley*, 361 Wis. 2d 529, ¶ 73 (citation omitted). Because one element of sexual assault is a defendant's intent to achieve sexual arousal or gratification, motive and intent are facts of consequence in these cases. *Id.* ¶¶ 73–74, 83. That point holds true even if the defendant does not dispute motive. *Davidson*, 236 Wis. 2d 537, ¶ 65; *see also Payano*, 320 Wis. 2d 348, ¶ 69 n.15 (evidence that bears on an undisputed element of a crime is still relevant).

Here, the other act involving Jane (given her age, her familiarity with Seaton, and her intoxicated state) is relevant to show that Seaton had a motive, intent, and purpose to have intercourse with Anna by getting into her bed and pressing her for sex. It further shows that he had a motive, intent, and purpose to exert power and control over a young and impaired acquaintance by engaging her after consuming alcohol together and to achieve sexual gratification from her protests. *See, e.g.*, *Hunt*, 263 Wis. 2d 1, ¶ 60 (holding that other-acts evidence of a 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, help prove that Seaton employed that same motive, intent, and purpose to exert power and control over another intoxicated 17-year-old acquaintance from high school and to obtain sexual gratification from her resistance.

b. Plan, opportunity, and mode of operation

Method or mode of operation (also known as modus operandi) are relevant 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 other acts and charged conduct are strikingly similar (both against 17-year-olds whom Seaton knew from high school, both of whom had been drinking with Seaton, both of whom Seaton caused or found to be isolated, and both of whom he forced intercourse with despite their pleas to stop). These similarities are relevant to Seaton's mode of operation, plan, and opportunity to target younger female acquaintances, whom he knew were drinking, and whom he could isolate.

These sets of purposes—motive-intent-purpose and plan-opportunity-mode of operation—are exactly what this Court identified in *Ziebart* as a sound basis for admitting evidence of strikingly similar other acts of nonconsensual sex by the defendant. In that case, the court admitted testimony from a man whom Ziebart had abducted, robbed, and sexually assaulted years earlier as other acts in a trial where a woman alleged that Ziebart offered her a ride, abducted her, and sexually assaulted her. *Ziebart*, 268 Wis. 2d 468, ¶¶ 4–5, 8. This Court had no difficulty affirming the admission of that evidence under multiple permissible purposes:

> Where, as here, the other-acts evidence of non-consent relates not only to sexual contact but also to a defendant's *modus operandi* encompassing conduct inextricably connected to the strikingly similar alleged criminal conduct at issue, the evidence of non-consent may be admissible to establish motive, intent, preparation, plan, and absence of mistake or accident under Wis. Stat. § 904.04(2).

Id. ¶ 20.

To be sure, the assaults in *Ziebart* shared an unusual similarity[2]—Ziebart claimed to be a vigilante police officer ridding the streets of people like the victims. But that Seaton's mode of operation here is less imaginative than Ziebart's was does not make the similarities between Jane's and Anna's stories any less striking. Seaton's pattern of conduct isolating a drunk, younger acquaintance and forcing sex over her objections reflects an identical exercise of power, control, and dominance to obtain sexual gratification.

[2] They also had a distinctive dissimilarity in that the victims were different genders.

c. Credibility

For those same reasons, Jane's claims of Seaton's assault of her assist the jury in assessing Anna's and Seaton's credibility. *See Marinez*, 331 Wis. 2d 568, ¶ 27. The other acts, if believed, corroborate the events Anna was able to describe—that Seaton entered her bedroom and bed while she was drunk and forced intercourse without her consent. It also rebuts Seaton's defense of consent; Jane's allegations are probative of Seaton's state of mind as to his conduct with Anna and rebut Seaton's implicit defense that he would have left Anna alone if she had not consented.

In its certification to the supreme court, this Court expressed uncertainty whether bolstering a victim's (or undercutting a defendant's) credibility is a permissible purpose to admit other acts, particularly in light of the greater latitude rule. Wisconsin courts have long held that corroborating or rebutting testimony, and bolstering or undercutting credibility, are permissible purposes in sexual assault cases, and that similar other acts are relevant to those purposes.[3]

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[3] *See, e.g.*, *State v. Marinez*, 2011 WI 12, ¶¶ 26–27, 24, 331 Wis. 2d 568, 797 N.W.2d 399 (emphasis added) (reiterating "that context, *credibility*, and providing a more complete background are permissible purposes under Wis. Stat. § 904.04(2)(a)"); *State v. Hunt*, 2003 WI 81, ¶ 59, 263 Wis. 2d 1, 666 N.W.2d 771; *State v. Plymesser*, 172 Wis. 2d 583, 595, 493 N.W.2d 367 (1992) (noting need and probative value of other-acts evidence "to corroborate the victim's testimony"); *State v. Fishnick*, 127 Wis. 2d 247, 257 n.4, 378 N.W.2d 272 (1985); *Proper v. State*, 85 Wis. 615, 629, 55 N.W. 1035 (1893); *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. 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

(Continued on next page)

Recognizing credibility as a permissible purpose comports with the greater latitude rule. Greater latitude facilitates the admission of other acts in sexual assault cases in part because witness credibility is always consequential in these cases. Moreover, greater latitude applies to all three prongs of the *Sullivan* analysis. *Davidson*, 236 Wis. 2d 537, ¶ 51. Bolstering a victim's (or undercutting a defendant's) credibility is a permissible purpose; it is the purpose against which courts assess relevance and probative value under *Sullivan*'s second prong, which drives the analysis under the balancing test of the third prong. *See, e.g.*, *Dorsey*, 379 Wis. 2d 386, ¶ 50 (credibility was always "consequential" and particularly probative in credibility contests).

3. The evidence is probative to those purposes.

The second part of *Sullivan*'s second prong—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.

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relevant to support the victim's credibility); *State v. C.V.C.*, 153 Wis. 2d 145, 162, 450 N.W.2d 463 (Ct. App. 1989) (other acts relevant to issue of defendant's claim that victim consented to intercourse).

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

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, purpose, and intent to exert power and control and to obtain sexual gratification. It indicates a plan, opportunity, and mode of operation that is probative of his intent to choose an intoxicated younger acquaintance (potentially because she would be more likely to trust him than she would a stranger), whom he could isolate,

[4] 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 a year earlier in 2017. That discrepancy was apparently based on a later police report stating that Jane said the assault was in 2017. (R. 46:10–11, 17; A-App. 6–7, 13.) Even if the span between the alleged assaults was a year and nine months, that gap is not reasonably lengthy to make the first alleged assault irrelevant or nonprobative. *See, e.g.*, *State v. Dorsey*, 2018 WI 10, ¶ 47, 379 Wis. 2d 386, 906 N.W.2d 158 (upholding circuit court's reasoning that two-year gap between acts did not render them too dissimilar given their other commonalities).

and whom he could press for intercourse. And its similar nature is probative of Anna's credibility in relaying the details of her alleged assault, and of Seaton's credibility to the extent that he's claiming that he would not have had sex with Anna without her consent.

And the greater latitude rule supports the conclusion that this other-acts evidence satisfies the second *Sullivan* 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 the "difficult proof issues" in sexual assault cases. *Marinez*, 331 Wis. 2d 568, ¶ 34. Sexual assault 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.

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. The other-acts evidence is relevant to and probative of facts of consequence in this case and will assist the jury in its credibility determinations. It would be admissible even without greater latitude applying; with greater latitude, its exclusion is wholly unreasonable.

Excluding the other acts here conflicts with *Dorsey*. 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 before the charged acts of abuse. *Dorsey*, 379 Wis. 2d 386, ¶¶ 16–17. That 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 (citation omitted).

That reasoning supports reversal in this case. Jane's allegations speak to Seaton's motive, intent, and purpose (exerting power and control for sexual gratification), his mode of operation, opportunity, and plan (to exploit a younger intoxicated female acquaintance), and both his and Anna's credibility (as to what happened that night and Seaton's implicit claim that he would not have had sex without Anna's consent). The circuit court unreasonably and inconsistently with case law excluded the other acts here.

4. The circuit court incorrectly applied the law and reached an unreasonable result.

Normally, the applicable standard of review on evidentiary decisions is difficult for an appellant to overcome. It is less daunting, however, when a circuit court excludes other acts of a defendant in a greater latitude case.[5] To start,

[5] State appeals of these decisions are relatively infrequent, mainly because either circuit courts generally correctly admit other acts or the State declines to appeal the adverse ruling. It bears noting, however, that this Court recently reversed circuit court decisions suppressing other-acts evidence in *State v. Coria-Granados*, No. 2019AP1989-CR, 2021 WL 503323, ¶¶ 9–83 (Wis.

(Continued on next page)

if there is a bias in other-acts decision-making, it is toward admissibility. *Marinez*, 331 Wis. 2d 568, ¶¶ 26, 33, 41 ("[T]he bias . . . is squarely on the side of admissibility." (citation omitted)). And that bias toward admissibility is even more pronounced when, as here, greater latitude applies. Wis. Stat. § 904.04(2)(b).

Yet, the circuit court operated under the opposite and incorrect principle that admission of other acts "is still an exception to the rule," (R. 46:13; A-App. 9), repeating that "other acts evidence is an exception to the general rule that . . . evidence of other crimes, wrongs or acts are not admissible," (R. 46:19–20; A-App. 15–16), and reiterating that admission of other acts "is the exception, not the rule." (R. 46:27; A-App. 23.) The court's incorrect view requiring the State to persuade why it should make an exception and admit evidence that normally is excluded—when under case law and greater latitude, it is the *exclusion* of other-acts evidence that is the exception—calls into doubt the soundness of its decision.

Along those lines, the court also expressed concern that admitting the other acts would require Seaton "to defend against not one, but two allegations." (R. 46:13.) To the extent that comment reflects a concern that Jane's allegations were uncharged and unproven, nothing in the law requires that the other acts resulted in a charge or conviction to be admissible. Wis. Stat. § 904.04(2)(b)1. If that comment reflects that the court was concerned that Seaton would have to defend himself against Jane's allegations, that concern disregards that the *Sullivan* analysis establishes safeguards against the risk of unfair use of the other acts. That test establishes limited purposes for which the other acts are used, it sets boundaries

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Ct. App. Feb. 11, 2021) (unpublished) (A-App. 56–71); and *State v. Smogoleski*, No. 2019AP1780-CR, 2020 WL 6750487, ¶¶ 17–25 (Wis. Ct. App. Nov. 18, 2020) (unpublished) (A-App. 72–77).

for how the jury must consider that evidence, and it makes clear that the jury may only consider the evidence for those select purposes.

But that Seaton might have to address the other-acts evidence at trial is not a basis for exclusion. Any similar other acts would make a defense more difficult and strengthen the State's case. That is precisely why the State seeks to admit them.

Furthermore, while the circuit court recognized the analytical framework, it failed to apply it correctly or consistently with *Sullivan*, Wisconsin's other-acts case law, and the greater latitude rule. To start, the circuit court summarily rejected each of the State's proposed permissible purposes:

> 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; A-App. 21.) The court noted that intent could be a relevant purpose; the State confirmed it was, but the court declined to consider it because it did not believe that the State developed it in its motion. (R. 46:25; A-App. 21.) It likewise rejected identity, plan, and mode of operation, primarily because the assault of Jane occurred outside, which rendered it too dissimilar to Anna's claims of an indoor assault to be relevant. (R. 46:26; A-App. 22.)

The circuit court erred when it denied the State's motion because the other-acts evidence was "not being offered for a permissible purpose." (R. 46:27; A-App. 23.) Here, the State identified multiple permissible purposes and, therefore,

satisfied the first *Sullivan* prong as a matter of law. As argued, evidence of Jane's allegations were plainly relevant to Seaton's motive, intent, and purpose (exerting power and control for sexual gratification), his mode of operation, opportunity, and plan (to exploit a younger intoxicated female acquaintance), and both his and Anna's credibility (as to what happened that night and Seaton's implicit claim that he would not have had sex without Anna's consent). The circuit court's decision here cannot be squared with the similar scenarios and reasoning in *Ziebart* and *Dorsey*.

Finally, the circuit court's view that the assaults were too different to be relevant cannot be squared with case law in *Ziebart* and *Dorsey* and the greater latitude rule. Jane's allegations were strikingly similar to Anna's and hence relevant and probative to the purposes for which the State intended to use them: to show that Seaton has had a motive and mode of operation of exerting power and control over an intoxicated acquaintance and obtaining sexual gratification from her resistance.

The distinctions between the assaults did not detract from that conclusion. In other words, the State was not proposing the other-acts evidence to argue that Seaton had a motive to assault women in their beds as opposed to in the grass or that he used a particular degree of force in his assaults. Given that, the differences between the assaults here were no more significant than the differences one would expect to see between two separate acts: different dates, different victims, different towns. If the circuit court's reasoning stands, it is difficult to see how any other act could be similar enough to be admitted, even though the last two-decades-plus of other-acts case law and the codification of the greater latitude rule counsel otherwise.

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

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

Below, the circuit court concluded that the State failed to identify a permissible purpose or prove relevance, and thus did not reach *Sullivan*'s third prong. (R. 46:27; A-App. 23.) Nevertheless, this Court may independently review the record to determine if there was "any reasonable basis for the trial court's discretionary decision." *Payano*, 320 Wis. 2d 348, ¶ 92 (citation omitted). Here, the record establishes that there is no reasonable basis to conclude that the probative value of the evidence of Jane's accusations would be substantially outweighed by the danger of unfair prejudice. *See Hurley*, 361 Wis. 2d 529, ¶ 87. Thus, this Court should find no basis to affirm the circuit court's decision to prohibit the admission of the evidence. *See Payano*, 320 Wis. 2d 348, ¶ 92.

In assessing the unfair-prejudice balancing test, the Court considers the State's "need to present [the other-acts] evidence given the context of the entire trial." *Hurley*, 361 Wis. 2d 529, ¶ 87. "Evidence that is relevant 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.'" *Id.* (quoting Wis. Stat. § 904.03 (2011–12)). "Essentially, probative value reflects the evidence's degree of relevance. Evidence that is highly relevant has great probative value, whereas evidence that is

only slightly relevant has low probative value." *Id.* (citation omitted). So, the assessment of probative value duplicates the relevancy analysis done under the second step of the *Sullivan* test. *See id.* ¶¶ 79, 91. "Prejudice is not based on simple harm to the opposing party's case, but rather 'whether the evidence tends to influence the outcome of the case by improper means.'" *Id.* ¶ 87 (citation omitted).

Here, the balancing test favors the State; Seaton cannot demonstrate otherwise. To prove Seaton's guilt, the State must show that in June 2019, Seaton had sexual intercourse with Anna without her consent. As discussed, the strikingly similar other-acts evidence of Jane's allegations has significant probative value because it establishes Seaton's motive, purpose, and intent with regard to exerting power and control over Anna; it supports the theory that Seaton employed a plan, opportunity, and mode of operation in assaulting Anna; it bolsters Anna's credibility and explanation of the events that night; and it undercuts Seaton's defense that he obtained Anna's affirmative consent to have intercourse.

The facts here align with those in *Smogoleski*, which has persuasive value. *State v. Smogoleski*, No. 2019AP1780-CR, 2020 WL 6750487, ¶¶ 17–25 (Wis. Ct. App. Nov. 18, 2020) (unpublished); (A-App. 74–76). In *Smogoleski*, this Court held that other acts of the defendant "engaging in sexual acts with an unconscious teenager who had been drinking alcohol at a house party" were highly relevant to show context, intent, motive, consent, and witness credibility, and were probative because those features were similar to the charged act. *Smogoleski*, 2020 WL 6750487, ¶ 23; (A-App. 75–76).

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." *Hurley*, 361 Wis. 2d 529, ¶ 88 (alteration in original) (citation omitted).

The other-acts evidence here does none of those things. Seaton stands charged with third-degree sexual assault; the nature of Jane's allegations are no more likely to arouse horror than what Anna will be alleging. Further, the circuit court can, and presumably will, instruct the jury not to use Jane's allegations 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, the greater latitude rule provides for the liberal admission of "any similar acts by the accused . . . without regard to whether the victim . . . is the same" in both the criminal proceeding and the similar act. Wis. Stat. § 904.04(2)(b)1. The rule was crafted for the very situation present in this case: similar offenses 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, Seaton seemed to argue prejudice because Seaton's defense to Jane's claims was that the encounter never happened, whereas he was claiming that his act with Anna was consensual; because there were no charges based on Jane's accusations; and because Jane's claims were uncorroborated. (R. 46:10–11; A-App. 6–7.) But that Jane's accusations were as of yet uncharged and uncorroborated reflects that that evidence would be inherently *less* prejudicial to Seaton. Seaton will also have the opportunity to bring out those points when cross-examining Jane. That Seaton has a different defense to Jane's claims does not compel exclusion, just as his defense of consent to Anna's claims does not dictate whether the other acts are admissible. And, as noted, limiting

instructions will clarify that Jane's testimony has narrow purposes and that Seaton is 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 reasonable basis to exclude the evidence, this Court should reverse the order denying the State's other-acts motion.

C. *Alsteen* and *Cofield* do not control the resolution of the issue.

To the extent that this Court is concerned with language in *Alsteen* and *Cofield* and how those cases apply to this case, those cases have narrow holdings that are distinguishable and that do not direct the outcome of this case.

1. *Alsteen* and *Cofield* hold that establishing that the current victim did not consent based on a different victim's lack of consent is not relevant to a permissible purpose.

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). *State v. Alsteen*, 108 Wis. 2d 723, 730, 324 N.W.2d 426 (1982). 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.* (alteration in original) (quoting *Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948)). Importantly, there was no mention of greater

latitude in the decision. *Alsteen* also was decided before *Sullivan* clarified the test and standard for relevance in admitting other acts.

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, 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. *Id.* ¶¶ 5, 10. This Court 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.* ¶ 10. This Court also considered but rejected other proposed purposes for admitting the evidence. *Id.* ¶¶ 11–12. Like the court in *Alsteen*, this Court in *Cofield* did not mention or apply the common-law greater latitude rule.

This Court in *Ziebart* later narrowly and correctly interpreted *Alsteen*'s holding. 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.

This Court rejected Ziebart's position, holding 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. This 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, this Court in *Ziebart* correctly recognized that *Alsteen* did not hold that a defendant's past sexual misconduct is never relevant or admissible in sexual assault prosecutions turning on consent. To the contrary, *Alsteen* stands for the limited and unremarkable holding that a prosecutor cannot simply offer a defendant's past sexual misconduct to argue something about the victim's state of mind regarding consent, i.e., that because the other-acts victim did not consent, the current victim most likely also did not. Rather, the prosecutor must offer other acts as relevant to permissible purposes going to the *defendant's state of mind*—such as the defendant's modus operandi, intent, motive, plan, opportunity, etc.—to assault the victim in the present case.

That is what the State did here. It offered evidence of Jane's allegations as relevant to and probative of permissible purposes ultimately bearing on Seaton's state of mind in his actions with Anna. *Alsteen* has no applicability to this case.

2. *Alsteen* and *Cofield* are inapplicable because those courts did not consider greater latitude.

An additional reason that *Alsteen* and *Cofield* have no bearing on this case is that neither of those courts addressed the greater latitude rule. Thus, neither case can be read to preclude admission of other acts in sexual assault cases based

on a raised defense of consent, or to provide guidance on the *Sullivan* analysis, given that greater latitude must apply to each step of the other-acts analyses in all sexual assault cases.

"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 *State v. Friedrich*, 135 Wis. 2d 1, 31, 398 N.W.2d 763 (1987)). 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. *Id.*

The greater latitude rule had its origins in *Proper v. State*, 85 Wis. 615, 629, 55 N.W. 1035 (1893). Wisconsin courts have recognized and applied this common-law rule in sexual assault prosecutions—regardless of the victim's age—with increasing regularity and consistency 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, 13–14, 429 N.W.2d 99 (Ct. App. 1988); *State v. Fishnick*, 127 Wis. 2d 247, 257, 378 N.W.2d 272 (1985); *Hendrickson v. State*, 61 Wis. 2d 275, 277, 212 N.W.2d 481 (1973). In 2016, the Legislature codified the greater latitude rule in Wis. Stat. § 904.04(2)(b). That statute provides that greater latitude eases the admission of other acts 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, because the courts in *Alsteen* and *Cofield* did not apply *Sullivan* through the lens of greater latitude, those decisions are distinguishable to the point of mootness to subsequent other-acts issues in sexual assault cases where greater latitude applies.

3. This Court can decline to follow *Cofield* because its analysis violated *Cook v. Cook*.

Finally, the analysis in *Cofield* rejecting the State's other offered permissible purposes is wrong, and it contradicted previous appellate decisions in violation of *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997) (only the supreme court can overrule precedent).

For example, the Court in *Cofield* stated 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. Yet Wisconsin courts have long held that intent and purpose are implicit elements 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; *Fishnick*, 127 Wis. 2d at 260. 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); *see also Friedrich*, 135 Wis. 2d at 22 (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" (citing *Fishnick*, 127 Wis. 2d at 260–61)).

The *Cofield* court also incorrectly stated that to show relevance to the common-plan-or-scheme purpose, there must be a link showing that the other act was a step in or reason for committing the later crime. *Cofield*, 238 Wis. 2d 467, ¶¶ 12–13. Yet the law at the time that *Cofield* was decided held that the common-plan-or-scheme purpose merely required similar acts, i.e., "a concurrence of common elements between the two incidents." *Davidson*, 236 Wis. 2d 537, ¶ 60

(citing *Friedrich*, 135 Wis. 2d at 24). For example, Davidson's assault of a six-year-old girl was admissible to establish a plan or scheme simply because that assault bore "striking similarities" to his charged assault of a thirteen-year-old girl, despite a decade-long gap between the crimes and the victims' age differences. *Id.* ¶¶ 60–61. Accordingly, *Cofield* conflicted with *Davidson* and other precedent when it deemed the earlier similar crime irrelevant to a plan or common scheme because it was not a step in or reason for the later assault.

Thus, this Court cannot follow *Cofield* to the extent that it conflicted with controlling precedent by constraining the scope of permissible purposes of intent, purpose, motive, common scheme, or plan. *See Cook*, 208 Wis. 2d at 189–90; *see also State v. Kempainen*, 2014 WI App 53, ¶ 14, 354 Wis. 2d 177, 848 N.W.2d 320 (declining to follow a court of appeals decision that conflicted with its own precedent), *affirmed*, 2015 WI 32, 361 Wis. 2d 450, 862 N.W.2d 587.

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

CONCLUSION

This Court should reverse and vacate the order denying the State's motion to admit other-acts evidence, remand the matter to the circuit court, and order it to enter an order granting the other-acts motion and admitting the other-acts evidence for the purposes proposed by the State.

Dated this 4th day of December 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 8840 words.

Dated this 4th day of December 2023.

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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 4th day of December 2023.

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