STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2021AP001937 CR

STATE OF WISCONSIN, Plaintiff-Respondent

vs.

JOSE A. AREVALO-VIERA Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH R. WALL PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUES PRESENTED

Did the circuit court erroneously exercise its discretion in allowing the State to introduce other acts evidence against Arevalo-Viera?

Does the judgment of conviction and sentence erroneously reflect the sentence imposed by the circuit court as to Count 7 of the information, armed robbery?

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel does not request oral argument. Counsel believes that publication will not be warranted as this appeal involves the application of well-established law to a specific set of facts.

STATEMENT OF THE CASE

The State charged Arevalo-Viera with the following offenses:

Count 1: First Degree Sexual Assault (Forcibly Aiding And Abetting);

Count 2: Kidnapping (Carries Forcibly)-As A Party To A Crime;

Count 3: First Degree Sexual Assault (Forcibly Aiding And Abetting);

Count 4: First Degree Sexual Assault (Forcibly Aiding And Abetting);

Count 5: First Degree Sexual Assault (Forcibly Aiding And Abetting);

Count 6: First Degree Sexual Assault (Forcibly Aiding And Abetting);[1]

Count 7: Armed Robbery As A Party To A Crime. Ap.6-8.[2]

The criminal complaint alleged in relevant part as follows: during the early morning hours of June 16, 2017, M.J.D. was driving in her vehicle on Interstate 94 in the City of Milwaukee when she exited the freeway at the Van Buren/Jackson exit. Ap.1. M.J.D. was stopped at the intersection of Clybourn and Jackson when an individual, identified in the complaint as Suspect 1, approached her front passenger door with a hammer. Ap.1-2. M.J.D. "took off" while Suspect 1 struggled to get into her vehicle. Ap.2. Despite M.J.D.'s efforts, Suspect 1 was able to get inside her vehicle and displayed a box cutter. Ap.2. Suspect 1 also said that he had a hammer. Ap.2. Suspect 1 ordered M.J.D. to drive to Chicago. Ap.2. A second individual, Suspect 2, followed behind M.J.D.'s vehicle in a pickup truck. Ap.2. As they were nearing General Mitchell Airport, Suspect 1 ordered M.J.D. to pullover on the freeway. Ap.2. Suspect 2, who was still following them in the pickup truck, also pulled over. Ap.2. Suspect 2 approached the vehicle and talked with Suspect 1 about the need to "get out of state." Ap.2. Suspect 1 directed

[1] As to Counts 1,3,4,5 and 6, the circuit court at trial instructed the jury as to Second Degree Sexual Assault as a lesser included offense. 76:9-10. The jury found Arevalo-Viera guilty of such offense on Count 3. 83:13.

[2] See Third Amended Information. 32:1-3, Ap.6-8.

M.J.D. again to drive to Chicago. Ap.2. Suspect 1 became "handsy" with M.J.D. and fondled her breasts. Ap.2. Near the 27th Street exit of Interstate 94, Suspect 1 again ordered M.J.D. to pull over. Ap.2. Suspect 1 told M.J.D. that if she wanted to live, she would listen to what he had to say. Ap.2. Suspect 1 ordered M.J.D. to get her purse and her dog, and get out of the vehicle. Ap.2. Suspect 1 pulled M.J.D. through the passenger window. Ap.2. Suspect 1 then got into the back seat of the pickup truck, and ordered M.J.D to do so as well. Ap.2. Suspect 1 at that point displayed a 3 inch knife. Ap.2. While in the backseat of the pickup, Suspect 1 grabbed M.J.D.'s breasts and crotch area. Ap.3. Suspect 1 put his hand inside M.J.D.'s pants and forced his finger inside M.J.D.'s vagina. Ap.3. As Suspect 1 and Suspect 2 were "bickering back and forth," Suspect 1 told Suspect 2, to "get the gun," "I'm going to shoot her." Ap.3. Suspect 1 ordered M.J.D. to remove her clothing, and she refused. Ap.3. Suspect 1 punched M.J.D., and became more aggressive. Ap.3. Suspect 1 started counting down, "10, 9, 8…." Ap.3. M.J.D. removed all of her clothing. Ap.3. After "futzing" with what M.J.D. believed was a condom, Suspect 1 "got on top of her, inserted his penis into her vagina, and forced sexual intercourse." Ap.3. M.J.D. was yelling as loud as she could. Ap.3. Suspect 2 drove the pickup truck and turned up the music as M.J.D. was yelling. Ap.3. When it seemed to M.J.D. that they were "done" with her, Suspect 2 came to a stop, and M.J.D. was allowed to leave and take her dog.

Ap.3. Suspect 1 ordered M.J.D. to leave her purse, and threatened to kill M.J.D. "if she went to the police." Ap.3. After the pickup truck pulled away, M.J.D walked to several houses to seek help. Ap.3. M.J.D. ultimately ended up at the "U-line" truck stop in Pleasant Prairie, Wisconsin, where a truck driver allowed her to use his cell phone to call 911." Ap.3. Arevalo-Viera was later identified as Suspect 1. Ap.3-5.

The case proceeded to a seven day trial during which the jury found Arevalo-Viera guilty on all counts. 83:12-13. At sentencing, the circuit court imposed the following sentences:

> Count 1: 40 years initial confinement, 20 years extended supervision;
> Count 2: 20 years initial confinement, 15 years extended supervision;
> Count 3: 10 years initial confinement, 10 years extended supervision;
> Count 4: 40 years initial confinement, 20 years extended supervision;
> Count 5: 40 years initial confinement, 20 years extended supervision;
> Count 6: 40 years initial confinement, 20 years extended supervision;
> Count 7: 5 years initial confinement, 5 years extended supervision.

55:56-58.[3]

The circuit court made Counts 1, 3, 4, 5,and 6 concurrent to each other, but consecutive to Counts 2 and 7. 55:57-58. The circuit court made Count 7

[3] As discussed later in this brief, the judgment of conviction erroneously reflects a sentence of 40 years initial confinement/20 years extended supervision on Count 7. Ap.10.

consecutive to Count 2. 55:58. The sentences contemplated a 65 year period of initial confinement and a 40 year period of extended supervision. 55:58. Arevalo-Viera timely filed a notice of intent to pursue posconviction relief, 52:1-2, pursuant to which the State Public Defender appointed the undersigned counsel to represent Arevalo-Viera on postconviction matters. By and through counsel, Arevalo-Viera filed a notice of appeal, 200:1, and these proceedings follow.

STATEMENT OF FACTS

Facts pertaining to State's motion to admit other acts evidence.

Prior to trial, the State filed a motion seeking to admit evidence of conduct that allegedly occurred between Arevalo-Viera and another woman, K.A., in Kenosha County "hours" before the alleged conduct with M.J.D. 23:2-3, Ap.12-17. The State proffered the following information in its motion:

> Hours earlier, KA was leaving Buffalo Wild wings in Kenosha County when a dark-colored pickup truck began to follow her car. The pickup truck was following KA's car extremely closely. When both cars were stopped at a light, the driver of the pickup truck exited the car, approached KA's car, and knocked on the window. KA refused, and told the subject she was calling the police. The subject returned to his pickup truck and pulled a gun from the bed of the pickup truck. Fearing for her safety, KA sped away.
>
> The subject with the gun returned to the pickup truck and followed KA. The pickup truck again pulled next to KA. This time, a Hispanic male with a mask covering his face exited the passenger side of the pickup truck with a baseball bat. KA immediately sped off again, made it home, and called Kenosha police. KA was able to positively identify the above Defendant as one of the individuals inside the pickup truck that followed her on July 16, 2017.

23:2-3, Ap.13-14.

The State offered the other acts evidence for the purpose of identity. In particular, the State asserted that '[t]he method of operation is so unique as to each offense as to carry the Defendant's "signature," and thus identify the Defendant as the perpetrator.' 23:3-4, Ap.14-15. The State also asserted that the evidence would serve to demonstrate motive, intent, and absence of mistake should Arevalo-Viera claim that his actions with M.J.D. were consensual. See 23:4, Ap.15.

Hearing on State's motion to admit other acts evidence.

At the hearing on the State's motion, trial counsel disagreed "that there is in fact a unique method of operation," and argued that "the incidents are quite different." 79:10. Trial counsel additionally argued that the admission of such evidence would cause extreme unfair prejudice which would outweigh the probative value of the evidence. 79:10.

In beginning its analysis, the circuit court referenced the three prong test under *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998). 79:11, Ap.21.

First, the circuit court determined that the State offered the evidence for a proper purpose. 79:11, Ap.21. In this regard, the circuit court determined that the State properly offered the evidence for the purpose of demonstrating method of operation, identity, or motive. 79:11, Ap.21. The circuit court next

determined that the evidence was relevant. 79:12, Ap.22. In this regard, the circuit court determined that it "relate[d] to a fact or proposition that is of consequence of the determination of the action," specifically, the identification of Arevalo-Viera, 79:12, Ap.22. The circuit court additionally determined that given that alleged incident with K.A. was "very, very similar and within hours of the charged conduct," it had probative value. 79:13, Ap.23. Finally, the circuit court considered whether the "prejudicial impact of that testimony substantially outweighs the relevance" of the evidence. 79:15, Ap.25. In this regard, the circuit court determined as follows:

> Here, there is nothing unusual about the other acts evidence. There's nothing that would, outside of its relevance, shock the conscience of a jury or cause them to make a decision based on outrage or cause any sort of confusion. It is prejudicial, of course, and the way to deal with that is through the trial procedure as well as jury instructions.
>
> So what I would suggest, first of all, the drafting of the appropriate limine instruction, first of all, that the other act involving KM would be - -go towards the identity of the individual who allegedly attacked MD and to further caution the jury to give that instruction before the introduction of the KM evidence and of course at the end of the trial.[4]
>
> But it's a bit conditional right now. As I say, I see that identity will probably be at play. And if it is, then this is admissible. It clearly passes the Sullivan test. And would be admissible with, as I say, the limine instructions. And it should not be mentioned in opening statement, again, because I think it's conditional upon how the defense plays out.

79:16, Ap.26.

At such point in the hearing, trial counsel pointed out that identity was not going to be an issue, because Arevalo-Viera was not denying that he was in the car with M.J.D. 79:16, Ap.26.

[4] The court used the initials KM instead of KA as used by the State in its motion.

The State responded by arguing that irrespective of whether Arevalo-Viera was contesting the issue of identity, the State could still offer evidence for that purpose. 79:17, Ap.27. In support of such position, the State cited *State v. Pymesser*, 172 Wis.2d 583, 493 N.W.2d 367 (1992) and *State v. Clark*, 179 Wis.2d 484, 507 N.W.2d 172 (1993). 79:18-19, Ap.28-29. The State additionally argued that if the defense were to claim that the encounter with M.J.D. was consensual, the evidence would be "extraordinarily relevant to demonstrate the absence of mistake on the part of MD that this was a violent assault and it wasn't as the defense claims." 79:18, Ap.28.

In further considering the other acts evidence in light of Arevalo-Viera's proffer that he would not be contesting identity, and the State's reply, the circuit court stated in relevant part as follows:

> THE COURT: Well, yeah. And I agree as to the second part. That's kind of where I was heading. But thank you for that. Again, that the - - the absence of mistake. But you know, the intent and the method of his operation here. I think all comports with the very same analysis that I talked about.

79:18, Ap.28.

The court additionally stated as follows:

> THE COURT: Okay. Well, as we calm things down at trial, we will see what the most appropriate avenues are. As I say, the preliminary instructions on those and give those to the jury. But I do find - -I will take a look at *Clark*, but I - - with identity being less relevant with Ms. Kuehn's proffer here, the other proffered avenues I think come more to the forefront of the analysis.
>
> - - -
>
> THE COURT: ….I was saying that the analysis is the same and the - - again, there is prejudice, but it's - - that can be handled with cautionary instructions and under the

> mode that I spoke about here not going into opening statement but rather as the issues arise and using the cautionary instructions before the evidence as well as at the end. Prejudice versus relevance analysis is the same, and I find that all these avenues pass that test.

79:21, Ap.31.

Other acts testimony at trial.

At trial, the State introduced testimony from two witnesses regarding the other acts evidence, K.T. 72:94, and S.J., 72:115.[5]

K.T.'s testimony

On June 15, 2017, K.T. went to BW3s in Kenosha to have dinner with some friends. 72:95. Her friend, S.J., was in the car with her. 72:95. K.T. went to the restaurant around 9:30 or 9:45 and left around 11:00. 72:95. As K.T. and S.J. were leaving the parking lot, a truck pulled up behind them and began following them "really close." 72:97. K.T. thought that "maybe they were just annoyed that (she) was going too slow." 72:97. After coming to a stop sign and turning right, the truck continued to follow. 72:97. K.T. then thought "maybe it was somebody (she) knew that recognized (her) car." 72:97. As K.T. pulled up to another stop sign, the truck was in the right hand lane. 72:98. K.T. rolled down the passenger window to see if it was somebody she knew. 72:98. "They didn't roll down their window or anything." 72:98. At that point, K.T. thought, "that's weird," and kept driving. 72:98. The truck got out of the right lane and began

[5]The State's motion uses the initials K.A. whereas the trial testimony references the witness as K.T.

following K.T. again. 72:98. K.T. sped up and the truck sped up too. 72:98. K.T. was going 55 to 60 miles per hour in a 40 mile per hour zone in order to get away from the truck. 72:99. The truck kept pace with K.T., and remained so close behind her that she could barely see the truck's headlights. 72:99.

K.T. tried to turn into the neighborhood before her own in order to see if the truck was following her, or if it was just mad that she was driving too slow. 72:100. As K.T. tried to make a right hand turn, the truck drove off the road onto the grass, and almost sideswiped her car. 72:100.

At the next light, K.T. slammed on her brakes in order to let the truck go around her. 72:100. The truck ended up pulling up in the lane next to her on the wrong side of the road, and stopped. 72:100.

K.T. sped up again trying to get away, and turned into her own neighborhood. 72:100. The truck followed her, and cut through a yard. 72:100. K.T. pulled over because she did not know what was going on, and she was angry. 72:101.

The driver from the truck got out and was knocking on her window, and telling her to roll down her window. 72:101,103. The person was telling her that he had to ask her something. 72:101. K.T. did not roll down her window. 72:101. At first, K.T. was not scared, but at some point, she did become scared. 72:101. The person kept knocking on her window, and asking her to roll it down. 72:101. K.T. held up her cell phone and said, "I don't care. I will call 9-1-

1. Go away." 72:102. The person said, "No, don't do that." 72:102. He then walked to the back of his truck, and pulled something out of it. 72:102.

At the time, K.T. did not know what the person retrieved. 72:102. It was just a long object. 72:102. As soon as K.T. saw that the person was grabbing something from the back of the truck, she immediately assumed it was a "gun or something," and sped off. 72:102. K.T. did not know for sure what it was. 72:103.

The truck started following K.T. again. 72:102. K.T. tried to move over, and let the truck pass, but it pulled over next to her. 72:102. The passenger of the truck got out with a mask on and a baseball bat. 72:102. The mask was "like a ski mask," and the bat was aluminum. 72:103. As soon as K.T. saw the person opening his door, she "took off," and dialed 911. 72:104.[6] K.T. was terrified because she "didn't know what was going on." 72:104.

K.T. pulled over in her neighborhood, and kept going around the block. 72:105. She did not know what to do. 72:105. Eventually, K.T. took a turn that the truck could not keep up with, and she ended up getting away. 72:105. In order to get away, K.T. was driving fast through her neighborhood, "easily 40,45," so fast she was scared her car would flip on the turns. 79:105.

[6] The State played and introduced a recording of the 911 call. 79:96,107; 204:1 (trial Exhibit 43).

At some point later, officers brought K.T. a photo array in order to identify the driver of the truck. 72:105. K.T. picked out a person but did not know the person's name. 72:106. K.T. wrote down that she was 90% sure. 72:106.

K.T. identified Arevalo-Viera in court as the person who knocked on her window, and who was the driver of the pickup truck. 72:107.

On cross-examination, K.T. testified that Arevalo-Viera did not make any threats to her. 72:108. He did say anything threatening to her or make any threatening gestures to her. 72:108. Arevalo-Viera did not bump K.T.'s car. 72:108. When K.T. had her window rolled down, Arevalo-Viera did not try to jump in the car and get her. 72:108. He never took a hammer and hit her window. 72:109. All Arevalo-Viera did was knock on her window and say, "Can I ask you a question." 72:110.

On re-direct, K.T. testified that she perceived Arevalo-Viera's pursuit of her in the truck to be threatening conduct. 72:110. She believed that Arevalo-Viera was trying to kidnap her. 72:109.

K.T. felt threatened when the passenger came towards her car with a ski mask on and a baseball bat. 72:112.

S.J.'s testimony

S.J. testified that she left Buffalo Wild Wings with K.T. at about 11:00 p.m. 72:116. It was dark out. 72:122. K.T. was driving. 72:116. They were heading back to K.T.'s house where S.J. planned to stay the night. 72:116.

After driving for a little bit, they noticed a truck behind them that was "kind of speeding." 72:116. They thought it was odd, but did not think much of it at the time. 72:116.

They stopped at a stop sign, and the truck pulled up parallel to them. 72:116. They could not see in the windows, but they thought it may be a friend "messing" with them. 72:116. They continued to go straight. 72:117. At that point, S.J. thought that the car was "like a drunk driver or they were trying to run us off the road." 72:117,122. S.J. was in disbelief that something like this was happening. 72:122.

K.T. turned into a neighborhood, and the car cut over the curb. 72:117. K.T. did not want to go to her house right away because she thought the truck was following them. 72:117. K.T. pulled over. 72:117. At that point, the truck was on the left side. 72:117.

That is when the driver came and started knocking on the window. 72:117,123. The driver said something like, "Open up. Like I need to ask you a question." 72:117,123. K.T "was like, no, I don't know you." 72:117. The man

kept asking her to open up, and at that point K.T. said that she was going to call 911. 72:117,123. S.J. had never seen the person before. 72:123.

S.J. saw another man come out with what looked like a ski mask on. 72:117. They went to the back of the truck, and picked up what at the time looked to S.J. to be a shotgun. 72:117. S.J. saw the men then get back in the car. 72:117. K.T. sped off, and called 911. 72:124. At that point, they were being chased around the neighborhood. 72:117. K.T.'s voice during the 911 call sounded "definitely panicked, super afraid." 72:124. S.J. was screaming in the background. 72:124.

After observing the men get something out of the back of the truck, S.J. believed that "they're going to shoot us." 72:125. S.J. had never seen the two people before. 72:125.

S.J. identified Arevalo-Viera in court as the driver of the truck. 72:126. "I just remember his face in the window. It's like something I will never forget." 72:126. S.J. was never shown a photo array by the police. 72:125. She was just shown a sketch drawing. 72:125.

On cross-examination, S.J. testified that what she thought was a shotgun, was a dark long object. 72:126. She first believed the object to be a shotgun, but now believed it was a sledgehammer. 72:126. She changed her opinion about what it was after "hearing of the other case up in Milwaukee."

72:126,127. She had heard that somebody else was a attacked with a hammer. 72:127. S.J. had never mentioned anything before about a hammer. 72:127.

S.J. could not recall previously characterizing the event as an attempted abduction, but "after knowing everything, going through everything," she would now characterize it as an attempted abduction. 72:128. By "knowing everything," S.J. meant after being told by a police officer that somebody in Milwaukee was abducted, after going through therapy, and some other stuff. 72:128.

Arevalo-Viera never verbally threatened her. 72:128. He did not make any threatening gestures to her. 72:128. Based on Arevalo-Viera's knocking on the window and stating, "Can I ask you a question," S.J. concluded that she was about to be abducted. 72:129.

On re-direct, S.J. testified that when Arevalo-Viera and the passenger went to the back of the pickup truck, she "began to feel real scared." 72:129. "Now looking at," S.J. believed that a stranger approaching her car at 11:30, and chasing her was threatening. 72:129.

S.J. recalled seeing the dark object, but did not know exactly what it was. 72:130. It was dark out and hard for her to see. 72:130.

At the time K.T. called 911, they did not know anything about what happened in Milwaukee. 72:130. At the time S.J. spoke to the officers that night, she did not know anything about what happened in Milwaukee. 72:130.

On re-cross, S.J. testified that although no one shot at her, a dark object was pointed out of the passenger side, and she was scared that it was a gun. 79:132. No one hit her with a sledgehammer. 72:132. No one hit her window with a sledgehammer. 72:132. No one hit her or her property with a baseball bat. 72:133. No one jumped in her car. 72:133. No one took her and forced her into a car. 72:133.

ARGUMENT

I. The *circuit court erroneously exercised its discretion in granting the State's motion to admit other acts evidence.*

A. Standard of review

A circuit court's decisions to admit or exclude evidence are entitled to great deference. *State v. Dorsey*, 2018 WI 10, ¶37, 379 Wis.2d 386, 906 N.W.2d 158. A reviewing court will uphold a circuit court's evidentiary ruling 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." *Id.*

B. The circuit court erred in determining that the other acts evidence was relevant, and that the probative value of the evidence substantially outweighed the danger of unfair prejudice.

Other acts evidence should be used sparingly and only when reasonably necessary. See *State v. Whitty*, 34 Wis.2d 278, 149 N.W.2d 557 (1967). In *Whitty*, the Wisconsin Supreme Court offered four reasons justifying the rule excluding other acts evidence:

> (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment for other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from brining in evidence of other crimes.

See *id.* at 292.

See also *State v. Sullivan*, 216 Wis.2d at 784. "[T]he exclusion of other acts evidence is based on the fear that an 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.

The propriety of the circuit court's decision to admit the State's other acts evidence is governed by three primary sources of authority, Wis. Stat. §904.04(2), Wis. Stat. §904.03, and *State v. Sullivan*, supra.

§904.04(2) provides as follows:

(2) OTHER CRIMES, WRONGS, OR ACTS.

(a) *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.

§904.03 provides as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The framework for the *Sullivan* analysis is as follows:

(1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. §904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident?

(2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. §904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.

(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, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

See *State v Sullivan*, 216 Wis.2d at 772-773.

With respect to the first prong of the *Sullivan* test, as long as the proponent identifies one acceptable purpose for the admission of the other acts evidence the first step is satisfied. See *State v. Payano*, 2009 WI 86, ¶63, 320 Wis.2d 348, 768 N.W.2d 832. Consequently, this "first step is hardly demanding." *Id.*

Here, the State offered the other acts evidence for the purpose of proving identity, intent, motive, and absence of mistake. 23:4, Ap.15. Arevalo-Viera recognizes that these are proper purposes under §904.04(2)(a), and that the other acts evidence therefore satisfied the first prong of *Sullivan*. The circuit court properly made this determination. 79:11, Ap.21.

The circuit court however did not properly determine that the other acts evidence was relevant, and that its probative value outweighed the "danger of unfair prejudice" as properly defined by Wisconsin law. In this regard, the circuit court did not properly apply the second and third prongs of the *Sullivan* framework.

Under *Sullivan,* a circuit court must not just refer to the three-step framework. Rather, the circuit court must relate the specific facts of the case to the analytical framework. See *State v. Sullivan*, 216 Wis.2d at 774. The circuit court must carefully articulate whether the other acts evidence relates to a consequential fact or proposition in the criminal prosecution, carefully

explore the probative value of the other acts evidence, and carefully articulate the balance of probative value and unfair prejudice. See *id*.

Here, the circuit court had before it a proffer by Arevalo-Viera that he was not denying that he was in the car with M.J.D. that night. 79:16, Ap.26. Such proffer was significant for three reasons.

First, with respect to the stated purpose of admitting the other acts evidence for proving identity, the fact that Arevalo-Viera was not contesting identity significantly altered the weight the circuit court should have given to the relevance of the other acts evidence. With the proffer, the identification of Arevalo-Viera was no longer a genuine fact or proposition of consequence to the case.[7]

Further, even if it remained a genuine fact or proposition of consequence, albeit an undisputed one, the other acts evidence which was offered to prove such fact or proposition had diminished probative value. 'The main consideration in assessing probative value of other acts evidence "is the extent to which the proffered proposition is in substantial dispute"; in other words, "how badly needed is the other act evidence?"' *State v. Payano,* 2009 WI 86 at ¶81. Given Arevalo-Viera's proffer, identity was not in substantial

[7] Arevalo-Viera is aware that under *State v. Plymesser*, supra, evidence which proves an element of the offense is admissible even if the defendant does not dispute that particular element. See *State v. Plymesser*, 172 Wis.2d at 594-595. However, such evidence is still subject to §904.04(2). This court has declined to adopt a rule in which all past conduct involving an element of the present crime is admissible under §904.02. See *State v. Barreau,* 2002 WI App 198, 257 Wis.2d 203, 651 N.W.2d 12.

dispute, and the other acts evidence was not needed at all. 79:16.[8] The other acts evidence therefore had minimal, if any, relevance, and minimal, if any, probative value as to identity. The circuit court therefore, as a proper exercise of discretion, should have considered Arevalo-Viera's proffer regarding identity in analyzing the second prong of the *Sullivan* framework. It did not.

Second, and similarly, Arevalo-Viera's proffer as to identity significantly altered the balancing of the probative value of the other acts evidence against the danger of unfair prejudice. As discussed above, Arevalo-Viera's proffer meant that the other acts evidence had minimal, if any, probative value as to identity. As a proper exercise of discretion, the circuit court should have weighed such minimal probative value against the "danger of unfair prejudice" as properly defined under Wisconsin law. *Sullivan* defines unfair prejudice as follows:

> Unfair prejudice results when the proffered evidence has the 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 decision on something other than the established propositions in the case.

State v. Sullivan, 216 Wis.2d at 789-790.

The specific danger of unfair prejudice when using other acts evidence "is the potential harm in a jury's concluding that because an actor committed one

[8] Consistent with such proffer, Arevalo-Viera testified at trial that he was in M.J.D.'s car that night, and that she was in his truck. 93:99-100,105. Arevalo-Viera denied forcing M.J.D. into his truck, or restraining her. 93:105, 104, 102. He denied inserting his penis into her vagina, inserting in finger into her vagina, or fondling her breasts. 93:114. He described a consensual encounter with M.J.D. after her car pulled along side his vehicle while traveling on the freeway. 93:98:-99.

bad act, he necessarily committed the crime with which he is now charged." *State v. Payano*, 2009 WI 86 at ¶89.

In this case, the circuit court wholly failed to weigh the minimal, probative value of the other acts evidence, against what properly constitutes the "danger of unfair prejudice." Specifically, the circuit court failed to weigh the minimal probative value of the evidence against the danger that such evidence would tend to influence the outcome by improper means, or cause the jury to base its decision on something other than the established propositions in the case. Quite simply, the circuit court failed to weigh the minimal probative value of the evidence against the danger that the jury would conclude that because Arevalo-Viera committed one bad act, he necessarily committed the crimes with which he was charged. Such failure was of consequence. Here, given the minimal relevance of the other acts evidence as to identity, its probative value was outweighed by the danger of unfair prejudice.

Third, as the circuit court properly noted, Arevalo-Viera's proffer as to identity brought the other stated purposes, specifically, motive, intent, and absence of mistake, "more to the forefront (of) the analysis." 79:20. Nevertheless, the circuit failed to specifically analyze whether the other acts evidence was admissible for any of those purposes under either the second or

third prongs of the *Sullivan* framework. Instead, the circuit court summarily concluded that "the analysis is the same:"

> Again, there is prejudice, but it's - - that can be handled with cautionary instructions and under the mode that I spoke about here not going into opening statement but rather as the issues arise and using the cautionary instructions before the introduction of the evidence as well as at the end. Prejudice versus relevance analysis is the same, and I find that all these avenues pass that test. 79:21.

The circuit court's assessment that "the analysis is the same" and that "all these avenues pass that test," was deficient and conclusory. The record of the motion hearing fails to reflect any analysis by the circuit as to how, under the specific facts of the case, the other acts evidence, as offered for *motive*, was relevant. The record similarly fails to reflect any analysis by the circuit court that the probative value of the evidence, as offered for *motive*, outweighed the danger of unfair prejudice. The record of the motion hearing fails to reflect any analysis by the circuit as to how, under the specific facts of the case, the other acts evidence, as offered for *intent*, was relevant. The record similarly fails to reflect any analysis by the circuit court that the probative value of the evidence, as offered for *intent*, outweighed the danger of unfair prejudice. The record of the motion hearing fails to reflect any analysis by the circuit as to how, under the specific facts of the case, the other acts evidence, as offered for *absence of mistake*, was relevant. The record similarly fails to reflect any analysis by the circuit court that the probative value of the evidence, as offered for *absence of mistake*, outweighed the danger of unfair prejudice.

The circuit court's bare conclusion that "all these avenues" pass "that test" was made without the analysis required under *Sullivan*. "The circuit court must …articulate its reasoning for admitting or excluding the evidence, applying the facts of the case to the analytical framework." *State v. Sullivan,* 216 Wis.2d at 774. " Without "careful statements" by the circuit court "regarding the rationale for admitting or excluding other acts, evidence, the likelihood of error at trial is substantially increased and appellate review becomes more difficult." *Id.* at 774. Such is the case here.

Indeed, in reviewing the transcript as to the circuit court's decision admitting the other acts evidence, one is left only to guess as to why the circuit court believed such evidence passed both the second and third prongs of the *Sullivan* framework for purposes of intent, motive, or absence of mistake. The circuit court simply failed to apply the proper standard of law to the facts before it as part of a demonstrated rational process. In failing to do so, the circuit court erroneously exercised its discretion in admitting the other acts evidence.

C. Even upon independent review by this court, the record does not provide an appropriate basis for the circuit court's decision.

Arevalo-Viera is aware that even if this court agrees that the circuit court failed to set forth a sufficient basis for its ruling, it may nonetheless

independently review the record to determine whether it provides an appropriate basis for the circuit court's decision. See *State v. Marinez*, 2011 WI 12, ¶17, 331 Wis.2d 568, 797 N.W.2d 399. Upon review of a circuit court's admission of other acts evidence under the *Sullivan* analysis, only the facts that were known to the circuit court when it ruled on the motion to admit the other acts evidence are relevant. *Id.* The record, as it existed at the time of the circuit court's decision, does not allow this court to conclude that there was an appropriate basis to admit the other acts evidence for purposes of identity, motive, intent, or absence of mistake under *Sullivan*.

As to the purpose of identity, Arevalo-Viera has already discussed that in light of his proffer, the other acts evidence had minimal, if any relevancy, for the purpose of identity. Arevalo-Viera has also discussed that the probative value of the evidence was outweighed by the danger of unfair prejudice. Arevalo-Viera will only add here that upon independent review, this court must consider that the factual differences between the other acts evidence and the crimes charged made the irrelevancy of the other acts evidence even more pronounced.

To be admissible for the purpose of identity, the other-acts evidence should have such a "concurrence of common features and so many points of similarity with the crime charged that it can reasonably be said that the

other acts and the present act constitute the imprint of the defendant." See *State v. Kuntz*, 160 Wis.2d 722, 746, 467 N.W.2d 531 (1991).

Here, the record fails to show that the other acts and the present acts had such a "concurrence of common features and so many points of similarity," so as to constitute the imprint of the defendant. In fact, there were significant differences between the other acts and the crimes charged. In this regard, the other acts evidence did not involve any allegation of sexual assault, kidnapping or robbery. The other acts evidence did not even involve an allegation of violence, or physically assaultive behavior directed towards the other acts party. In short, the other acts evidence did not present the "concurrence of common features and so many points of similarity," so as to constitute the imprint of the defendant. And of course, the circuit court made no such finding.

As to intent, the other acts evidence was not admissible to show that Arevalo-Viera had the intent to sexually assault M.J.D., as urged by State, 23:4, because intent was not an element of the sexual assault charges brought against Arevalo-Viera. See *State v. Cofield*, 2000 WI App 196, ¶11, 238 Wis.2d 467, 618 N.W.2d 214.

Additionally, even though the charges of kidnapping and robbery involved the element of intent, the State never argued that it sought to introduce the other acts to prove such elements. Rather, the State's argument

was that the other acts evidence proved that it was "a violent assault" and not a consensual encounter. 79:18, 23:4. As such, this court should find, as it did in *Cofield*, that any argument that the other acts evidence was admissible to prove intent as to the robbery or kidnapping, is a "stretch at best," and also, waived, since it was not made before the circuit court. See *Id*.

As to motive, the record does not allow the conclusion that the other acts were properly admitted to establish motive. Other crimes evidence may be admitted to establish motive for the charged offense if there is a relationship between the other acts and the charged offense, or if there is a purpose element to the charge crime. See *State v. Cofield,* 2000 WI App 196 at ¶12. Here, neither can be satisfied. The record does not reveal that the alleged conduct towards K.A. provided a reason for committing the charged offenses or that there was some link between them. Further, there is no purpose element in the crimes charged in this case. As such, this court cannot properly find that the other acts evidence was properly admitted to establish motive.

Finally, the record does not allow this court to find that the other acts evidence was properly admitted to prove absence of mistake. Evidence of other acts may be admitted if it tends to undermine an innocent explanation for an accused's charged criminal conduct. *State v. Sullivan*, 216 Wis.2d at 784. In *Sullivan*, the court referred to an example of where a hunter is

charged with having shot a companion and the hunter claims that the shooting was accidental. *Id.* at 785. Under these circumstances evidence of the hunter's having fired at the companion on other occasions becomes admissible to disprove the claim of accidental shooting. *Id.* The Maryland Supreme Court has succinctly stated the rule as follows: for absence of mistake to apply, "the defendant generally must make some assertion or put on a defense that he or she committed the act for which he or she is on trial, but did so by mistake." *Wynn V. State*, 718 A.2d 588, 599-600 (1998).

In this case however, the record fails to reflect that Arevalo-Viera made any assertion that he committed the acts for which he was on trial, specifically, sexual assault, kidnapping, and robbery, but that he did so by mistake. The record fails to reflect that Arevalo-Viera admitted the acts for which he was on trial, but offered an innocent explanation for them. As such, the record does not support admitting the other acts evidence for the purpose of proving absence of mistake.

In short, the record does not allow this court to conclude that the other acts evidence was properly admitted for purposes of identity, intent, motive, or absence of mistake.

II. The judgment of conviction erroneously reflects the sentence imposed by the circuit court as to Count 7, armed robbery.

When there is a conflict between the court's oral pronouncement of sentence, and the judgment of conviction, the oral pronouncement controls. *State v. Perry*, 136 Wis.2d 92, 114, 401 N.W.2d 748 (1987).

In this case, the circuit court at sentencing imposed a sentence of 5 years initial confinement and 5 years extended supervision on Count 7, armed robbery. 55:56-58.

The judgment of conviction however reflects a sentence of 40 years initial confinement and 20 years extended supervision on Count 7. See Ap.10. This appears to be a clerical error. The judgment of conviction should be amended to the extent that it conflicts with the oral pronouncement of sentence. This court should order the circuit court to amend the judgment of conviction to reflect a sentence of 5 years initial confinement and 5 years extended supervision on Count 7.

CONCLUSION

For all reasons stated in this brief, this court should vacate the judgment of conviction and remand the case for a new trial; in the alternative, the court should direct the circuit clerk to amend the amend the

judgment of conviction to reflect a sentence of 5 years initial confinement and 5 years extended supervision on Count 7.

Dated this 31st day of January 2022.

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CERTIFICATIONS BY ATTORNEY

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 this brief is 7849.

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 31st day of January 2022.

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