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 REPLY BRIEF

ZALESKI LAW FIRM
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Steven.W.Zaleski@gmail.com
Attorney for Defendant-Appellant

The probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice.

The State's brief explores why, in the State's perspective, the other acts evidence was relevant. See State's brief at pages 16-22. The State's brief also explores why, in the State's perspective, the probative value of the other acts evidence was not substantially outweighed by danger of unfair prejudice. See State's brief at pages 22-26. Arevalo-Viera wishes to respond to certain arguments made by the State.

First, Arevalo-Viera maintains that the other acts evidence carried a real and significant danger of unfair prejudice.

The *Sullivan* court stated the following about unfair prejudice:

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. *Internal citations omitted.* In this case the danger of unfair prejudice was that the jurors would be so influenced by the other acts evidence that they would be likely to convict the defendant because the other acts evidence showed him to be a bad man. See *State v. Sullivan*, 216 Wis.2d at 790.

In other words, "the danger exists that the jury will convict the accused on improper considerations such as the defendant's propensity to commit a crime." *State v. Speer*, 176 Wis.2d 1101, 1118, 501 N.W.2d 429 (1993). The evidence at issue here plainly created such a real and significant risk. In contrast, the probative value of the other acts evidence, for the following reasons, was speculative and minimal.

As discussed in Arevalo-Viera's brief in chief at pages 19-20, Arevalo-Viera's concession as to identity greatly diminished the probative value of the other acts evidence for such purpose. The State however argues that "[t]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's brief at page 20 citing *State v. Plymesser*, 172 Wis.2d 583, 594-595, 493 N.W.2d 367 (1992) *and State v. Hammer*, 2000 WI 92, ¶25, 236 Wis.2d 686, 613 N.W.2d 629.

The State's argument overstates *Plymesser* and *Hammer*. Arevalo-Viera agrees that such cases provide that even if a defendant does not dispute the element for which the evidence is offered as proof, the evidence is still relevant given that the state has the burden of proving such element. Arevalo-Viera has acknowledged as much in his brief-in chief. See Arevalo-Viera's brief at page 20.

However, as also noted in Arevalo-Viera's brief-in-chief at page 20, 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. As such, the evidence is still subject to a proper analysis under §904.03 or *Sullivan*.

Given the concession as to identity, the weight to be afforded the other acts evidence for such purpose must be regarded minimal. After all, '[t]he 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 dispute, and the other acts evidence was not needed at all. As a result, the other acts evidence had minimal, if any, probative value as to identity.

The State next argues that the other acts evidence was relevant for purposes of intent and motive. See State's brief at pages 20-21. The State in particular argues that "Arevalo-Viera intentionally touching MJD and his purpose or motive for doing so were elements of the crimes charged," and therefore admissible under *State v. Davidson*, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606, and *State v. Hunt*, 2003 WI 81, 263 Wis.2d 1, 666 N.W.2d 771. See State's brief at pages 20-21.

To the extent that three of the five sexual assault charges against Arevalo-Viera were for sexual contact, as opposed to intercourse, Arevalo-Viera concedes that the State is correct in its assessment that intent was an element of such offenses. Under *State v. Cofield*, 2000 WI App 196, ¶11, 238 Wis.2d 467, 618 N.W.2d 214, intent is not an element where the sexual assault charge is based on sexual intercourse rather than sexual contact.

Arevalo-Viera also recognizes that intent was an element for the kidnapping and armed robbery charges. Arguably, the other acts evidence had some relevance then to the issue of intent.

However, again, under the third part of the *Sullivan* analysis, the ultimate question is how much weight such evidence should be afforded when balanced against the danger of unfair prejudice. Specifically, is the probative value of the evidence substantially outweighed by the danger of unfair prejudice? In this case, the probative value of the other acts evidence has to be regarded as minimal given the significant differences between the other acts and the crimes charged. Specifically, the other acts evidence did not involve any allegation of sexual assault, kidnapping or robbery. They additionally did not even involve an allegation of violence, or physically assaultive behavior directed towards the other acts party.

The State next argues that the other acts evidence was relevant for purposes of credibility and absence of mistake. See State's brief at pages 21-22. However, the record fails to reflect that Arevalo-Viera made any assertion that he committed the acts for which he was on trial, 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, to the extent that the other acts evidence had some probative value for the

purposes of credibility or absence of mistake, that value was speculative and minimal.

For whatever purpose the other acts evidence stood to serve, the danger of unfair prejudice created by its admission was real and significant. In contrast, the probative value of the evidence, for reasons discussed above, was speculative and minimal. Given the disparity in these considerations, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Lack of prejudice due to cautionary instructions, harmless error.

The State argues that due to the cautionary instructions given by the circuit court, any potential prejudicial effect was mitigated. See State's brief at page 26. The State additionally argues that any error in admitting the other acts evidence was harmless. See State's brief at page 26.

Arevalo-Viera recognizes that the circuit court provided the jury with the cautionary instructions as noted by the State. Nonetheless, such instructions were overbroad, and not particularly tailored to the facts of the case. As such, their cautionary effect was significantly limited. See *Sullivan*, 216 Wis.2d at 40.

As to harmless error, Arevalo-Viera would show that as a general rule, receipt of evidence of the defendant's bad character or commission of specific

disconnected acts is prejudicial error. See *Hart v. State*, 75 Wis.2d 371, 394-395, 249 N.W.2d 810 (1977). The underlying rationale for such rule is explained in *Paulson v. State*, 118 Wis. 89, 94 N.W. 771 (1903). In such case, the Wisconsin Supreme Court explained the hazards in a jury's learning of other alleged bad acts by a defendant:

> *[Other cases] are cited more especially to show how uniformly courts have held that one cannot be deemed to have had fairly tried before a jury the question of his guilt of the offense charged when their minds have been prejudiced by proof of bad character of accused or former misconduct, and thus diverted and perverted from a deliberate and impartial consideration of the question of whether the real evidentiary facts hasten guilt upon him beyond a reasonable doubt. In a doubtful case, even the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent it having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect. Id. at 99.*

Given the recognized danger and hazardous effects caused by the admission of other acts evidence, this court cannot conclude that the admission of such evidence in this case did not at least "contribute" to the verdicts obtained.

CONCLUSION

For all reasons stated in this brief and in the Defendant-Appellant's brief-in-chief, this court should vacate the judgments of conviction and remand the case for a new trial.

Dated this 2nd day of May 2022.

Electronically signed by:
Steven W. Zaleski
Zaleski Law Firm
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone), Steven.W.Zaleski@gmail.com

Attorney for Defendant-Appellant

CERTIFICATION 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 1622.

Dated this 2nd day of May 2022.

Electronically signed by:

Steven W. Zaleski
Zaleski Law Firm
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Steven.W.Zaleski@gmail.com
Attorney for Defendant- Appellant