STATE OF WISCONSIN

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

DISTRICT I

Case No. 2021AP1937-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSE A. AREVALO-VIERA,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONRABLE JOSEPH R. WALL, PRESIDING

BRIEF OF RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

KIERAN M. O'DAY
Assistant Attorney General
State Bar #1113772

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2065
(608) 294-2907 (Fax)
odaykm@doj.state.wi.us

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INTRODUCTION

MJD had just taken the wrong exit off the freeway in Milwaukee when Arevalo-Viera approached her car, hit her car window with a hammer, and climbed in her car as she drove away. He groped her, threatened her with a boxcutter, and demanded she drive south toward Chicago. After travelling south for some time, Arevalo-Viera demanded she pull over—he then transferred her to his truck, which was driven by his accomplice and had been following them the entire time. He put her in the backseat and began groping her again. When she tried to fight back, he punched her in the face. He demanded she strip, forcibly pried her legs open, and sexually assaulted her. A jury found Arevalo-Viera guilty of several counts of sexual assault, kidnapping, and armed robbery for that incident.

Mere hours before, Arevalo-Viera and his counterpart, in that same truck where MJD was sexually assaulted, accosted two women leaving the Buffalo Wild Wings in Kenosha. They followed the women's vehicle extremely closely, prevented them from turning at times, and chased them through residential neighborhoods. When the women threatened to call the police, Arevalo-Viera and his counterpart exited the truck brandishing weapons.

Evidence of the Kenosha incident was admitted during Arevalo-Viera's trial. He now contends that the circuit court erroneously exercised its discretion when it admitted the Kenosha other-acts evidence. Arevalo-Viera is wrong, and this Court should affirm.

The circuit court properly applied the *Sullivan* test when determining the admissibility of the evidence. As the circuit court properly found, the other-acts evidence and the present case shared such commonalities that they became the imprint of Arevalo-Viera and showed his method of operation. Accordingly, the evidence was offered for several permissible

purposes, was relevant, and was highly probative. The circuit court also properly addressed prejudice, noting the obvious prejudicial effect, but also finding that there was "nothing unusual" about the other-acts evidence. The circuit court also cured any potential prejudice by providing three cautionary instructions to the jury about its use of the evidence.

And, even if the circuit court did erroneously exercise its discretion, any error was harmless because of the overwhelming other evidence that the State had against Arevalo-Viera. The jury heard detailed and thorough testimony from MJD. That testimony was consistent with other witnesses' testimony, her injuries, cell phone tacking information, and surveillance footage. The jury also learned that Arevalo-Viera's DNA and Y-STR profile were found in MJD's DNA samples. That evidence supported the State's case and undercut Arevalo-Viera's highly incredible testimony of a random consensual highway encounter where MJD invited him into her vehicle at a stoplight for drinks and then assaulted him for no reason. No reasonable jury would have had a reasonable doubt as to Arevalo-Viera's guilt absent the other-acts evidence.

Because the circuit court properly exercised its discretion and because any error in doing so was harmless, this Court should affirm.

STATEMENT OF THE ISSUE[1]

Did the circuit court erroneously exercise its discretion when it admitted the other-acts evidence of the incident that happened earlier in the night in Kenosha?

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[1] Arevalo-Viera's second presented issue: "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?" is a non-issue. (Arevalo-Viera's Br. 4

(continued on next page)

This Court should answer: No. But even if the circuit court did err, any error was harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

Factual Background

MJD was driving to visit her boyfriend (Logan) at the police administrative building in Milwaukee in the early morning hours of June 16, 2017. She had just stopped at her boyfriend's house to pick up some belongings. (R. 75:5.) MJD accidentally got off on the wrong exit (R. 75:6–7.)

While MJD was waiting for the light to turn green, a dark truck pulled up next to her. (R. 75:9–10.) She noticed a man, later identified as Arevalo-Viera, exit the truck and approach her car. (R. 75:10.) When Arevalo-Viera reached her passenger window, he struck it multiple times with a hammer. (R. 75:10–11.) MJD tried to roll up the window, but it was too late; Arevalo-Viera entered her car through the passenger window and demanded she drive south toward the

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(for all citations to the Appellant's Brief, the State cites to the electronic page number at the top of the brief).) The State does not dispute that the first amended judgment of conviction entered on November 1, 2019, reflected the incorrect sentence. (R. 58.) However, the circuit court entered an order again amending the judgment of conviction to reflect the accurate sentence on December 20, 2019. (R. 61.) It entered an amended judgment of conviction reflecting the accurate sentence three days later. (R. 62.) Therefore, this issue is moot.

Chicago exit. (R. 75:11–14.) MJD began driving, and the dark truck followed. (R. 75:14.) While MJD was driving, Arevalo-Viera pushed her leg to ensure she pressed the accelerator, and he began rummaging around her car. (R. 75:13–15, 18–19.) In an effort to end the interaction, MJD offered Arevalo-Viera money, her phone, and her car. (R. 75:16–17.)

Arevalo-Viera continuously told MJD to shut up and took her phone from her when he noticed it vibrating in her lap. (R. 75:17.) He asked her if she wanted to live. (R. 75:19.) She said yes; Arevalo-Viera said, "Good" and began caressing her face while holding a boxcutter to her neck. (R. 75:19.) Arevalo-Viera then began rubbing MJD's thigh and reached down her shirt and grabbed her breasts. (R. 75:19–20.)

Near the College Avenue exit, Arevalo-Viera instructed MJD to pull over. (R. 75:25.) When she pulled over, Arevalo-Viera exited the car to talk to the driver of the truck. (R. 75:27.) He pulled MJD across the passenger's seat and was holding her in place by her wrist. (R. 75:27.) Arevalo-Viera and the driver were talking and looking at a map on Arevalo-Viera's phone. (R. 75:28–29.) Arevalo-Viera got back in the car and told MJD to drive and to "[j]ust go the speed limit. Don't do anything funny." (R. 75:30.) Arevalo-Viera also continued to grope MJD while she was driving. (R. 75:31.)

Further south, Arevalo-Viera told MJD to pull over again. (R. 75:33.) He pulled her out of the passenger's side of the car and told her to get in the truck. (R. 75:34–35.) When she refused and was unable to get in the truck, Arevalo-Viera pushed her into the backseat. (R. 75:35–36.) Once she was in the truck, the driver continued down the freeway. (R. 75:37.) Arevalo-Viera told MJD to lay down, and when she did, he straddled her, grabbed her breasts, and rubbed her vagina. (R. 75:38–39.) When she tried to kick him off of her, he held her down, slapped her, and punched her in the face. (R. 75:40–41.)

Arevalo-Viera then said to MJD, "If you want to live, do what I say." (R. 75:43.) He then instructed her to take her clothes off, and when she refused, he threatened her and her dog and began counting down from 10. (R. 75:43, 53–54; 2:3.) MJD tried to cover herself by sitting in the fetal position in the truck—Arevalo-Viera began groping her again, grabbing her inner thighs and her breasts. (R. 75:46.) Arevalo-Viera then told MJD to lay down; when she laid on her side, he rolled her onto her back. (R. 75:46–47.) She tried to close and cross her legs, but Arevalo-Viera pried them open. (R. 75:47.) He then began groping her again, took off his clothes, inserted first a finger and then his penis into MJD's vagina. (R. 75:48–50.) MJD was screaming for him to stop. (R. 75:49–51.)

When Arevalo-Viera eventually stopped, he told her to get dressed. (R. 75:55.) She did; he told her to lay down again, and they kept driving. (R. 75:55–56.) They eventually stopped driving and Arevalo-Viera told MJD to get out of the truck—he kept her phone and her ID and told her to not call the police. (R. 75:58–59.)

MJD first hid until she knew they were out of sight, and then ran looking for help. (R. 75:61.) She ended up in the parking lot of Uline in Pleasant Prairie. (R. 2:3) She flagged down a truck driver who let her use his phone to call Logan and the police. (R. 75:62–63.) Detective Andrea Brey responded and escorted her to the hospital. (R. 82:62–63, 66.)

During the investigation, officers learned that MJD's credit card was used in Chicago and in Louisville, Kentucky. (R. 2:3.) The investigation also revealed that only one phone using Google location services was in the area of the Milwaukee exit where MJD was carjacked, the area in Kenosha where she was assaulted, in the area of the restaurant in Chicago where her card was used, and in Louisville where her card was used. (R. 2:4.) The subscriber information for that phone matched Arevalo-Viera's information. (R. 2:4.)

Arevalo-Viera was arrested in Louisville. (R. 71:31.) The State ultimately charged him with five counts of first-degree sexual assault, kidnapping, and armed robbery. (R. 32:1–2.)

Pre-Trial

Before trial, the State moved to introduce other-acts evidence. (R. 23.) The evidence was an incident between Arevalo-Viera, his cohort, and another woman mere hours before he kidnapped and sexually assaulted MJD. (R. 23:2–3.)

The other-acts motion alleged that K.T.[2] was leaving the Buffalo Wild Wings in Kenosha on June 16, 2017, when "a dark-colored pickup truck began to follow her car." (R. 23:2.) According to the motion, "[t]he pickup truck was following [K.T.'s car] extremely closely." (R. 23:2.) The motion further alleged that the driver of the pickup exited the truck, approached K.T.'s window, and knocked on it. (R. 23:2.) "[K.T.] refused, and told the subject she was calling the police." (R. 23:2.) Afterward, "[t]he subject returned to his pickup truck and pulled a gun from the bed of the pickup truck. Fearing for her safety, [K.T.] sped away." (R. 23:2.) The motion alleged that the man returned to his truck and began following the car again. (R. 23:2.) The truck again pulled up to K.T.'s car, and "a Hispanic male with a mask covering his face exited the passenger side of the pickup truck with a baseball bat." (R. 23:2–3.) K.T. once again sped off. (R. 23:3.) She identified Arevalo-Viera via photo array. (R. 23:3; 72:105–06.)[3]

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[2] The other-acts motion uses the initials K.A., but the correct initials appear to be K.T. based on the trial transcript.

[3] The other-acts motion references only K.T. However, during trial, the jury learned that her friend, S.J., was in the car and party to the incident as well. S.J. also testified at Arevalo-Viera's trial.

The State offered the evidence based primarily on it proving Arevalo-Viera's unique method of operation. (R. 23:3.) The other-acts evidence, the State argued, went toward identity, motive, intent, and absence of mistake. (R. 23:3–4.) The State argued that "the only difference between the two offenses is [K.T.] was able to get away from [Arevalo-Viera] and MD wasn't." (R. 23:4.)

At the hearing on the other-acts motion, Arevalo-Viera's counsel attempted to diminish the similarities between the other-acts evidence and the incident with MJD. (R. 79:10–11.) Counsel also argued that "that evidence would be extremely prejudicial to my client." (R. 79:11.)

The circuit court then went through the *Sullivan*[4] test and found that the evidence was being offered for permissible purposes—identity and method of operation. (R. 79:11–12.) The circuit court concluded that the evidence was relevant to identity and had probative value because the other-acts evidence was "very, very similar and within hours of the charged conduct." (R. 79:13.) To that end, the circuit court referenced *State v. Gray*, 225 Wis. 2d 39, 590 N.W.2d 918 (1999), which "talks about the other acts evidence is admissible to show identity as the other acts evidence has such a concurrence of common features." (R. 79:14.) The court continued, "[a]nd so many points of similarity with the crime charged that . . . it can reasonably be said that the other act and present act constitute the imprint of the defendant." (R. 79:14.)

Finally, the circuit court addressed prejudice. The court noted that "there's nothing unusual about the other acts evidence." (R. 79:15.) "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." (R. 79:15–16.) The court acknowledged that "[i]t is

[4] *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

prejudicial, of course, and the way to deal with that is through the trial procedure as well as the jury instructions." (R. 79:16.)

Arevalo-Viera responded to the circuit court's *Sullivan* analysis by noting that "identity is not going to be an issue." (R. 79:16.) Counsel stated, "My client is not denying that he was in the car." (R. 79:16.) The State responded, arguing that "even if the defense is not contesting the issues such as identity, that the state may nevertheless offer the evidence . . . for that specific purpose." (R. 79:17.) The State, acknowledging that Arevalo-Viera might attempt to argue that this was a consensual encounter, also argued that the other-acts evidence was relevant to show absence of mistake. (R. 79:17–18.) The circuit court held, "the intent and the method of his operation here, I think [it] all comports with the very same analysis that I talked about." (R. 79:18.) The court acknowledged that, regardless of the offered purpose, the "[p]rejudice versus relevance analysis is the same, and I find that all these avenues pass that test." (R. 79:21.) Accordingly, the circuit court admitted the other-acts evidence.

Trial

During Arevalo-Viera's trial, the jury heard testimony from MJD, (R. 75:4–69, 78–119; 72:7–44), MJD's boyfriend, (R. 82:7–47), several police officers, (*see, e.g.,* R. 82:62–106; 82:107–29; 69:30–61; 71:125–42)[5]; the SANE nurse, (R. 72:56–91), and a DNA expert, (R. 71:60–76, 82–102), among others. MJD's testimony, which is discussed more below, was detailed and thorough in its description of the allegations. Her testimony was consistent with the testimony of other witnesses, (*see, e.g.,* R. 72:79–80), surveillance footage, (R. 71:128–38), Arevalo-Viera's cell phone tracking data, (R. 71:10), and her injuries, (R. 72:80–81). The jury learned that Arevalo-Viera's DNA was found on MJD's

[5] The officers testifying above were Detective Andrea Brey, Detective Eric Draeger, and Officer James Henry, respectively.

sweatshirt and that a Y-STR profile consistent with Arevalo-Viera's was found on her underwear, and in her genital samples. (R. 71:83–92.)

The jury also heard testimony on the other-acts evidence. K.T. and S.J. each testified that the truck followed them at a close distance, that Arevalo-Viera exited the truck and approached K.T.'s window, that the truck blocked them from turning, and that the truck followed them through residential neighborhoods even after K.T. called the police. (R. 72:97–113, 115–17.) K.T.'s 911 call was also played for the jury. (R. 72:95–96.) The circuit court provided cautionary instructions to the jury before K.T.'s testimony and before S.J.'s testimony. (R. 72:92–94, 114.) It also instructed the jury on the other-acts evidence again at the end of the trial. (R. 85:88–89.)

Arevalo-Viera testified in his defense. (R. 65:93–114; 85:13–60.) He alleged that he noticed MJD driving on the freeway and wanted to ask her if she wanted to go drinking with them. (R. 65:98–99.) Arevalo-Viera testified that they were talking at the stoplight and MJD told him to get in her car because the light was turning green. (R. 65:99.) He testified that she said they need to get out of Milwaukee. (R. 65:100.) Arevalo-Viera testified that eventually MJD ran out of gas, so they left her car on the side of the freeway, and she got in their truck. (R. 65:102–05.) He denied ever taking MJD's phone and alleged that she started to get notifications and became "hysterical," telling them to drop her off. (R. 65:100, 106–07.) He testified that he tried to calm her down, but she hit the driver and slapped him. (R. 65:107–08.) Arevalo-Viera testified that he retaliated to MJD's slap by hitting her twice across the face. (R. 65:108.) He denied touching MJD, having a boxcutter, and sexually assaulting her. (R. 65:113–14; 85:15.)

The jury found Arevalo-Viera guilty on all counts, and the circuit court entered a judgment of conviction. (R. 83:12–13; 62.)[6] Arevalo-Viera now appeals. (R. 200.)

STANDARD OF REVIEW

This Court reviews "a circuit court's admission of other-acts evidence for an erroneous exercise of discretion." *State v. Marinez*, 2011 WI 12, ¶ 17, 331 Wis. 2d 568, 797 N.W.2d 399. A circuit court properly exercises its discretion 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.* (citation omitted). Additionally, "an appellate court may consider acceptable purposes for the admission of evidence other than those contemplated by the circuit court." *State v. Hunt*, 2003 WI 81, ¶ 52, 263 Wis. 2d 1, 666 N.W.2d 771.

Moreover, "[e]ven if a circuit court fails to set forth the basis for its ruling, we will nonetheless independently 'review the record to determine whether it provides an appropriate basis for the circuit court's decision.'" *Marinez,* 331 Wis. 2d 568, ¶ 17 (citation omitted). An appellate court must "look for reasons to sustain a trial court's discretionary decision" and "may not substitute its discretion for that of the circuit court." *State v. Gutierrez*, 2020 WI 52, ¶ 27, 391 Wis. 2d 799, 943 N.W.2d 870 (citation omitted).

Finally, even if the circuit court erred, this Court will still affirm if the error was harmless. *State v. Lock*, 2012 WI App 99, ¶ 42, 344 Wis. 2d 166, 823 N.W.2d 378. "Application of the harmless error rule presents a question of law that this court reviews" independently. *State v. Jackson*, 2014 WI 4, ¶ 44, 352 Wis. 2d 249, 841 N.W.2d 791.

[6] Record item 62 is the third amended judgment of conviction that reflects the proper sentence.

ARGUMENT

The circuit court properly exercised its discretion when it admitted the other-acts evidence.

A. Other-acts evidence is admissible if it is offered for a permissible purpose, is relevant, and is not substantially outweighed by the risk of unfair prejudice.

Other-acts evidence is admissible if it meets a three-part test: (1) it is offered for a permissible purpose under Wis. Stat. § 904.04(2)(a); (2) it meets the two relevancy requirements under Wis. Stat. § 904.01; and (3) its risk of unfair prejudice under Wis. Stat. § 904.03 does not substantially outweigh its probative value. *Marinez*, 311 Wis. 2d 568, ¶ 19 (citing *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998)). "The party seeking to admit the other-acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence." *Id.* (citing *State v. Payano*, 2009 WI 86, ¶¶ 63, 68 n.14, 320 Wis. 2d 348, 768 N.W.2d 832). "Once the proponent of the other-acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by . . . unfair prejudice." *Id.*

Section 904.04(2) "favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *State v. Speer*, 176 Wis. 2d 1101, 1115–116, 501 N.W.2d 429 (1993). That is, section 904.04(2) "performs dual functions: (1) it acts as an exclusionary rule that 'precludes the use of a person's character as circumstantial evidence of conduct'; and (2) it acts as an inclusionary rule that allows 'other act evidence [to]

be used to prove something other than the forbidden propensity inference.'" *Payano*, 320 Wis. 2d 348, ¶ 63 (alteration in original) (citing Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence*, § 404.6, at 171–72 (3d ed. 2008)). And the "case law in no way indicates that a circuit court should predispose itself against the admission of other crimes evidence." *Speer*, 176 Wis. 2d at 1115; *see also State v. Grande*, 169 Wis. 2d 422, 434, 485 N.W.2d 282 (Ct. App. 1992) (noting that the rules "favor admissibility").

B. The circuit court properly found that the other-acts evidence was admissible.

1. The evidence was offered for a permissible purpose.

The first step in the *Sullivan* analysis is whether the evidence was offered for a permissible purpose. This step "is not demanding." *Marinez*, 331 Wis. 2d 568, ¶ 25. "Identifying proper purposes for the admission of other-acts evidence is largely meant to develop the framework for the relevancy determination." *Id.* "As long as the State and circuit court have articulated at least *one* permissible purpose for which the other-acts evidence was offered and accepted, the first prong of the *Sullivan* analysis is met." *Id.*

Here, the State offered the other-acts evidence for the purposes of identity, intent, motive, and absence of mistake—all of which are permissible purposes delineated in section 904.04(2)(a). (R. 23:3–4.) The circuit court accepted the evidence for the same purposes. (R. 79:11–12, 18.) Arevalo-Viera rightfully concedes that the first prong of the *Sullivan* analysis has been met here. (Arevalo-Viera's Br. 22.)

2. The other-acts evidence was relevant.

"The second step in the *Sullivan* analysis is to assess whether the evidence is relevant as defined by Wis. Stat. § 904.01." *Payano*, 320 Wis. 2d 348, ¶ 67. "This second prong

is significantly more demanding than the first prong but still does not present a high hurdle for the proponent of the other-acts evidence." *Marinez*, 331 Wis. 2d 568, ¶ 33. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* (quoting Wis. Stat. § 904.01).

The relevancy inquiry asks: (1) "whether the other acts evidence relates to a fact or proposition that is of consequence to the determination" and (2) "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." *Payano*, 320 Wis. 2d 348, ¶ 68 (citing *Sullivan*, 216 Wis. 2d at 772). "Even dissimilar events or events that do not occur near in time may still be relevant to one another." *Marinez*, 331 Wis. 2d 568, ¶ 33.

Here, the circuit court correctly found that the other-acts evidence was relevant to the State's offered purposes: identity, motive, intent, and absence of mistake. Despite Arevalo-Viera's contention, (*see* Arevalo-Viera's Br. 22), the circuit court provided a reasonable basis for admitting the other-acts evidence under the various "avenues" of admissibility.

Underlying the circuit court's decision was the similarity between the Kenosha incident and the present case; the similarities in the allegations demonstrated Arevalo-Viera's method of operation. (R. 79:18.) Other-acts evidence that demonstrates a defendant's method of operation can be utilized to show many of the delineated exceptions to section 904.04(2)(a). *See State v. Harris*, 123 Wis. 2d 231, 235, 365 N.W.2d 922 (Ct. App. 1985) (holding that evidence showing method of operation is admissible if it fits an exception in section 904.04(2) and is relevant to that exception); *see also State v. Rutchik*, 116 Wis. 2d 61, 68, 341

N.W.2d 639 (1984) (holding the other-acts evidence of method of operation was admissible to show preparation, plan, identity and intent).

Arevalo-Viera argues that the circuit court erroneously exercised its discretion because it did not repeat its analysis for every offered purpose. (Arevalo-Viera's Br. 22–23.) However, such repetition was unnecessary. It is clear from the circuit court's discussion that the Kenosha incident showed Arevalo-Viera's method of operation—following a vehicle with a female passenger and attempting to gain entry through force or threat of force—and was therefore relevant to all of the State's offered purposes. All *Sullivan* requires is that circuit courts "relate the specific facts of this case to the [three-step] analytical framework." *Sullivan*, 216 Wis. 2d at 774. The circuit court comported with that requirement by analyzing the probative value of the method of operation in the first instance. Nothing required the court to repeat its same analysis ad nauseum. *See State v. Lindh*, 161 Wis. 2d 324, 361 n.14, 468 N.W.2d 168 (1991) (rejecting the argument that the lack of "magic words" shows that a circuit court erroneously exercised its discretion). As the circuit court stated, "the intent and the method of his operation here, I think [it] all comports with the *very same analysis* that I talked about." (R. 79:18 (emphasis added).)

And, even if the circuit court's explanation was not enough, independent review of the record confirms the circuit court's discretionary decision.[7] *Hunt*, 263 Wis. 2d 1, ¶ 52.

In each case, Arevalo-Viera and his counterpart travelled together in a pickup truck. They followed a car, which, in each instance, was occupied by a woman, at a close

[7] Importantly, nothing in *Sullivan* or its progeny limits this Court's review to "only the facts that were known to the circuit court when it ruled on the motion to admit the other acts evidence" as Arevalo-Viera contends. (Arevalo-Viera's Br. 28.)

distance, ultimately pulling alongside the women. Arevalo-Viera exited the pickup, and he approached a woman driving the targeted car. He attempted to (or in this case successfully) make contact with the driver of the car. In each incident Arevalo-Viera or his counterpart threatened the women with a weapon. Arevalo-Viera's counterpart had his face covered in each incident. Finally, the two incidents occurred mere hours apart. As the State noted in its other-acts motion, "the only difference between the two offenses is [K.T.] was able to get away from [Arevalo-Viera] and MD wasn't." (R. 23:4.) The incidents are similar enough and closely related in time such that they are the imprint of Arevalo-Viera. *See Gray*, 225 Wis. 2d at 51.

That distinct method of operation supports each of the individual avenues under which the circuit court admitted the other-acts evidence.

Identity

First, the State offered the Kenosha incident to show identity—that it was Arevalo-Viera that carjacked, kidnapped, and sexually assaulted MJD, not some other person. (R. 23:3–4.) If other-acts evidence shares "common features and so many points of similarity with the charged crime charged that it 'can reasonably be said that the other acts and the present act constitute the imprint of the defendant,'" the evidence is admissible to show identity. *Gray*, 225 Wis. 2d at 51 (citation omitted). Said differently, a defendant's method of operation "is one of the factors 'that tends to establish the identity.'" *State v. Hammer*, 2000 WI 92, ¶ 24, 236 Wis. 2d 686, 613 N.W.2d 629 (citation omitted). Based on the similarities in the two incidents, the method of operation here constituted the imprint of Arevalo-Viera and made it more likely that Arevalo-Viera committed the charged crimes.

On the identity issue, Arevalo-Viera makes much of the fact that he did not dispute identity. (Arevalo-Viera's Br. 23–26.) But Arevalo-Viera's argument is belied by decades of case law.

"The identity of the defendant was among the other elements that the state had to prove." *Hammer*, 236 Wis. 2d 686, ¶ 25. And "in criminal cases the State 'must prove all elements of a crime, even elements the defendant does not dispute.'" *Payano*, 320 Wis. 2d 348, ¶ 69 n.15 (collecting cases) (citations omitted). Further, "[i]f the state must prove an element of a crime, then evidence relevant to that element is admissible, even if a defendant does not dispute the element." *Hammer*, 236 Wis. 2d 686, ¶ 25.

Arevalo-Viera's arguments that identity was no longer a fact or proposition of consequence and that the other-acts evidence had diminished probative value hold no water. The supreme court has long rejected any argument that the probative value of other-acts evidence is diminished merely because a defendant does not dispute an element of the crime. *See State v. Plymesser*, 172 Wis. 2d 583, 594–95, 493 N.W.2d 367 (1992) (rejecting this argument); *see also Hammer*, 236 Wis. 2d 686, ¶ 25 (reiterating *Plymesser*'s rejection of such an argument).

Intent and motive

The circuit court also concluded that the other-acts evidence, because of the unique method of operation, was admissible to prove intent, motive, and absence of mistake. Contrary to Arevalo-Viera's contention, (Arevalo-Viera's Br. 29–30), intent and motive were still proper considerations for the admissibility of the other-acts evidence.

Three of Arevalo-Viera's five sexual assault charges were for sexual contact. Sexual contact is defined as any "types of *intentional* touching, whether direct or through clothing, if that *intentional* touching is either for the *purpose*

of sexually degrading; or for the *purpose* of sexually humiliating the complainant or sexually arousing or gratifying the defendant . . . ." Wis. Stat. § 940.225(5)(b)1. Accordingly, Arevalo-Viera intentionally touching MJD and his purpose or motive for doing so were elements of the crimes charged. *See State v. Davidson*, 2000 WI 91, ¶¶ 58–59, 236 Wis. 2d 337, 613 N.W.2d 606 (utilizing the definition of sexual contact to confirm that motive is an element of second-degree sexual assault of a child); *see also Hunt*, 263 Wis. 2d 1, ¶ 60 ("There is no doubt that sexual assault, involving either sexual contact or sexual intercourse, requires an intentional or volitional act by the perpetrator."). Additionally, Arevalo-Viera was charged with kidnapping and armed robbery, each of which have intent elements that the State must prove. *See* Wis. Stat. §§ 940.31(1)(a) and 943.32(1), (2).

Evidence of a similar, albeit unsuccessful, interaction with two other women mere hours apart makes it more likely that Arevalo-Viera intended, not to try and get a drink with the women, but to gain access to their car and have sexual contact with them. Additionally, the other-acts evidence of Arevalo-Viera accosting other random women, threatening them with a weapon, and hindering their escape from him made it more likely that he intended to steal from MJD and kidnap her.[8]

Credibility and absence of mistake

Relatedly, the other-acts evidence also undercut Arevalo-Viera's credibility and undercut his testimony that he merely asked MJD if she wanted to get a drink, she said yes,

[8] Contrary to Arevalo-Viera's argument, (Arevalo-Viera's Br. 29–30), there is no evidence in the record that the State introduced the other-acts evidence as relevant only to the sexual assaults. And, as noted above, "an appellate court may consider acceptable purposes for the admission of evidence other than those contemplated by the circuit court." *State v. Hunt*, 2003 WI 81, ¶ 52, 263 Wis. 2d 1, 666 N.W.2d 771.

and then got cold feet after her boyfriend called. Said differently, the other-acts evidence was also relevant to absence of mistake because it "tend[ed] to undermine [Arevalo-Viera's] innocent explanation for his . . . behavior." *Gray*, 225 Wis. 2d at 56.

Additionally, based on the similarities between the other-acts evidence and the charged offense, the other-acts evidence had high probative value. "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." *State v. Hurley*, 2015 WI 35, ¶ 79, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted). "Similarity is demonstrated by showing the 'nearness of time, place, and circumstance' between the other-act and the charged crime." *Id.* And, "[t]he greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." *Id.* As discussed above, the events were remarkably similar—same culprits on the same night in the same truck following random women, preventing their escape, and taking weapons out of the truck. Again, the only difference is that K.T. got away and MJD did not. It was "reasonable for the circuit court to conclude that the similarity provided context for [Arevalo-Viera's method of operation]." *Id.* ¶ 84.

In sum, the other-acts evidence was relevant to several permissible purposes and the similarities between the evidence and the charged offense made the evidence highly probative. The evidence therefore passes *Sullivan*'s second prong.

3. The risk of unfair prejudice did not substantially outweigh the evidence's probative value.

The final prong of the *Sullivan* analysis is to determine whether the probative value of the other-acts evidence is substantially outweighed by the risk of unfair prejudice.

Sullivan, 216 Wis. 2d at 772–73. However, "nearly all evidence operates to the prejudice of the party against whom it is offered." *Payano*, 320 Wis. 2d. 348, ¶ 88 (citation omitted). Accordingly, "[t]he test is whether the resulting prejudice of relevant evidence is *fair or unfair*." *Id.* (emphasis in original). Said differently, "[p]rejudice is not based on simple harm to the opposing party's case, but rather 'whether the evidence tends to influence the outcome of the case by improper means.'" *Hurley*, 361 Wis. 2d 529, ¶ 87 (citation omitted).

Throughout his brief, Arevalo-Viera admonishes the circuit court all while getting the test for prejudice backwards. Arevalo-Viera contends that the circuit court failed to assess how "the probative value of the evidence . . . outweighed the danger of unfair prejudice." (Arevalo-Viera's Br. 26.) That is not the law. "The term 'substantially' indicates that *if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted*." *Payano*, 320 Wis. 2d 348, ¶ 80 (emphasis in original) (citation omitted). The circuit court properly cited and applied *Payano*'s standard.

When viewed under the appropriate framework, it becomes clear that the probative value of the evidence was not outweighed at all, let alone *substantially*, by the risk of unfair prejudice. Accordingly, by noting that there was prejudice but it wasn't unfair and the evidence would not shock the conscience of the jury, the circuit court properly exercised its discretion.

For the reasons discussed above, the other-acts evidence was highly probative. *See Payano*, 320 Wis. 2d 348, ¶ 81 ("Evidence that is highly relevant has great probative value, whereas evidence that is only slightly relevant has low probative value."). The other-acts evidence revealed a nearly identical method of operation and tended to prove Arevalo-Viera was the person who committed the charged crimes, intended to have sexual contact with MJD for the purpose of

sexual gratification, and intended to steal her properly and kidnap her. Importantly, it also disproved Arevalo-Viera's innocent explanation of the incident.

Based on that probative value, the circuit court properly assessed whether the other-acts evidence's probative value was *substantially* outweighed by unfair prejudice. The court reasonably answered that question in the negative.

The court acknowledged the prejudicial effect of the evidence, but it reasonably concluded that "there's nothing unusual about the other acts evidence." (R. 79:15.) "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." (R. 79:15–16.) Based on the evidence before it, the similarities between the other-acts evidence and the charged crimes, and the nearness in time, that was a decision that any reasonable judge could make. *State v. Kleser*, 2010 WI 88, ¶ 37, 328 Wis. 2d 42, 786 N.W.2d 144 (appellate court will uphold a circuit court's exercise of discretion "if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach").

Arevalo-Viera does not attempt to explain how the prejudicial effect of the other-acts evidence was unfair or *substantially* outweighed its probative value. Rather, he flips the test on its head, attempts to admonish the circuit court for not properly assessing prejudice, and latches onto his argument that the evidence had diminished or negligible probative value because he was not contesting identity. None of these arguments have merit.

First, as noted above, the circuit court was not required to assess whether the evidence's probative value outweighed any risk of unfair prejudice—the law is the opposite and supports the manner in which the circuit court assessed

prejudice here. *See Payano*, 320 Wis. 2d 348, ¶¶ 80–81. To that end, the circuit court acknowledged the potential prejudicial effect but did not find that the prejudicial effect outweighed the probative value—especially in light of the similarity in the conduct. (R. 79:15–17.) It is unclear from Arevalo-Viera's argument how much more analysis he expected the circuit court to undertake. Moreover, as already explained, the argument regarding his concession is without merit. A party's concession to an element does nothing to the State's burden or the evidence's probative value. *Plymesser*, 172 Wis. 2d at 594–95 (rejecting this argument); *see also Hammer*, 236 Wis. 2d 686, ¶ 25 (reiterating *Plymesser*'s rejection of such an argument)

Next, Arevalo-Viera ignores that the circuit court provided three limiting instructions on the other-acts evidence. "To limit the possibility that the jury will convict based on 'improper means' circuit courts may provide limiting instructions, give cautionary instructions, edit the evidence, or restrict a party's argument." *Hurley*, 361 Wis. 2d 529, ¶ 89. And "[a] reviewing court 'presume[s] that juries comply with properly given limiting and cautionary instructions." *Id.* ¶ 90 (second alteration in original) (citation omitted). Limiting instructions are therefore "effective means to reduce the risk of unfair prejudice." *Id.*

The circuit court's first two cautionary instructions came before the individual witnesses testified about the other-acts evidence and instructed the jury that it could consider the evidence for only motive and intent. (R. 72:92–94, 114.) The final instruction came at the end of the case and instructed the jury that it could consider the other-acts evidence for only Arevalo-Viera's method of operation. (R. 85:88–89.) In giving the jury instructions, the circuit court made clear that the jury could not use the evidence to conclude that Arevalo-Viera had any certain character traits and acted in conformity with those traits. (R. 72:93; 85:89.)

Because this Court presumes juries follow instructions, it is presumed that the jury here used the evidence for only permissible purposes. *Weborg v. Jenny*, 2012 WI 67, ¶ 69, 341 Wis. 2d 668, 816 N.W.2d 191. Arevalo-Viera has not overcome that presumption, and any potential prejudicial effect was therefore properly mitigated.

Because the other-acts evidence was highly probative, would not shock the conscience of the jury, and the jury was instructed three times to use it for only permissible purposes, the evidence passes *Sullivan*'s third prong.

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At bottom, these evidentiary decisions were "quintessential judgement call[s] of the type we rely on circuit courts to make every day." *State v. Johnson*, 2021 WI 61, ¶ 36, 397 Wis. 2d 633, 961 N.W.2d 18. Arevalo-Viera simply disagrees with how the circuit court weighed the evidence under the *Sullivan* test. But disagreement with how much weight the court gave to the evidence's probative value or how it assessed the relative danger of unfair prejudice is not a basis for reversal. *Gutierrez*, 391 Wis. 2d 799, ¶ 27; *Johnson,* 397 Wis. 2d 633, ¶ 36.

Because the record reveals that the circuit court properly exercised its discretion, this Court should affirm.

C. Even if the circuit court erred in admitting the other-acts evidence, any error was harmless.

If this Court concludes that the circuit court erroneously exercised its discretion, it should also conclude that any error was harmless. "The erroneous exclusion [or admission] of testimony is subject to the harmless error rule." *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434. An "error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant

guilty absent the error.'" *Id.* (citation omitted). It is the burden of the party benefiting from the error to prove beyond a reasonable doubt that the "error complained of did not contribute to the verdict obtained." *Id.* (citation omitted). "In determining whether an error is harmless, [this Court] weigh[s] the effect of the trial court's error against the totality of the credible evidence supporting the verdict." *State v. Beamon*, 2011 WI App 131, ¶ 7, 336 Wis. 2d 438, 804 N.W.2d 706.

Reviewing courts utilize "several non-exclusive factors to aid [in the] application of the harmless error rule in the evidentiary context." *State v. Monahan*, 2018 WI 80, ¶ 35, 383 Wis. 2d 100, 913 N.W.2d 894. Those factors include, for example "the frequency of the error; . . . the importance of the erroneously included or excluded evidence to the prosecution's or defense's case; . . . [and] the presence or absence of evidence corroborating or contradicting the erroneously included or excluded evidence." *Id.* Courts also consider "whether erroneously excluded evidence merely duplicates untainted evidence; . . . the nature of the defense; . . . the nature of the State's case; and . . . the overall strength of the State's case." *Id.*

Here, the State had overwhelming evidence of Arevalo-Viera's guilt, including detailed testimony from MJD about the kidnapping and assault, consistent testimony from several other witnesses to whom she described the incident, DNA evidence, video evidence, photographic evidence, and cell phone tracking evidence. In short, there is no possibility a rational jury could have found him not guilty without the other-acts evidence.

MJD provided vivid, detailed, and thorough testimony about the incident. She described to the jury that she left work around 1:10 a.m. on June 16. (R. 69:90.) She went to her boyfriend's house to pick up some belongings and their dog, Mac. (R. 69:90–91.) She detailed that while she was on the

way to the police administration building, she got off on the wrong exit. (R. 75:6–7.) She noticed a truck follow her off of the freeway, turn the opposite direction, but then end up next to her at a red light. (R. 75:8–10.) The jury learned that MJD saw a man, later identified as Arevalo-Viera, approach and then began hitting the window with a hammer. (R. 75:10–11.) She immediately attempted to roll the windows up, but Arevalo-Viera climbed into her car through the window. (R. 75:11.) She began screaming for Arevalo-Viera to get out of her car. (R. 75:12.) Arevalo-Viera sat down and directed her to drive toward the Chicago exit; he also pushed her leg to put pressure on the accelerator. (R. 75:13–14.) She noticed the gray truck began to follow her as she was driving. (R. 75:14.)

The jury learned that while MJD was driving south toward Chicago, she offered Arevalo-Viera her purse, her car, and whatever else she had, hoping he would accept and leave her alone. (R. 75:16–17.) MJD testified that irritated Arevalo-Viera and he told her to shut up and took her cell phone. (R. 75:17.) Arevalo-Viera, after rummaging through MJD's car, pulled out a boxcutter, and asked MJD if she wanted to live. (R. 75:18–19.) When she said yes, he said "[g]ood" and began caressing her face. (R. 75:19.) MJD testified that while Arevalo-Viera was still holding the boxcutter to her neck, he began rubbing her thighs and grabbing her breasts. (R. 75:19–20.)

She testified that Arevalo-Viera gestured to the truck and instructed her to pull over. (R. 75:24–25.) When they pulled over near the College Avenue exit, Arevalo-Viera pulled her across the passenger's seat and was holding her in place by her wrists, while he and his counterpart talked. (R. 75:27–29.) Arevalo-Viera rubbed MJD's thighs and breasts again when she began driving again and told her to do what he said if she wanted to live. (R. 75:31.)

They eventually pulled over again near the Seven Mile Road exit in a dark area of the freeway. (R. 75:32–34.)

Arevalo-Viera pulled MJD out of the passenger's side of the car, MJD grabbed Mac from the backseat, and Arevalo-Viera pulled them both toward the truck, which was parked behind MJD's car. (R. 75:34–35.) Arevalo-Viera told MJD to get in the car, but she refused, so he pushed her into the truck. (R. 75:35–36.) She testified that they began driving south again. (R. 75:37.)

Eventually, Arevalo-Viera told MJD to lay down; he straddled her and began touching her breasts again. (R. 75:38–40.) He also began rubbing her vagina over her clothes. (R. 75:39–40.) MJD tried kicking Arevalo-Viera off of her and told him to stop. (R. 75:40.) She testified that this irritated Arevalo-Viera, and he began hitting her. (R. 75:40–41.) She testified to three strikes—the first felt more like an open hand slap, the second missed, and the third felt like a closed fist punch. (R. 75:41.)

Arevalo-Viera eventually got off of MJD, but he then told her again that if she wanted to live to do what he said. (R. 75:41, 43.) He then directed her to take off her clothes. (R. 75:43.) When she refused, he threatened to kill Mac and began counting down. (R. 75:53–54.) MJD took her clothes off but said "don't touch me" and sat in a ball trying to cover herself. (R. 75:43, 46.) Instead, Arevalo-Viera began touching her inner thighs and breasts again—he also told her to lay down. (R. 75:46.) MJD laid on her side at first, but Arevalo-Viera rolled her onto her back and then rubbed her vagina and grabbed her breasts. (R. 75:47.) MJD closed her legs and crossed them, but Arevalo-Viera pried her legs open. (R. 75:47.)

MJD testified that when Arevalo-Viera pried her legs open he touched her vagina again and she thought it sounded like he began taking his clothes off. (R. 75:47–48.) She testified that Arevalo-Viera also reached toward the glove compartment, and MJD hoped that he was reaching for a box of condoms. (R. 75:48–49.)

MJD testified that Arevalo-Viera then put his fingers in her vagina and then eventually put his penis in her vagina. (R. 75:49–50.) She testified that she was screaming "[n]o" and yelling "as loud as I could" telling him to stop. (R. 75:49–51.)

She testified that Arevalo-Viera eventually stopped assaulting her, told her to get dressed, and told her to lay back down. (R. 75:52, 55.) MJD testified that the driver continued on the freeway for approximately five more minutes until the truck stopped. (R. 75:56.) Arevalo-Viera then opened the door and told MJD to get out. (R. 75:58.) Before leaving the area, Arevalo-Viera told MJD, "Don't call the cops. Don't call the police because I have your ID and your phone." (R. 75:59.)

MJD testified that she was "scared they were going to turn around," so her and Mac hid in a ditch "until [she] couldn't see the truck." (R. 75:61.) MJD testified that she began "running down the street to any intersection [she] could find." (R. 75:61.) She saw two houses and knocked on each house's door attempting to get help, but no one responded. (R. 75:62.) MJD testified that across the street she saw a guard tower and ran toward it. (R. 75:62.) She "continued to run . . . into the light [of the parking lot] hoping someone would like see [her]." (R. 75:62.) She testified that she eventually encountered a truck driver who let her use his cell phone after she told him what happened. (R. 75:63.) She first called her boyfriend who told her to call 911. (R. 75:63–65.)

MJD's testimony was bolstered by consistent testimony from her boyfriend who testified that MJD was supposed to come see him at the police administration building when she got off of work. (R. 82:11.) He testified that he asked MJD to pick up items from his house, and he testified that MJD was bringing Mac along as well. (R. 82:11–12.) He testified that MJD last texted him just before two in the morning, and that when she did not arrive at his office, he began texting and calling her. (R. 82:14–15.) He testified he did not hear from MJD again until she called him after Arevalo-Viera let her go.

(R. 82:15.) He testified that when MJD called him she sounded "upset" and that she was "speaking quickly [and] had an elevated pitch." (R. 82:15–16.) He testified that MJD told him she had just been carjacked and raped. (R. 82:16.) Finally, he testified that when he saw MJD at the hospital he saw "scratches on her neck, her face was puffy and swollen with some discoloration." (R. 82:19.)

The jury also heard testimony from the truck driver who let MJD use his phone. (R. 82:48–56.) He testified that MJD "waived [him] down," and she told him that "she was kidnapped, and sexually assaulted and dropped off down the street." (R. 82:49.) He testified that she seemed "confused and shocked." (R. 82:50.) He also testified that it "[l]ooked like she had two black eyes and something on her nose and a busted up . . . lip." (R. 82:50.) After hearing from the truck driver, the jury heard from the Uline security guard who encountered MJD that night. He testified that MJD "was crying pretty hard." (R. 82:58.) He testified that MJD told him she was "car-jacked and beat up" and that MJD "was crying harder than [he] ever seen a woman cry before." (R. 82:59.)

The jury learned from Detective Andrea Brey that, when she responded to Uline, she saw MJD crying. (R. 82:63.) She also testified that she observed that MJD's "makeup was smeared, her mascara was running. She had puffy eyes, she had a swollen eye." (R. 82:63.) Detective Brey testified that MJD's eye "was even starting to turn purple from a bruise." (R. 82:63.) She testified that MJD told her that "she was up in Milwaukee [and] that someone forced their way into her vehicle. [A]t some point she was forced out of her car and into another vehicle and sexually assaulted before being dropped off in our vicinity at Uline." (R. 82:65.) Detective Brey testified that after she learned that MJD was sexually assaulted she "immediately transported her to the local hospital" to get a SANE exam. (R. 82:66.) Detective Brey testified to the more

detailed report that MJD gave her at the hospital—that report also matched MJD's testimony. (R. 82:69–75.)

The jury learned from the SANE nurse (Nurse Rodriguez) that MJD described the assailant as a "Hispanic male with a chin strap beard, bushy eyebrows, tattoo on right arm, half mask, skinny, and short." (R. 72:66.) MJD described that Arevalo-Viera's "mere presence was controlling." (R. 72:67.) She told the nurse that "he intimidated her verbally, threatened her by saying he would kill her. That he was grabbing her by her head, arm, and shirt. Used his body to hold her down. That there was a presence of a weapon . . . and he said that he had a gun." (R. 72:67.) MJD also told Nurse Rodriguez that Arevalo-Viera "hit her with a closed fist and an open hand to her face." (R. 72:67.)

Nurse Rodriguez also read her report to the jury, which included MJD's recounting of the assault—MJD's report to Nurse Rodriguez was consistent with her testimony and her report to the police. (R. 72:79–80.) Nurse Rodriguez testified that she observed and documented MJD's injuries; those injuries were also consistent with MJD's testimony. (R. 72:75–78, 80–81.) Nurse Rodriguez observed the cuts on the back of her neck from the boxcutter, the swelling and bruising around her eyes, the swelling and redness on her cheek, "[r]ed marks to the upper portion of her chest and both of her breasts above the nipples . . . . [b]ruising and redness to the inner part of her right arm . . . bruising to the medial aspect of the thighs, the inner part of the legs," and redness to the labia minora "consistent with a finger being put in the vagina [and] consistent with a penis being forced into a vagina." (R. 72:71, 74, 81.) Nurse Rodriguez testified that the bruising to MJD's inner thighs was "consistent with someone forcibly grabbing her thighs," and she called the marks "a prying injury, a prying apart of the legs injury." (R. 72:81.) Nurse Rodriguez testified that pry marks are inconsistent

with consent because "someone having to use pressure to open your legs does not seem like consent." (R. 72:91.)

Importantly, the jury also learned that Arevalo-Viera's DNA was found on MJD's samples submitted to the state crime lab. Arevalo-Viera's DNA was found on the neckline of MJD's sweatshirt. (R. 71:83–84.) Additionally, a Y-STR profile consistent with Arevalo-Viera's was found on the crotch of MJD's underwear, and in MJD's cervical, vaginal, external genital, and mons pubis samples. (R. 71:87–91.) That DNA testimony supported the State's argument and undercut Arevalo-Viera's testimony denying any sexual contact or assault.

The jury also saw photos of MJD's injuries, (R. 72:75–78),[9] saw surveillance footage showing the cars at the locations that MJD described, (R. 71:128–38), heard MJD's 911 call, (R. 75:66), heard testimony that the tracking information from MJD's and Arevalo-Viera's cell phones matched the carjacking/kidnapping/sexual assault, (R. 71:10), and learned that MJD's credit card, which was with her other belongings in Arevalo-Viera's car, was used in Illinois and Kentucky, (R. 75:89–90).

All of this evidence, considered together, completely undermined Arevalo-Viera's implausible story of a consensual roadside encounter whereby MJD invited him into her car while idling at a stoplight and then began hitting him for no apparent reason later in the interaction. The DNA evidence and evidence of MJD's physical injuries conclusively showed that Arevalo-Viera's denials of a forced sexual encounter were incredible.

In sum, the State had overwhelming evidence against Arevalo-Viera, and the jury would not have had a reasonable

[9] In addition to the exhibits that were published to the jury, it requested and received all pictures during deliberation. (R. 83:5.)

doubt as to Arevalo-Viera's guilt without the other-acts evidence. Therefore, any erroneous admission of the other-acts evidence was harmless; this Court should affirm.

CONCLUSION

For the foregoing reasons this Court should affirm Arevalo-Viera's judgment of conviction.

Dated this 15th day of April 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney General
State Bar #1113772

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2065
(608) 294-2907 (Fax)
odaykm@doj.state.wi.us

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 8878 words.

Dated this 15th day of April 2022.

Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney General

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 Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of April 2022.

Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney General