STATE OF WISCONSIN

COURT OF APPEALS

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 Evidence Entered in Waukesha County Circuit Court, the Honorable Jennifer Dorow, Presiding

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BRIEF OF DEFENDANT-RESPONDENT

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ISSUE PRESENTED

I. Did the circuit court properly exercise its discretion in denying the State's motion to admit other acts evidence in a sexual assault case with an adult victim where consent is the primary issue?

The defendant, Morris V. Seaton, was charged with third degree sexual assault for an allegation that he had sexual intercourse with a close friend without her consent in her bed after she had invited him to her home for a night of drinking. The State filed a pretrial motion to introduce other acts evidence of a prior uncharged allegation of nonconsensual sex with a different woman.

The circuit court denied the State's motion. (46:24-27) In so deciding, the court applied the *State v. Sullivan*[1] three-step legal framework for determining whether to admit or exclude other acts. *Id*. The court found that the other act did not meet the State's proffered purposes of identity, plan, and modus operandi and that bolstering Anna's credibility was not itself a stand-alone permissible purpose. (46:24,26-27) The court concluded that, even with the application of the greater latitude rule, the other acts evidence was not offered for a permissible purpose and not similar enough to the instant case and denied the motion to admit this evidence. (46:27)

The State appealed pursuant to Wis. Stat. § 974.05(1)(d)2. Following briefing, this court certified the case to the Wisconsin Supreme Court. After briefing and oral argument, the Supreme Court vacated its order accepting certification and remanded the case to this court, explaining it was equally divided on whether to affirm or reverse the circuit court's order. On remand, this court ordered the parties to file replacement briefs.

[1] 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

POSITION ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE

On June 1, 2020, the State charged Mr. Seaton with one count of third-degree sexual assault, contrary to Wis. Stat. § 940.225(3)(a) for an allegation that he had sexual intercourse with Anna[2] without her consent on June 13, 2019. (2:1) Anna accused Mr. Seaton, her former "close friend," of having sexual intercourse with her without her consent in her bed after he had been invited to her home to spend time together and drink alcohol. (2:2-4) Mr. Seaton admitted the intercourse, but asserted Anna consented to it. (46:10,12)

The State filed a pretrial motion, pursuant to Wis. Stat. §904.04(2), to introduce other acts evidence of a prior uncharged allegation regarding Jane. (21) Mr. Seaton filed a brief opposing the introduction of this other acts evidence. (36) At a subsequent hearing, the circuit court, the Honorable Jennifer R. Dorow, considered the parties' briefs and oral arguments and orally denied the State's motion. (46:10-27). After the court issued a written order denying the motion, the State filed a notice of appeal, pursuant to Wis. Stat. § 974.05(1)(d)2. (53, 54)

Following briefing by the parties, this court issued a certification. After the parties' briefing and oral argument, the Wisconsin Supreme Court vacated its order accepting certification and remanded the case to this court.

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

STATEMENT OF FACTS

Anna's allegations

The complaint detailed Anna's first report to the police on September 6, 2019, and her September 10, 2019 forensic interview. (2:2-3). Anna (DOB: 4/10/02) stated that on June 13, 2019, while her mother worked overnight, she and her older sister, invited two male friends, Dayveon and Mr. Seaton, to their home where they all drank alcohol. (2:2). Anna, then a 17-year-old Brookfield East High School student, knew 19-year-old Mr. Seaton, a former student at the school. (2:1-2) Mr. Seaton had been to her home approximately fifteen (15) times, while Anna had been to his home a handful of times. (2:2) Months later, Anna referred to having been assaulted on June 13, 2019, by "what used to be, a close friend of hers." (2:3)

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

Anna fell asleep, and after an unknown period of time, Dayveon and Mr. Seaton came into the bedroom. (2:2-3) Dayveon got into her sister's bed and Mr. Seaton got into Anna's bed. (2:2-3) Anna's sister had a previous sexually intimate relationship with Dayveon and Anna knew about their relationship. (2:2) Anna heard Dayveon and her sister kissing; they later left the bedroom to have sex in her mother's bedroom. (2:2-3)

Mr. Seaton touched Anna's thigh, which she moved away. (2:2-3) Although her memory was "foggy", Anna recalled Mr. Seaton's fingers inside of her and that he took off her clothes. (*Id*.) Mr. Seaton was behind her and pushed her up against the wall. (*Id*.) As Anna was on her knees, with her hands against the wall, Mr. Seaton put his penis in her vagina. (*Id*.) Anna told Mr. Seaton to stop because it hurt, but

he did not stop. (2:2-4) Anna "began to sober up" and pushed Mr. Seaton off of her. (2:2,4)

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

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

Jane's allegations

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

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

Brookfield East High School. (*Id*.) Mr. Seaton, a graduate of the school, had been in the class one year ahead of Jane. (*Id*.)

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

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

Parties' arguments and the circuit court's decision

The State written motion offered Jane's allegations, under Wis. Stat. §904.04(2)(a)[3] , for the purpose of showing Mr. Seaton's identity, plan, and modus

[3]WIS. STAT. § 904.04(2)(a) provides:

General admissibility. Except as provided in par. (b) 2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

operandi, and to bolster Anna's credibility. (21:3,6) The State argued that the two similar incidents showed Mr. Seaton's pattern of behavior and his modus operandi of choosing younger victims he knew from school and a time of opportunity when the victim had been drinking alcohol and was isolated from family or friends, and initiated intercourse and then refuses to stop when asked by the victims. (21:6)

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

At the hearing, the prosecutor stated the proffered purposes in her written motion included intent and motive. (46:15) Yet, while the State included "motive" in its list of proffered purposes in its brief, *see* 21:3,6, the State did not otherwise develop an argument about how and why motive was a permissible purpose for the admission of Jane's allegations. *See* 21. Nor did it so argue at the hearing. *See* 46:13-18, 25. Additionally, the State's motion did not list "intent" as one of its proffered purposes and the State did not develop an argument about how and why intent was a permissible purpose in its motion or at the hearing. *See* 21; 46:13-18, 25.

Mr. Seaton asserted that the State's justification for Jane's proffered testimony was merely an attempt to prove that he acted in conformity with the alleged character trait and that he is a bad person and, therefore, is guilty. (36:4,6)

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

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

The circuit court orally denied the State's motion to admit the other acts evidence. (46:19-27) In its decision, the circuit court applied Wis. Stat. § 904.04(2) (a) and (b), including the greater latitude rule, and the *Sullivan* test for other acts evidence. (46:20-21, 24-27)

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

The court also found several differences between the two accusations:

- the type of relationship differed, as Anna and Mr. Seaton were more known to each other and had been spending time together, while Jane and Mr. Seaton knew each other from school, but were not friends (46:22-23);
- the circumstances of how Mr. Seaton came into contact with Anna and Jane differed, as Anna had invited him to her home where they consumed alcohol, while Mr. Seaton happened to come into contact with Jane and tried to help her (46:22-24,26);
- the location of the assaults differed, as the intercourse with Anna occurred in a bedroom in her home to which Mr. Seaton had been invited while the alleged intercourse with Jane occurred outside on the grass (46:22-24,26);
- the force allegedly used by Mr. Seaton differed between Anna's and Jane's accusations. (46:23)

The court found that the other act did not meet the State's proffered purposes of identity, plan, and modus operandi and that bolstering Anna's credibility was not itself a stand-alone permissible purpose. (46:24-27) It found that the State had not offered the other act evidence for the purposes of motive, intent, and opportunity. (46:25) The court concluded that, even with the application of the greater latitude rule, the other acts evidence was not offered for a permissible purpose and not similar enough to the instant case and denied the motion to admit this evidence. (46:27)

Additional facts will be discussed below as necessary.

ARGUMENT

I. The circuit court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion, thus properly exercised its discretion in denying the State's motion to admit other acts evidence.

INTRODUCTION

The State tries to take a discretionary evidence issue and elevate it to de novo review. While the State claims that the circuit court made an error of law, the State's real complaint is that the court did not decide the issue in the State's favor.

Instead of focusing on the circuit court's decision, first discussed on page 24 of its brief, the State treats the evidentiary issue as subject to de novo review. *See* App. Br. at pages 15-24. The State also does not properly apply the meticulous *Sullivan* framework for determining the admissibility of other acts evidence. Instead of starting with the circuit court's analysis of the first step, the permissible purposes for the evidence, the State mergers the first step with the second step, whether the evidence is relevant. In so doing, the State distorts the purpose prong analysis, presents new arguments, and fails to focus on the circuit court's conclusion that the State had not offered the evidence for a permissive purpose under §940.04(2)(a).

A. Standard of review.

A circuit court's decision to admit or exclude evidence is entitled to great deference. *State v. Jackson*, 2014 WI 4, ¶45, 352 Wis. 2d 249, 841 N.W.2d 791 (citation omitted). The decision to admit or exclude evidence is left to the discretion of the trial court, which an appellate court upholds unless there was an erroneous exercise of discretion. *State v. Mayo,* 2007 WI 78, ¶31, 301 Wis. 2d 642, 734 N.W.2d 115 (citation omitted).

Under this standard of review, an appellate court examines whether "the circuit court applied the proper legal standard to the relevant facts and reached a

reasonable discretionary decision." *State v. Johnson*, 2021 WI 61, ¶34, 397 Wis. 2d 633, 961 N.W.2d 18 (citation omitted). If the circuit court did so, its decision is upheld. *Id.* Review of a circuit court's evidentiary decision is limited to the parties' arguments presented to the circuit court at the time it made its decision whether to admit or exclude the evidence. *State v. Dorsey*, 2018 WI 10, ¶36, 379 Wis. 2d 386, 906 N.W.2d 158.

The question is not whether this court would have admitted the evidence but whether the circuit court exercised its discretion in accordance with accepted legal standards and the facts of record. *State v. Payano*, 2009 WI 86, ¶51, 320 Wis. 2d 348, 768 N.W.2d 832 (citations omitted). As the Wisconsin Supreme Court recently explained, "an appellate court may not substitute its discretion for that of the circuit court." *Johnson*, 397 Wis. 2d 633, ¶34 (citation omitted). Rather, appellate courts "look for reasons to sustain a trial court's discretionary decision." *Id*. (citation omitted).

If the circuit court fails to set forth its reasoning, the appellate court reviews the record to determine if there is a reasonable basis for the circuit court's discretionary decision. *State v. Davidson*, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted). "The circuit court's decision will be upheld unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *Payano*, 320 Wis. 2d 348, ¶51 (internal quotation and citation omitted).

B. Law Regarding the Admissibility of Other Acts Evidence.

Wisconsin Stat. §904.04(2) prohibits the admission of evidence that the accused committed some other act which tends to show that the accused has a particular character trait, and that the accused acted in conformity with that trait. *Sullivan*, 216 Wis. 2d at 782. In so doing, this statute "forbids a chain of inferences running from act to character to conduct in conformity with the character" *Id*. Such

"propensity" evidence is inadmissible because its "invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." *Id*. at 783.

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

The Wisconsin Supreme Court enumerated the three-step analytical framework for admitting or excluding other acts evidence in *State v. Sullivan*: 1) is the evidence offered for an acceptable purpose under Wis. Stat. §904.04(2); 2) is the other acts evidence relevant under Wis. Stat. §904.01; 3) is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury? 216 Wis. 2d at 772-73. The proponent of the evidence has the burden of proving the first two steps and, if met, the burden shifts to the party opposing the admission of the other acts evidence to show the third step. *State v. Hurley*, 2015 WI 35, ¶58, 361 Wis. 2d 529, 861 N.W.2d 174 (citations omitted). The proponent "must clearly articulate" their reasoning for seeking admission of the evidence and must apply the case facts to the analytical framework. *Sullivan*, 216 Wis. 2d at 774.

Additionally, Wis. Stat. §904.04(2)(b)1, greater latitude, applies to a charge of third-degree sexual assault, permitting a circuit court to admit evidence of similar acts by the accused regardless of whether the victim of the current offense and the similar act are the same person. Wis. Stat. §904.04(2)(b)1. The greater latitude rule permits a more liberal admission of other acts evidence and applies to each prong of the *Sullivan* test. *State v. Gutierrez*, 2020 WI 52, ¶29, 391 Wis. 2d 799, 943 N.W.2d 870 (citation omitted). Although this rule permits a more liberal admission

of other acts evidence, "such evidence is not automatically admissible." *Davidson*, 236 Wis. 2d 537, ¶52. The greater latitude rule does not relieve the court of its "duty to ensure that the other acts evidence is offered for a proper purpose, is relevant, and its probative value is not substantially outweighed by undue prejudice." *Gutierrez*, 391 Wis. 2d 799, ¶29.

C. The circuit court reached a reasonable conclusion to exclude the other act evidence by applying the proper legal standard to the relevant facts.

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

1. The circuit court applied the proper legal standard to the relevant facts.

The court applied the proper legal standard. It began its decision by quoting the statutory language of the Wis. Stat. §904.04(2), including Subsections (a) and (b). (46:19-20) It noted that the admission of other acts evidence for a permissible purpose (in the second sentence of Subsection (a)) is an exception to the general rule of its inadmissibility (in the first sentence of Subsection (a)):

> Start with 904.04. As I indicated, other acts evidence is an exception to the general rule that…evidence of other crimes, wrongs or acts are not admissible to prove the character of a person in order to show that the person acted in conformity therewith.
>
> The subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or lack of mistake or accident.

(46:19-20)

The court also noted that the greater latitude rule of Subsection (b) applied to its analysis of the other acts motion due to Mr. Seaton's criminal charge:

> [The] next subsection…regarding the greater latitude rule…in a criminal proceeding alleging…the commission of a serious sex offense as defined in Section 939.615(1)(b)…[e]vidence of any similar acts by the accused is admissible

> and is admissible without regard to whether the victim of the crime that is the subject of proceeding is the same as the victim of the similar act.
>
> So I don't think there's any doubt that the charge for which Mr. Seaton faces [in this case] is a serious sex offense. It's a third-degree sexual assault…and it warrants this court analyzing the motion to admit other acts in light of the greater latitude rule.

(46:20-21)

The record also reflects that the court also applied the proper legal framework for determining the admissibility of other acts evidence -- the three-pronged *Sullivan* analysis. The court repeatedly returned to the first prong to determine if the State had offered the other act evidence for a permissible purpose:

> The evidence still needs to be offered for a permissible purpose. And according to the State's…motion, they are talking about bolstering the credibility of the victim. But really, that's only acceptable if there's another acceptable purpose.
>
> So what is the purpose for which the State seeks to introduce this if it's not solely to bolster the credibility of the victim? Is it for intent? Is it for motive? Is it solely just because it goes to the issue of whether it happened or not? Well that's really is it relevant?
>
> Here we need to get to a purpose.

(46:24)

> There's that interplay…under the Sullivan analysis, number 1 and number 2. And that's is it being offered for a permissible purpose? And…is it relevant? And that's where I get stuck on this because despite all of those similarities, we know it can't just be offered for the purpose to bolster the credibility…
>
> I do not believe that evidence of the…[Whitewater assault]… fits under identity, plan or modus operandi.

(46:26-27)

> [I]s it really relevant? Sure it could be relevant on credibility…It could bolster. But without being able to say it's being offered for a permissible purpose under step one of the Sullivan analysis, I have difficulty finding that it would be relevant then to those purposes.

(46: 27)

In the end, the court concluded that, even with the greater latitude rule, the evidence was not offered for a proper purpose and therefore denied the motion. (46:27)

The court also examined the relevant facts of the charged offense and the other act and analyzed the similarities and differences between them. (46:10-12, 21-27) It noted similarities: the female's ages, but found that Mr. Seaton was their peer, they both knew him from attending the same high school, they both had consumed alcohol, and claimed that Mr. Seaton forced sexual intercourse with them without their consent and that he did not stop when they asked him to. (46:21-24) The court also found several differences between Anna and Jane's accusations: the type of relationship each had with Mr. Seaton; the circumstances of how each of them came into contact with him, the location of the alleged assaults, and the force Mr. Seaton allegedly used. (46:22-24,26) Contrary to the State's suggestion, the court, therefore, did not find that the differences between the two incidents were based on the fact that one occurred inside while the other occurred outside.

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

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

First, the circuit court's decision to limit its analysis of permissible purposes to Mr. Seaton's identity, plan, and modus operandi and to bolster Anna's credibility was a proper exercise of its discretion. These were the permissible purposes the State had in fact argued in its written motion and/or at the hearing. *See* 21; 46:13-18, 25. The State's motion sought to introduce the other act evidence for the purpose

of showing Mr. Seaton's identity, plan, and modus operandi, and to bolster Anna's credibility:

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

(21:6)

In oral argument, the prosecutor claimed the proffered purposes in her written motion included intent and motive. (46:15) The circuit court clarified with the prosecutor that the State's proffered purposes were identity, plan, and modus operandi, which the prosecutor admitted was correct:

> THE COURT: …As I understand it – and [the Prosecutor], you can correct me if I'm wrong – but you really were trying to argue for admissibility under identity, plan and modus operandi, correct?
>
> [THE PROSECUTOR]: Those are the ones I fleshed out the most, yes. But I did list all of the statutory language, permissible purposes, and I believe that intent can certainly be considered as well.
>
> THE COURT: It may be, but I'm gonna hold the State to what it believed in this particular case…

(46:25)

In addition to the prosecutor's concession, the circuit court reasonably concluded the State had not developed any arguments that Mr. Seaton's motive and/or intent were permissive purposes for the admission of this evidence. While the State included "motive" in its list of proffered purposes in its brief, *see* R21:6, it did not otherwise develop an argument about how and why motive was a permissible purpose for the admission of Jane's allegations. *See* R21. Nor did it so argue at the hearing. *See* R46:13-18, 25. The State's motion did not also list "intent" as a proffered purpose and it did not develop an argument about how and why intent was a permissible purpose in its motion or at the hearing. *See* 21; 46:13-18, 25. The

circuit court was not required to develop the State's arguments for the State. *See State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) (stating "[a] party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories.")

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

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

(46:25)

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

Evaluating each of these proffered purposes, the circuit court reached a reasonable decision that the State failed to prove its proffered purposes apply:

Identity. Although, the Court did not explain its rationale for concluding the evidence did not "fit" the permissible purpose of identity, there is a reasonable basis for this conclusion. (46:26-27) Mr. Seaton's identity is not at issue as he admittedly had sexual intercourse with Anna.

Plan. The Court did not explain its rationale for concluding that Jane's accusations did not "fit" the permissible purpose of showing Mr. Seaton's plan.

(46:26-27) However, there is a reasonable basis in the record for the court's conclusion.

The concept of "plan" within the meaning of Wis. Stat. § 904.04(2) is a particular one. For the plan acceptable purpose, the proponent must demonstrate that the prior act constitutes a step in a plan leading to the charged offense, or some other result where both acts are part of one plan. As the Wisconsin Supreme Court has explained, the meaning of plan under this statute requires evidence showing "a plan establish[ing] a definite prior design, plan, or scheme which includes the doing of the act charged…there must be such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations." *State v. Spraggin*, 77 Wis. 2d 89, 99, 252 N.W.2d 94 (1977) (internal quotations and citation omitted).

Here, the circuit court could have reasonably concluded that the prior act with Jane was not part of a plan to assault Anna. The record facts show there is no linkage between the acts with Jane and Anna or evidence that the incident with Jane was a step in a plan to assault Anna.

Modus Operandi. The court reasoned that the other acts did not meet the purpose of modus operandi, due to the differences between the two allegations it had discussed earlier, that Mr. Seaton, who had been invited to Anna's home to "hang out" and the intercourse took place inside her home, and in Jane's accusations, Mr. Seaton, whom Jane was "aware of", happened to run into her and then had forcible intercourse with her outside. (46:24, 26-27)

The Court's conclusion that the State failed to meet its burden to prove that modus operandi was a permissible purpose for the admission of the other act evidence was a reasonable conclusion. Evidence of a defendant's distinctive modus operandi can be admissible if probative of the purpose for which it is offered, including identity, plan, and intent. *See e.g. State v. Hall*, 103 Wis. 2d 125, 144, 307

N.W.2d 289 (1981). Here, the State offered the other act evidence to try to show Mr. Seaton's alleged modus operandi for the purposes of his identity and plan. Because, as argued above, Mr. Seaton's identity and plan were not permissive purposes, the court's finding that modus operandi was not itself a permissible purpose for the admission of Jane's allegations was a reasonable conclusion.

Contrary to the State's argument, given the circuit court's implicit determination that the two allegations were not strikingly similar or distinctive, it was not unreasonable for the court to conclude that the Jane's allegation was not admissible to prove that Mr. Seaton had a mode of operation. The case the State relies on to argue otherwise, *State v. Ziebart*, 2003 WI App 258, 268 Wis. 2d 468, 673 N.W.2d 369 (2003), involved very distinctive and unusual similarities. Ziebart represented himself to be a police officer, engaged in physical and sexual degradation, and had expressed a vigilante determination to deal with "crack whores" in one case and "drug addicts" in the other case. *Id*., ¶10.

Bolstering Anna's credibility.

Contrary to the State's assertion, the court's conclusion that Jane's testimony was not admissible solely for the purpose to bolster Anna's credibility was correct. Bolstering the credibility of an adult victim of a sexual assault is not a stand-alone permissive purpose for the first prong of the *Sullivan* test.

Contrary to the State's claim, the Wisconsin Supreme Court has never held that bolstering a victim's credibility is a stand-alone permissible purpose under the *Sullivan* test. The cases the State relies on did not find that bolstering the victim's credibility to be a stand-alone permissible purpose under the *Sullivan* test's first prong and presented unique circumstances related to the specific victims' credibility, including recanting witnesses. In *State v. Hunt*, where the defendant was charged with sexual assaults of his wife and stepdaughter, the other acts evidence was admissible largely because the victims recanted their statements to the police

and were uncooperative with the prosecution. 2003 WI 81, ¶¶8-14, 58-60, 263 Wis. 2d 1, 666 N.W.2d 771. Hunt's prior acts of drug use, and physical and sexual abuse of his family, was admissible for multiple purposes, including context, opportunity, motive, and to show the victim's state of mind: *Id*., ¶¶58-60. The other acts evidence provided a context for the victims' and witnesses' fear of Hunt and their pattern of recantations and helped establish the victims' and witnesses' credibility "in light of their recantations." *Id*., ¶¶58-59.

In *Marinez*, a child sexual assault case, Marinez's prior act of burning the victim's hand was admissible for the purposes of establishing the five-year-old victim's identification of the defendant and to provide a more complete context for the child victim's statements for the jury to assess the victim's credibility. 331 Wis. 2d 568, ¶26. In *Dorsey*, a domestic violence case, the court admitted the prior acts for the permissible purposes of intent and motive. 379 Wis. 2d 386, ¶41. The victim's credibility was not itself a permissible purpose under the first *Sullivan* prong, but rather was analyzed under the relevancy prong. *Id*. at ¶50[4].

Mr. Seaton's case, however, does not involve the contextual complexities of the difficulties presented by child sexual assault victim testimony or the dynamics of recanting family victims and witnesses. Moreover, part of the rationale for the greater latitude rule in child sexual assault cases is because to a normal person the idea of the sexual exploitation of young children is " 'so repulsive that it's almost impossible to believe that none but the most depraved and degenerate would commit

[4] Other cases, predating *Sullivan*, either involve child sexual assault prosecutions and the admissible purpose was the defendant's intent and motive in touching the victim for sexual gratification, an element of the charged offense, *State v. Plymesser*, 172 Wis. 2d 583, 593-94, 493 N.W.2d 367 (1992) and *State v. Fishnick*, 127 Wis. 2d 247, 260, 378 N.W.2d 272 (1985), do not address the permissible purpose for the admission of evidence, *State v. C.V.C.*, 153 Wis. 2d 145, 160-62, 450 N.W.2d 463 (Ct. App. 1989) and *State v. Parr*, 182 Wis. 2d 349, 360, 513 N.W.2d 647 (Ct. App. 1994), or do not include an analysis under §904.04(2), *State v. Schaller*, 199 Wis. 2d 23, 40-43, 544 N.W.2d 247 (Ct. App. 1995) and *Proper v. State*, 85 Wis. 615, 55 N.W.2d 1035 (1893).

such an act.' " *Davidson*, 236 Wis. 2d 537, ¶42 (quoting *State v. Friedrich*, 135 Wis. 2d 1, 27-28, 398 NW.2d 763 (1987)). That rationale, however, does not apply to Mr. Seaton's case involving two older teenagers engaging in sexual intercourse in one of their bedrooms.

Therefore, solely bolstering Anna's credibility itself is not a permissible purpose in this case and the circuit court's decision so finding was a reasonable exercise of its discretion.

Any argument that the court failed to apply the correct legal standard fails. Contrary to the State's argument, the court did not approach its decision with an incorrect or unsound view requiring the State to prove why an exception to the rule of exclusion exists. The court was referring to the statutory language that other acts evidence is not admissible except for the enumerated exceptions and stated that greater latitude applied to the admission of other acts evidence. The prosecutor later conceded that the court's analysis of other acts evidence being an exception to the rule of admission. The prosecutor stated it "agreed with the court's analysis of other acts, that it is an exception to the rule". (46:13) It then argued that the application of greater latitude rule makes the admission of other acts in serious sex offenses not an exception to the rule. (46:13-14) Additionally, the State, as the proponent of the evidence, has the burden of proving the evidence is admissible for a permissive purpose.

Further, the State's citation to language in *Marinez* regarding a bias generally towards admissibility of other acts evidence is misplaced. App. Br. 24-25. The *Marinez* court was discussing the bias toward admissibility implicit in the language of the third prong of the *Sullivan* analysis. 331 Wis. 2d 568, ¶41.

Nor did the court demonstrate a bias against the admission of other acts evidence or preemptively believe that Mr. Seaton would be prejudiced by the admission of Jane's allegations. Rather, the court took seriously its duty to ensure

that the other acts evidence met each step of the *Sullivan* test. After finding that the first step, permissible purpose, was not met, the court did not decide the other two prongs of the test.

The circuit court's evidentiary decision was a quintessential judgment call that appellate courts rely on circuit courts to make every day. *See Johnson*, 397 Wis. 2d 633, ¶36. Its decision excluding the other acts evidence was not a decision that no reasonable judge could make.

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

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

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

Intent. Intent is not a permissible purpose because intent is not an issue in this case. A defendant's prior act of sexual intercourse is not admissible to show intent in a case of sexual intercourse because intent is not an element of the crime. *See State v. Cofield*, 2000 WI App 196, ¶¶1-5,11, 238 Wis. 2d 467, 618 N.W.2d 214. (noting, in a case of sexual assault by acts of sexual intercourse, that intent is

not an element of the charged offense) Intent is not an element of Mr. Seaton's charged offense. Mr. Seaton is charged with third degree sexual assault which can be committed by two different ways -- either engaging in "sexual intercourse" with the victim or by having "sexual contact" with them -- in either case without their consent. *See* Wis. Stat. §940.225(3)(a) and (b). Mr. Seaton is charged with the "sexual intercourse" alternative pursuant to §940.225(3)(a). Sexual intercourse is defined by several specific acts but requires no specific intent or purpose. *See* Wis. Stat. §940.225(5)(c). On the other hand, "sexual contact" requires the State to prove that a defendant engaged in "intentional touching" or "intentional" ejaculation or emission of feces or urine, for one of several purposes. *See* Wis. Stat. §940.225(5)(b).

The State admits that Mr. Seaton's intent is not an express element of his charged crime. App. Br. at 15. Nevertheless, the State argues that that his intent is an implicit element for proving sexual intercourse. *Id*. The State is wrong.

Contrary to the State's argument[5], a defendant's intent to achieve sexual arousal or gratification is not an element in all sexual assault cases nor are a defendant's motive and intent facts of consequence in all sexual assault cases. While a defendant's intent, motive, and purpose are always at issue in a sexual contact sexual assault prosecution, the same is not true for a sexual intercourse sexual assault prosecution. This is because sexual contact requires "intentional" touching for a specific "purpose." In a sexual contact sexual assault case, a defendant may have, or claim to have, accidently or inadvertently touched the victim's intimate parts, perhaps, for example, when changing a diaper. However, because one cannot have accidentally had sexual intercourse with another person, a defendant's intent, motive, and purpose are not implicit elements, nor facts of consequence, for proving sexual intercourse in a sexual assault case.

[5] App. Br. at 19.

The State's reliance on language from *Hunt* that sexual assault either by sexual contact or sexual intercourse requires an intentional or volitional act is misplaced. App. Br. at 15. (citing *Hunt*, 263 Wis. 2d 1, ¶60) The language in *Hunt* is overly broad and inartful, because, as explained above, unlike sexual contact, sexual intercourse does not require an intentional act. Moreover, *Hunt* itself uses only sexual contact as an example immediately following this overly broad statement. *See* 263 Wis. 2d 1, ¶60.

The State's reliance on language in *Hurley* is also misplaced. First, *Hurley* relies on the same overly broad language in *Hunt* explained above. *See* 361 Wis. 2d 529, ¶73. Second, the State omits key facts from *Hurley*. Hurley's motive to achieve sexual arousal or gratification was an element of his charged crime. *Id*., ¶74. Hurley was charged with repeated sexual assaults of a child involving sexual contact for touching his stepdaughter when she was between 6-11 years old. *Id*., ¶¶13-17, 38.

Motive. Motive is not a permissible purpose because motive is not an issue in his case. As explained above, Mr. Seaton is charged with third degree sexual assault by "sexual intercourse" which requires no specific intent or purpose. *See* Wis. Stat. §940.225(5)(c). A defendant's purpose for committing the sexual assault is relevant when that purpose is an element of the crime, such as sexual assault by sexual contact. *See Plymesser*, 172 Wis. 2d at 593; *see also*, *State v. Friedrich*, 135 Wis. 2d 1, 22, 398 N.W.2d 763 (1987).

The State's current assertion that Mr. Seaton had the intent, motive, and purpose to exert power and control over Anna to have sexual intercourse and to achieve sexual gratification from her protests and resistance fails. First, any intent or motive to achieve sexual gratification from Anna's resistance is not, as argued above, an element of Mr. Seaton's charged offense. Moreover, this newly claimed factual spin to try to meet the permissive purpose of intent and/or motive was not

argued in the circuit court. The State cannot now argue that the circuit court erroneously exercised its discretion on the basis of this current argument.

***Opportunity*.** Opportunity is not a permissible purpose for the admission of Jane's accusation. McCormick on Evidence has explained opportunity in the context of other act evidence as follows:

> Uncharged crimes can be admissible to establish opportunity[] by demonstrating that defendant had access to or was present at the scene of the crime[] or possessed certain distinctive or unusual skills or abilities employed in the commission of the crime charged.

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

Here, Jane's allegations themselves occurring months earlier in a different county than the charged crime do not place Mr. Seaton near or in Anna's bedroom or give him access to Anna's bedroom. Nor do her allegations demonstrate that Mr. Seaton had unusual skills or distinctive abilities used to commit the crime charged. The State's argument that Jane's allegations could show that Mr. Seaton acted on an opportunity to isolate Anna when she was drunk to force sexual intercourse fails as it is not the nature of opportunity evidence for this purpose. This is really an assertion that Mr. Seaton has the propensity to have nonconsensual sexual intercourse. Moreover, the State's overall attempt to link Mr. Seaton's alleged prior incident to an acceptable statutory purpose is a thinly veiled endorsement of the unrestricted use of propensity evidence in sexual assault cases.

The circuit court's decision to exclude the other acts evidence was a proper exercise of its discretion. Despite the State's contentions, the circuit court did what the law requires. In making its decision, in addition to the considering the parties' written and oral arguments, the court reviewed the case law, the applicable statute, the criminal complaint and the proffered facts of the other uncharged act and made

a reasonable decision. It applied the correct statute, the *Sullivan* test along with the greater latitude rule, and reached a conclusion that a reasonable judge could reach using a demonstrated, rational process. The record shows that there is a reasonable basis for the court's decision. That decision should be given great deference by this court and be affirmed.

II. The circuit court's decision excluding the other acts evidence must be affirmed because *State v. Alsteen* bars the admission of prior acts of nonconsensual sexual intercourse with a different person, in a sexual assault case where consent is the only issue at trial and the evidence is not relevant.

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

If, however, this court concludes that the circuit court erroneously exercised its discretion in finding that the other act evidence did not meet a permissible purpose, Jane's accusations must still be excluded because they are barred by controlling Wisconsin Supreme Court law. Further, the State cannot meet its burden of proving that Jane's accusations meet the two relevancy requirements of Wis. Stat. §904.01.

Relevant evidence defined in §904.01 has two components: 1) whether the evidence relates to a fact of consequence to the determination of the action; and 2) whether the evidence has a tendency to make that consequential fact more probable or less probable than it would be without the evidence. *Sullivan*, 216 Wis. 2d at 785-786.

First, as noted above, Mr. Seaton's defense will be that Anna consented to the sexual intercourse. Given his consent defense, controlling Wisconsin Supreme Court case law bars the admission of Jane's testimony on the issue of Anna's consent. In *State v. Alsteen*, the Wisconsin Supreme Court stated that past acts of nonconsensual sexual intercourse cannot be introduced to prove lack of consent in

the current offense. 108 Wis. 2d 723, 730, 324 N.W.2d 426 (1982). In *Alsteen*, because Alsteen admitted having sexual intercourse with the complainant, "the only issue was whether [the complainant] consented to the act." *Id*. The *Alsteen* court explained: "Consent is unique to the individual." *Id*. The fact that one complainant may have been assaulted does not tend to prove that another individual would never consent to sexual intercourse with the defendant. *Id*. The *Alsteen* decision was based on a finding that the prior act was not relevant under 904.01. *Id*. at 729-731. A pre-*Sullivan* framework case, it did not reach the issue of whether the other act evidence met a permissible purpose under Wis. Stat. § 904.04(2). *See Id*.

This court followed *Alsteen* in *Cofield*. As in *Alsteen*, the defendant claimed that sexual intercourse was consensual. Relying on *Alsteen*, the *Cofield* court reversed the trial court's admission of an earlier non-consensual act. 238 Wis. 2d 467, ¶10. The *Cofield* court concluded that the prior acts were not admissible for several purposes and that "the prior acts were improper propensity evidence used to prove that Cofield acted in conformity with his prior conviction." *Id*., ¶¶10-14.

Contrary to the State's suggestion, the holdings in *Alsteen* or *Cofield* have not been implicitly overruled or rendered moot by the greater latitude rule. Only the Wisconsin Supreme Court can overrule its own prior cases and court of appeals caselaw. *Cook v. Cook*, Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). The Wisconsin Supreme Court has not overruled *Alsteen* or *Cofield*.

This means that this court's subsequent discussion of *Alsteen* in *Ziebart* cannot narrow or overrule *Alsteen*'s holding or change *Cofield*'s holding and analysis. Moreover, the application of the greater latitude rule does not change or impact the *Cofield* court's conclusion that that intent, motive, and purpose, are not permissive purposes for the admission of other acts evidence in a sexual assault by sexual intercourse case because there was no intent, motive or purpose element in the charged offense, *see* 238 Wis. 2d 467, ¶¶3-4, 11-12.

Therefore, *Alsteen*'s conclusion that in a case involving a sexual assault by sexual intercourse, where the only issue is consent, an unrelated act of nonconsensual sexual intercourse with a different person is not relevant remains controlling law. *See Alsteen*, 108 Wis. 2d at 730. The instant case illustrates this point. Here, the other prior act does not have a probative value of a fact of consequence given the facts of this case. First, the fact that Jane did not consent to sexual intercourse with Mr. Seaton on a prior occasion is not related to whether Anna consented to sexual intercourse with him on a different occasion months later in her own bed. Moreover, the fact that Jane did not consent earlier does not make it more or less probable that Anna did not consent to the intercourse with Mr. Seaton. Jane's lack of consent has nothing to do with, nor prove, Anna's own lack of consent months later in a different location.

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

Therefore, *Alsteen* remains controlling law, applies to the instant case, and bars the admission of Jane's accusation in Mr. Seaton's case on the issue of Anna's consent.

III. The circuit court's decision excluding the evidence must be affirmed because any probative value is substantially outweighed by the danger of unfair prejudice to Mr. Seaton.

Because the State has not proven a permissible purpose for the admission of the other acts evidence and because it is barred by *Alsteen*, the court does not need to address this issue. If, however, arguendo this court concludes that the circuit court erroneously exercised its discretion in finding that the other act evidence did not meet a permissible purpose and, despite *Alsteen*'s holding, the evidence is probative to consequential fact in this case, it must still be excluded because any probative value is substantially outweighed by the danger of unfair prejudice to Mr. Seaton, confusion of this issues or misleading the jury. *See Sullivan*, 216 Wis. 2d at 772.

The *Sullivan* Court explained unfair prejudice:

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

Id. at 789-90 (citations omitted).

First, as argued above in Issue II, Jane's allegations do not have any probative value on the issue of whether Anna consented. Any marginal probative value of this evidence is substantially outweighed by the danger of unfair prejudice. There is a significant danger of unfair prejudice to Mr. Seaton if Jane's allegations are admitted at trial. This evidence has a tendency to influence the outcome in the charged case by improper means. Jane's allegations are disputed and unsubstantiated and the introduction of her uncharged allegations would cause the jury to try Mr. Seaton on, and he would have to defend against both the charged incident here and Jane's uncharged allegation. This would distract the jury from the charged issue involving Anna.

Additionally, Jane's allegations are arguably more serious than the charged offense, due to the alleged degree of force. Jane's allegations could constitute a

second degree sexual assault, contrary to Wis. Stat. §940.225(2)(a), given her claim that Mr. Seaton used physical force, including putting his arm over her mouth to engage in sexual intercourse with her without her consent. There is a danger that this evidence would appeal to the juror's sympathies and horror because Jane's case was not charged. The jury might be so influenced by Jane's accusations that it would punish Mr. Seaton in the instant case and cast aside its duty to analyze the evidence regarding Anna's claims. Here, as in the *Sullivan* case, the danger of unfair prejudice was that the jury would be "so influenced by the other acts evidence that they would be likely to convict the defendant because the other acts evidence showed him to be a bad man." *Id.* at 790.

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

CONCLUSION

For all of the reasons set forth above, Mr. Seaton respectfully requests that this Court affirm the circuit court's decision and order excluding the other acts evidence and remand this case to the circuit court for further proceedings.

Dated this 7th day of May, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of the brief is 9,392 words.

Dated this 7th day of May, 2024.

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