STATE OF WISCONSIN

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

DISTRICT II

Case No. 2021AP1399-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MORRIS V. SEATON,

Defendant-Respondent.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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The circuit court misapplied the greater-latitude rule and the *Sullivan* analysis.

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

A. The standard of review does not prevent reversal.

Seaton complains that the State is elevating a discretionary issue to de novo review. (Seaton's Br. 16.) Yet evidentiary decisions are not purely discretionary—appellate review of such decisions includes whether the circuit court "applied the proper legal standards," and its decision "comports with legal principles," which are reviewed de novo. *Pinczkowski v. Milwaukee County*, 2005 WI 161, ¶ 15, 286 Wis. 2d 339, 706 N.W.2d 642; *State v. Sarnowski*, 2005 WI App 48, ¶ 11, 280 Wis. 2d 243, 694 N.W.2d 498.

Thus, a discretionary evidentiary decision must still comport with legal standards and principles; whether it does is a question of law. *Sarnowski*, 280 Wis. 2d 243, ¶ 11. Even so, the standard of review is not a bar to appellate reversal of an incorrect decision excluding other-acts evidence. *See, e.g.*, *State v. Smogoleski*, No. 2019AP1780-CR, 2020 WL 6750487, ¶¶ 17–25 (Wis. Ct. App. Nov. 18, 2020) (unpublished) (A-App. 74–76); *State v. Coria-Granados*, No. 2019AP1989-CR, 2021 WL 503323, ¶¶ 9–83 (Wis. Ct. App. Feb. 11, 2021) (unpublished) (A-App. 57–67).

Seaton also critiques the State's organization of its opening brief (Seaton's Br. 16), in which it first set forth the correct application of the relevant legal standards for the other-acts evidence and then explained why the circuit court's decision departed from those standards. That organization is consistent with how this Court has reviewed such issues. *See, e.g.*, *Smogoleski*, 2020 WL 6750487, ¶¶ 17–24; *Coria-Granados*, 2021 WL 503323, ¶¶ 26–41, 57–83. Nevertheless, leading with a focus on the circuit court's incorrect and erroneous decision likewise supports reversal.

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

Seaton argues that the circuit court applied the proper legal standards because it identified them. (Seaton's Br. 18.) But *identifying* the correct legal framework is not the same as correctly *applying* it. And here, the circuit court's application of *Sullivan* and the greater-latitude rule was demonstrably incorrect because the circuit court excluded Jane's allegations based on the first *Sullivan* step, i.e., that the State offered no permissible purpose. (Seaton's Br. 21, 27–28.)

1. The State identified multiple permissible purposes to which Jane's claims were relevant.

In a greater-latitude case, the circuit court's suppression of other-acts evidence based on the first *Sullivan* step should raise immediate questions as to the decision's correctness. The first *Sullivan* step:

> is not demanding. Identifying proper purposes for the admission of other-acts evidence is largely meant to develop the framework for the relevancy determination. 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.

State v. Marinez, 2011 WI 12, ¶ 25, 331 Wis. 2d 568, 797 N.W.2d 399 (citations omitted); *see also State v. Hurley*, 2015 WI 35, ¶ 62, 361 Wis. 2d 529, 861 N.W.2d 174.

The State satisfied its burden on the first step here, articulating and identifying in its motion the well-recognized permissible purposes of motive, identity, plan, intent, modus operandi, and bolstering Anna's credibility. (R. 21:3, 6; 46:15.)

That is all that was needed to satisfy the first *Sullivan* step. *Dorsey* is instructive on this point. There, the State offered other acts of Dorsey's past domestic abuse to show Dorsey's motive and intent to harm and control the victim in a domestic-abuse case; that articulation was all that was needed to satisfy the first step: "Under Wis. Stat. § 904.04(2)(a), 'motive' and 'intent' are listed as permissible purposes. Thus, the evidence was offered for a permissible purpose." *State v. Dorsey*, 2018 WI 10, ¶ 42, 379 Wis. 2d 386, 906 N.W.2d 158.

Yet here, the circuit court incorrectly deemed the State's articulated purposes impermissible. (R. 46:27.) It summarily stated that Jane's assault did not "fit[] under the identity, plan or modus operandi"; that it wasn't "being offered for motive" and "[n]ot really" offered for opportunity; and that "bolstering the credibility of the victim" is "only acceptable if there's another acceptable purpose." (R. 49:24–26.) When the prosecutor told the circuit court at the hearing that intent was also a purpose, the circuit court did not permit her to develop that position any further. (R. 46:25.)

Seaton wrongly argues that the State's proffered purposes are impermissible because they are either "not at issue," Jane's allegations do not fit the narrowest interpretation of those purposes, or the State failed to develop them below. (Seaton's Br. 23–25, 28–32.) The State responds briefly to each point:

Identity. Even though identity is not contested here, it is still a fact of consequence even if Seaton does not dispute it. *State v. Payano*, 2009 WI 86, ¶ 69 n.15, 320 Wis. 2d 348, 768 N.W.2d 832.

Plan. Both alleged assaults show a "concurrence of common elements" by Seaton to isolate and press sexual intercourse on younger, impaired acquaintances. Plan is akin to mode of operation and shows "a concurrence of common elements between the two incidents." *State v. Davidson*, 2000 WI 91, ¶ 60, 236 Wis. 2d 537, 613 N.W.2d 606. It is relevant information for the jury to consider. *See State v. Evers*, 139 Wis. 2d 424, 443, 407 N.W.2d 256 (1987) ("[I]f a like occurrence takes place enough times, it can no longer be attributed to mere coincidence.").

Mode of operation. Mode of operation relates to issues of nonconsent when the other acts are similar to the charged acts. *See State v. Ziebart*, 2003 WI App 258, ¶ 20, 268 Wis. 2d 468, 673 N.W.2d 369. As argued (State's Br. 18–19), and like in *Ziebart*, the two alleged assaults here are markedly similar and show a relevant mode of operation: Seaton posed as a trusted friend or acquaintance to teens and compelled sexual gratification without regard for consent. That mode of operation goes to identity, motive-intent-purpose, plan-opportunity, and credibility.

Seaton attempts to distinguish *Ziebart* because Ziebart posed as law enforcement and targeted people he believed were drug users. (Seaton's Br. 25.) Mode of operation does not require inventive role-playing by the defendant or unusual individual circumstances. It is the convergence of similar features occurring in both sets of acts that matters. *See State v. Sullivan*, 216 Wis. 2d 768, 786–87, 576 N.W.2d 30 (1998) ("The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence.").

Credibility. Witness credibility is always "consequential" under Wis. Stat. § 904.01, and especially so in sexual assault cases. *Dorsey*, 379 Wis. 2d 386, ¶ 50. Seaton's other act involving Jane is relevant to Anna's and Seaton's credibility regarding what happened between them, which indisputably are propositions of consequence. Therefore, credibility is a permissible purpose.

For three reasons, Seaton is wrong when he argues that credibility is not a permissible purpose. (Seaton's Br. 25–27.) *First*, the permissible purpose step recognizes "almost infinite" purposes, with the only clear impermissible purpose being propensity. *Marinez*, 331 Wis. 2d 568, ¶ 25. *Second*, credibility is a consequential proposition under *Sullivan*'s second step, *id.* ¶ 34, which asks whether the other acts are relevant to the purposes identified in step one. *Hurley*, 361 Wis. 2d 529, ¶ 62 (step one of *Sullivan* is "largely meant to develop the framework for the relevancy examination"). Therefore, bolstering or impeaching credibility must be a permissible purpose, even if other permissible purposes exist. *See, e.g.*, *Dorsey*, 379 Wis. 2d 386, ¶¶ 46, 50 (treating other acts as relevant to credibility does not transform them into improper propensity evidence).[1] *Third*, recognizing bolstering or impeaching witness credibility as a permissible purpose is consistent with a sound application of the greater-latitude rule, which applies here and to each prong of the *Sullivan* analysis. *See Marinez*, 331 Wis. 2d 568, ¶ 16.

[1] Seaton argues that because the courts in *Dorsey* and other cases discussed credibility under the relevance prong, it is not a permissible purpose under the first prong. (Seaton's Br. 26 & n.4.) It does not make sense for a court to hold that evidence is relevant and probative to credibility under the second prong but that credibility is not a permissible purpose.

This Court should reject Seaton's suggestion that the greater-latitude rule and its rationale does not apply to a case involving older teens. (Seaton's Br. 26–27.) Wisconsin Stat. § 904.04(2)(b) applies to sexual assault cases regardless of the victim's age.[2]

Seaton also attempts to overlimit *Hunt* and *Marinez* to hold that other-acts evidence is admissible for credibility only when rebutting a recantation or providing context. (Seaton's Br. 25–26.) The common thread in those cases was that similar other acts were admissible to rebut credibility attacks against the victims. *Marinez*, 331 Wis. 2d 568, ¶¶ 34–35; *State v. Hunt*, 2003 WI 81, ¶ 59, 263 Wis. 2d 1, 666 N.W.2d 771. Similarly, here, there is evidence challenging Anna's credibility: she delayed disclosure of the assault, Seaton is asserting that she consented, and her sister appeared to have a different opinion about the encounter. Jane's description of Seaton's alleged assault of her would serve to rebut evidence attacking Anna's credibility.

Motive and intent. Seaton asserts that the State did not raise these purposes below and that they should be deemed forfeited. (Seaton's Br. 28.) The State sufficiently raised these purposes. (R. 21:3, 6–8; 46:15, 25.) The circuit court rejected them in the same summary fashion as it did the other purposes. (R. 46:22–27.) Even so, reviewing courts may consider purposes beyond what the circuit court considered.

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[2] Seaton misstates that one rationale for the greater-latitude rule is to combat the "monster myth"—that only "the most depraved and degenerate" could sexually assault a child—is absent when the victim is an older teen. (Seaton's Br. 26–27 (citation omitted).) That and other harmful myths are prevalent in cases involving teen and adult victims. Dr. JoAnne Sweeny, *"Brock Turner Is Not a Rapist": The Danger of Rape Myths in Character Letters in Sexual Assault Cases*, 89 UMKC L. Rev. 121, 140–48 (2020).

See, e.g., *Hurley*, 361 Wis. 2d 529, ¶ 29; *Sullivan*, 216 Wis. at 784–85.[3]

Seaton incorrectly asserts that intent, motive, and purpose are only at issue in cases alleging sexual assault by *contact*, not intercourse. (Seaton's Br. 28–30.) The supreme court rejected that argument long ago. *See State v. Dodson*, 219 Wis. 2d 65, 79, 580 N.W.2d 181 (1998) ("sexual intercourse" necessarily involves "sexual contact"). Intent and motive are implicit elements of third-degree sexual assault, which requires the State to prove that Seaton had sexual intercourse without Anna's consent. Wis. Stat. § 940.225(3)(a). Sexual assault involving intercourse "requires an intentional or volitional act by the perpetrator." *Hurley*, 361 Wis. 2d 529, ¶ 73 (citation omitted). Hence, motive, purpose, and intent are intrinsic elements to sexual assault. *Hunt*, 263 Wis. 2d 1, ¶ 60 ("purpose is an element of sexual assault, and motive . . . [is] relevant to purpose").

Opportunity. As with plan, Seaton cites a general treatise to argue that opportunity is a narrow purpose limited to placing him at the scene or showing that he had distinctive abilities to commit the crime. (Seaton's Br. 31.) As argued (State's Br. 18–19), opportunity overlaps with motive, mode of operation, and plan, and its purpose is not as limited as Seaton suggests. *See, e.g.*, *Hunt*, 263 Wis. 2d 1, ¶ 60 (holding that 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").

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[3] Seaton suggests that *Dorsey* bars review of arguments or purposes beyond what was argued at the trial court. (Seaton's Br. 17.) The court, however, was simply explaining that it was choosing to limit its review in that case. *Dorsey*, 379 Wis. 2d 386, ¶ 36.

Finally, Seaton denies that the circuit court approached its decision with a bias toward inadmissibility and argues that the bias toward admission only exists in the third *Sullivan* step. (Seaton's Br. 27–28.) Beyond highlighting that the prosecutor (correctly) argued that the greater-latitude rule eases admission of other acts, Seaton offers no other explanation for the court's multiple remarks indicating that it considered *admission* of Jane's claims an exception. Additionally, the statute favors admissibility in all respects, not just the third *Sullivan* step:

> The case law in no way indicates that a circuit court should predispose itself against the admission of other crimes evidence. . . . [Wis. Stat. § 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.

State v. Speer, 176 Wis. 2d 1101, 1114–15, 501 N.W.2d 429 (1993).

2. Jane's accusations were highly probative, and that value is not substantially outweighed by the risk of unfair prejudice.

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

Seaton does not apply any analysis to the second *Sullivan* prong or address the State's arguments on those points. He instead argues that *Alsteen* and *Cofield* bar Jane's claims because he is raising a consent defense. (Seaton's Br. 32–34.) He also suggests, without support, that to be relevant or probative, the other act must share "uncommon or unique" elements with the charged act. (Seaton's Br. 34.)

As for the first point, Seaton incorrectly suggests that the State is seeking to admit Jane's other act to prove Anna's lack of consent. (Seaton's Br. 34–35.) It is not. The State has offered multiple purposes, none of which are to prove Anna's lack of consent. And again, similarity is based on combined features, not individually unique ones. Jane's and Anna's claims share such key combined features that it is less probable that the two events repeated "by mere chance or coincidence." *Sullivan*, 216 Wis. 2d at 786–87.

Seaton also incorrectly writes that *Alsteen* and *Cofield* bar all other acts in a sexual assault case involving a consent defense. (Seaton's Br. 33–34.) Both *Alsteen* and *Cofield* note that other acts of nonconsensual sexual conduct could be admissible when they are relevant to permissible purposes other than proving lack of consent. *Ziebart*, 268 Wis. 2d 468, ¶ 19; *State v. Cofield*, 2000 WI App 196, ¶¶ 11–12, 238 Wis. 2d 467, 618 N.W.2d 214.

Seaton also wrongly insists that raising a consent defense makes consent the only issue and effectively bars admission of other acts of his sexual misconduct. (Seaton's Br. 32–34). It defies law and logic to suggest that an accused's choice of defense can unilaterally bar relevant and probative other acts in any case, let alone in a greater-latitude case. And it is archaic to assert that consent is *ever* the only issue in a sexual assault case. *Alsteen*'s language to that effect is from a 75-year-old federal case reflecting hostility toward admitting other-acts evidence in sexual assault cases. (*See* State's Br. 31 (discussing *State v. Alsteen*, 108 Wis. 2d 723, 730, 324 N.W.2d

426 (1982)).) *Alsteen*'s language misleadingly narrows the evidentiary focus to the victim's credibility, when the accused's credibility is equally at issue. By raising a consent defense, the defendant is saying, *I would have stopped if she did not consent*. Thus, here, evidence of similar circumstances showing that Seaton compelled intercourse despite nonconsent is relevant and probative to Seaton's credibility. *See Ziebart*, 268 Wis. 2d 468, ¶ 24 (holding other-acts evidence of similar past sexual assault relevant to rebut a consent defense).

Finally, Seaton suggests that *Ziebart* improperly narrowed or overruled *Alsteen* and *Cofield*. (Seaton's Br. 33.) It didn't. The *Ziebart* court held, consistently with *Alsteen* and *Cofield*, that other-acts evidence could be admissible in sexual-assault consent cases for purposes other than proving nonconsent. *Ziebart*, 268 Wis. 2d 468, ¶ 20. Nothing in *Alsteen* or *Cofield* requires this Court to affirm the circuit court's decision here. In sum, a defendant's chosen defense cannot bar other-acts evidence that is subject to the greater-latitude rule and that objectively satisfies *Sullivan*.

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

Seaton argues that there is significant danger of unfair prejudice if the jury hears Jane's allegations because they are "arguably more serious than the charged offense, due to the alleged degree of force." (Seaton's Br. 35–36.) Yet neither Jane nor Anna alleged violence by Seaton beyond restraint and painful intercourse. And Seaton offers no response to the State's points that Jane will be available for cross-examination, the uncharged nature of her allegations is inherently less prejudicial to Seaton, and jury instructions would limit any potential prejudice. (State's Br. 28–31.) Seaton has failed his burden to show that the high probative

value of the other acts is substantially outweighed by the risk of unfair prejudice.

CONCLUSION

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

Dated this 10th day of July 2024.

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 2985 words.

Dated this 10th day of July 2024.

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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 10th day of July 2024.

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