STATE OF WISCONSIN

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

DISTRICT I

Case No. 2021AP2207-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALVIN JAMES JEMISON, JR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

A jury convicted Alvin James Jemison, Jr., of second-degree sexual assault of an unconscious person, Teresa[1]. Before trial, the State moved to admit other-act evidence of five prior sexual-assault incidents. The victims in the other-acts incidents were, just like Teresa, (1) family friends of Jemison's, (2) sleeping in their own bed, and (3) unconscious at the time of Jemison's sexual assaults. Two of these sexual assaults resulted in guilty pleas and convictions. Jemison's trial attorney did not object to the admission of these two sexual assaults, and they were the only two that the State ultimately admitted at trial.

Because Jemison's trial attorney did not object, postconviction Jemison argued that the trial court committed plain error when it allowed the State to introduce the other acts. Jemison also argued that trial counsel was ineffective for not objecting, and Jemison requested an evidentiary hearing. The court denied Jemison's motion without a hearing, and it denied Jemison's claims of plain error. Specifically, the court determined that: (1) the other-acts evidence was admissible under the *Sullivan*[2] test; (2) the admission of Jemison's convictions, which were presented in conjunction with the complaints, was proper, and (3) the State did not violate Jemison's right to confrontation when it read from the prior complaints. Finally, the court denied Jemison's claims of ineffective assistance. Jemison appeals the following issues:

1. Did the State present sufficient evidence for the jury to find Jemison guilty of second-degree sexual assault of an unconscious person?

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[1] The State uses a pseudonym. *See* Wis. Stat. § (Rule) 809.86(4).

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

Jemison did not raise this issue in his postconviction motion. This Court should determine, Yes.

2. Did Jemison show that the trial court made a fundamental, obvious, and substantial error when it admitted the other-acts evidence?

The postconviction determined, No. This Court should affirm.

3. Did Jemison show that he is entitled to an evidentiary hearing on his claims of ineffective assistance?

The postconviction court determined, No. This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication as it believes that this case can be resolved by applying well-established legal principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

The Charges

The State charged Jemison with one count of second-degree sexual assault of an unconscious victim. (R. 1.) According to the complaint, on July 26, 2016, Teresa was out celebrating with family and friends. (R. 1:1.) She then returned home and watched television until she fell asleep. (R. 1:1.) She awoke feeling pain, and it felt like "someone had their penis in her anus." (R. 1:1.) Teresa also felt that her underwear had been pulled down. (R. 1:1.) She got out of bed, ran to the bathroom, and she saw that Jemison, who was a "family friend," was in her bed. (R. 1:1.) Teresa told police that she never gave Jemison consent to have sex with her, and she never invited him into her bedroom. (R. 1:1.)

Police talked to Teresa's mother, Alice[3]. (R. 1:1.) Alice informed them that when she arrived home, she noticed that the pole to the blinds in the kitchen were damaged, as if someone had attempted to get in through the window. (R. 1:1.) She also indicated that she knew Jemison because he was involved in a sexual assault of another family member in 2004, but that the family had forgiven Jemison. (R. 1:1.)

By an amended information, the State charged Jemison with second-degree sexual assault, repeater – serious sex crimes. (R. 139:1.) The State also pursued a charge of burglary (home invasion). (R. 42:7–8.)

Motion to Admit Other Acts

Before trial, the State sought to admit five instances of other-acts evidence. (R. 8.) Two of these instances resulted in convictions, and three instances were uncharged allegations. (R. 8:3–5.) Of the two that resulted in convictions, both of the victims were family friends of Jemison, both were sleeping in their bed, and both woke up to Jemison sexually assaulting them. (R. 8:3–5.) The State argued that the evidence demonstrates "proof of motive, intent, absence of mistake or accident, and context."[4] (R. 8:7.) Jemison's counsel did not

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[3] The State again uses a pseudonym.

[4] The State's motion explained:

> In this case, one could argue that [Jemison] was simply entering a familiar residence and engaging in sexual intercourse or contact with an acquaintance. The prior, very similar circumstances show that [Jemison], in a drunken state, did not simply enter a familiar residence and lay down, but entered the familiar residence because he knew a female was present. Further, he entered with intent to have sexual contact with that female.

(R. 8:7–8.) And,

object to admission of the *convictions,* only the allegations. (R. 43:9; 54:2–3; 55:4.) Counsel informed the court that he recognized that the State is granted greater latitude for sexual assault cases. (R. 54:2.) But, counsel argued, the *allegations* are too remote in time and prejudicial. (R. 54:2–3.) The court ruled that the convictions were admissible, and that two of the three allegations were admissible. (R. 54:4–5.) Regardless, at trial, the State only introduced Jemison's two prior *convictions* to the jury; it did not introduce any allegations. (R. 65:119–22.)

The first certified record of conviction introduced was from a 1993 case, in which Jemison pled guilty to second-degree sexual assault of a child. (R. 8:4–5; 65:119.) In that case, the juvenile victim was asleep and woke up to find Jemison, who was a family friend, cupping and massaging her breast. (R. 8:4.) The juvenile victim screamed for her mother, who came into the room. (R. 8:4.) The second certified record of conviction introduced was from a 2003 case, in which the

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> [T]he proposed "other acts" would show absence of mistake or accident. The "other acts" would show that this was not a circumstance when [Jemison], who was drunk, stumbled randomly into a residence and had sexual intercourse with a consenting adult, but rather a circumstance where he intentionally and without permission entered a residence and while in that residence intentionally and without permission had sexual intercourse with one of the residents.
>
> Finally, the prior "other acts" evidence will show context. Specifically, it will help explain the relationship between the parties. This is often important when the issue of consent is present. This is also important to explain why an individual would not be welcome in a residence, much less into the bed of one of the resident's [sic].

(R. 8:8.)

defendant pled guilty to second-degree sexual assault of an unconscious victim. (R. 8:3–4.) In that case, the victim was asleep and woke to find Jemison, who was a family friend, with his hand inside her pajamas, rubbing her vagina. The victim moved around so that he would stop, but when she stopped moving, Jemison began touching her buttocks over the blanket. (R. 8:3.)

The Jury Trial

The first issue on appeal is that "[t]he State did not meet its burden to show Mr. Jemison had 'sexual intercourse' with [Teresa]." (Jemison's Br. 16.) During opening argument, defense counsel informed the jury, "there is no dispute here that the victim and Mr. Jemison had sex." (R. 65:15.)

Teresa was the first witness. She testified that Jemison was a family friend that she had known for almost 20 years. (R. 65:18–19.) On July 26, 2016, Teresa went to her aunt's house, and Jemison also showed up there. (R. 65:25–26.) Teresa had some drinks and watched a show. (R. 65:27.) When she needed to get home again, Jemison drove her. (R. 65:28.) When he dropped Teresa off, they both did a "shot" and then Teresa went inside. (R. 65:30–31, 46.) She never invited Jemison inside her home. (R. 65:31.)

Once inside, Teresa cooked dinner, went to her bedroom to watch television and listen to the radio, and then fell asleep. (R. 65:31–33.) She woke up that night by "[a] forced feeling in my anal." (R. 65:35.) She testified that Jemison was "trying to put his stuff inside of my butt." (R. 65:36.) She testified that Jemison "was almost in there, but not quite in my anal." (R. 65:36.) Teresa saw that it was Jemison, "lunged him" with her elbow, jumped out of bed, and ran to the bathroom. (R. 65:36.)

Jemison ran out of Teresa's room. (R. 65:37.) While in the bathroom, Teresa "felt [a clear] liquid down [her] legs." (R. 65:38.) Teresa ran into her step-father's room and told him

that she thought she had just been raped by Jemison. (R. 65:39.) Her step-father drove her to the hospital where the nurse performed a SANE exam. (R. 65:39.) Teresa also testified that Jemison had some "prior problems" with her older sister, Vivian[5]. (R. 65:41.)

George Hall, Teresa's step-father[6], testified that on the evening of July 26, 2016, he woke up to Teresa "knocking on my door, and it was like a real forceful knock. Like a bang." (R. 65:72.) Teresa was "crouching real tight" and "crying hysterical." (R. 65:72.) Teresa told Hall that Jemison "just tried to rape her." (R. 65:73.)

Allison Lopez, the SANE nurse, testified that she met with Teresa on the morning of July 27, 2016. (R. 65:82.) Lopez read from the report, which provided that Teresa had told Lopez that she woke up "between one and two a.m. realizing that she was being assaulted." (R. 65:87.) Teresa told her, "I woke up and he was trying to push it in there. [Teresa] states that her anus was being penetrated by the assailant's penis." (R. 65:87.) Teresa was "tearful, sobbing, trembling when discussing events that occurred." (R. 65:88.) Lopez also testified that Teresa was "complaining of pain to her anus." (R. 65:88.)

Detective Jonathan Mejias-Rivera testified that the SANE kit was sent to the Wisconsin Crime Laboratory. (R. 65:101.) And, that the police had retrieved a buccal standard from Jemison. (R. 65:101.) Emily Schmitt, a DNA analyst at the Crime Laboratory, testified to a reasonable degree of scientific certainty that Jemison was the source of the semen that was collected from Teresa. (R. 65:116.)

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[5] The State uses a pseudonym.

[6] Teresa refers to Hall as her "step-father" (R. 65:38–39), but it appears that Hall is Teresa's mother's boyfriend (R. 65:75).

Finally, the State introduced Jemison's two certified criminal complaints (the other-acts evidence) and read parts from the complaints to the jury. (R. 65:119–122; *see also* Jemison's Br. 11–13.)

Jemison's defense was that the sex was consensual. (R. 65:15; 66:39.) As already pointed out, Jemison told the jury: "there is no dispute here that the victim and Mr. Jemison had sex." (R. 65:15.)

The court instructed the jury that the evidence that Jemison pled guilty to second-degree sexual assault of a child and to second-degree sexual assault of an unconscious victim should be considered "only on the issue of identity, that is, whether the prior conduct of [Jemison] is so similar to the offense charged that it tends to identify [Jemison] as one who committed the offense charged, opportunity that is whether [Jemison] had the opportunity to commit the offense charged." (R. 66:22.) However, the court instructed the jury, it could not consider the other-acts evidence "to conclude that [Jemison] has certain character or certain character traits that [Jemison] acted in conformity with that trait or character with respect to the offense charged in this case." (R. 66:22.)

The jury deliberated for 11 minutes and then convicted Jemison of both counts.[7] (R. 109:2; 20; 21.) The court sentenced Jemison to life. (R. 33:1.)

Postconviction Proceedings

Jemison moved for postconviction relief, requesting a new trial. (R. 102.) He alleged that the trial court committed plain error when it allowed the State to introduce the other-acts evidence at trial of his two prior sexual assault convictions. (R. 102:7–15.) He also alleged that trial counsel was ineffective for not objecting to the introduction of the

[7] Jemison does not challenge his burglary conviction on appeal.

other-acts, and he requested an evidentiary hearing. (R. 102:15–20.)[8]

After briefing, the court denied Jemison's motion without an evidentiary hearing. (R. 112.) It determined that the other-acts evidence was properly admitted because they "were clearly similar to the current offense in terms of their *modus operandi* as all three offenses involved [Jemison] sexually taking advantage of sleeping victims, and therefore, the other acts were relevant to the issue of identity." (R. 112:2.) The court also determined that Jemison failed to establish that "the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice." (R. 112:2.) Finally, the court determined "that any danger of unfair prejudice was minimized or eliminated by the court's cautionary instruction." (R. 112:2.)

Regarding Jemison's plain-error argument, the court determined that "the primary purpose of the complaints created for separate criminal actions was not as an out-of-court substitute for trial testimony in this case." (R. 112:3.) The court also agreed with the State that Jemison's "right to confrontation as to the complaints was waived by his guilty pleas in those cases." (R. 112:3.) The court found that "evidence of the convictions presented in conjunction with the complaints was proper other acts evidence," and, "as a practical matter, even if presentation of these specific documents was objectionable, [Jemison] admitted to this conduct by his guilty pleas." (R. 112:3.) And, because the State could have provided evidence of Jemison's other acts "by a variety of other means, the admission of these documents was harmless. The manner of the presentation of [Jemison's] prior

[8] Jemison did not raise a sufficiency-of-the-evidence claim in his postconviction motion.

acts of sexual assault did not affect the outcome of the trial." (R. 112:3.)

Finally, with respect to Jemison's claim of ineffective assistance, the court determined that because the other-acts were properly admitted, Jemison "cannot demonstrate that he was prejudiced as the court would have overruled an objection from trial counsel and the State could have presented evidence of the conduct to which the defendant pled guilty to by other means." (R. 112:4.)

Jemison appeals.

ARGUMENT

I. The evidence was sufficient to find Jemison guilty of second-degree sexual assault.

Jemison's counsel argued to the jury that "there is no dispute here that the victim and Mr. Jemison had sex." (R. 65:15.) Jemison now argues that the State failed to prove that Jemison had sexual intercourse with Teresa. (Jemison's Br. 16.) This Court should reject Jemison's argument.

A. Jemison has a heavy burden to overcome the great deference that this Court gives to the jury and its verdict.

"When a defendant challenges a verdict based on sufficiency of the evidence, [appellate courts] give deference to the jury's determination and view the evidence in the light most favorable to the State." *State v. Coughlin*, 2022 WI 43, ¶ 24, 402 Wis. 2d 107, 975 N.W.2d 179. "If more than one inference can be drawn from the evidence, [this Court] must adopt the inference that supports the conviction." *Id.* This Court "will not substitute our own judgment for that of the jury unless the evidence is so lacking in probative value and force that no reasonable jury could have concluded, beyond a reasonable doubt, that the defendant was guilty." *Id.*

"[A] defendant challenging the sufficiency of the evidence bears a heavy burden to show the evidence could not reasonably have supported a finding of guilt." *State v. Beamon*, 2013 WI 47, ¶ 21, 347 Wis. 2d 559, 830 N.W.2d 681. Finally, this Court considers "the totality of the evidence when conducting a sufficiency of the evidence review." *Coughlin*, 402 Wis. 2d 107, ¶ 25.

B. In addition to defense counsel's admission that Jemison had sex with Teresa, the evidence was sufficient to prove that Jemison had "sexual intercourse" with Teresa.

First, Jemison *conceded* at trial that he had sex with Teresa. His argument at trial was that it was *consensual*. (R. 65:15; 66:39.) For obvious reasons then, Jemison did not contest at trial whether the State proved that Jemison had "sexual intercourse" with Teresa. He agreed that he did.

Second, in this case, the court instructed the jury:

> Second degree sexual assault as defined by the Criminal Code of Wisconsin is committed by one who has sexual contact or intercourse with a person who the defendant knows is unconscious. Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present:
>
> One, the defendant had sexual intercourse with [Teresa]. Two, that [Teresa] was unconscious at the time of the sexual assault. That the defendant knew that [Teresa] was unconscious at the time of the sexual intercourse.
>
> "Sexual intercourse" means any intrusion *however slight* by any part of the person's body or of any object, into the genital or anal opening of another.

(R. 66:18–19 (emphasis added).)

On appeal, Jemison only challenges the first element: Did the State prove beyond a reasonable doubt that Jemison had "sexual intercourse" with Teresa? (Jemison's Br. 16.) Jemison argues that Teresa's testimony "was insufficient to prove 'sexual intercourse,' as 'sexual intercourse' required Mr. Jemison's penis *to actually enter* [Teresa's] 'anal opening.'" (Jemison's Br. 18 (emphasis added).) Jemison argues that Teresa "testified that Mr. Jemison's penis was not actually in her 'anal opening'—it almost was." (Jemison's Br. 17–18.)

To recap, Teresa testified that she woke up to "[a] forced feeling *in* my anal." (R. 65:35 (emphasis added).) Jemison was "trying to put his stuff *inside* of my butt." (R. 65:36 (emphasis added).) She testified that Jemison "was almost in there, but not quite in my anal." (R. 65:36.) Based on this testimony—and giving deference to the jury's determination and viewing the evidence in the light most favorable to the State—a jury could conclude that Jemison had sexual intercourse with Teresa. At the very least, there is an inference drawn from Teresa's testimony that supports the jury's conviction. *Coughlin*, 402 Wis. 2d 107, ¶ 24.

Further, the SANE nurse read from her report, which provided that Teresa told her, "I woke up and he was trying to push it in there. [Teresa] states that her anus was *being penetrated* by the assailant's penis." (R. 65:87 (emphasis added).) This evidence is clearly sufficient as "any intrusion however slight by any part of the person's body or of any object, into the genital or anal opening of another." (R. 66:19.) So contrary to Jemison's argument, the jury did not have to "speculate" (*see* Jemison's Br. 18), about whether Jemison had sexual intercourse with Teresa.

Based on Jemison's admission that he had sex with Teresa, the State's evidence supporting his admission, Teresa's testimony, and DNA evidence, Jemison fails to overcome his heavy burden of showing that the evidence could

not reasonably have supported a finding of guilt. *See Beamon*, 347 Wis. 2d 559, ¶ 21.

II. The trial court did not commit a fundamental, obvious, and substantial error when it admitted the other-acts evidence.

Jemison next argues that he is entitled to a new trial because the trial court committed plain error when it admitted the other-acts evidence, which included the allegations in the complaints from his two prior convictions. (Jemison's Br. 19, 23.) Jemison cannot meet this high burden.

A. To prove plain error, Jemison must show that the trial court made a fundamental, obvious, and substantial error.

Because defense counsel did not object, Jemison argues that the court committed plain error when it allowed the evidence. *See State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77. A plain error is an error that is so fundamental that a new trial or other relief must be granted despite the lack of an objection. *Id*. To warrant relief, the error must be obvious and substantial, and courts should use the plain error doctrine sparingly. *Id*. "If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless." *Id*. ¶ 23.

B. This Court applies a deferential standard of review to a circuit court's evidentiary decisions.

This Court reviews the "circuit court's admission of other-acts evidence for an erroneous exercise of discretion." *State v. Griffin*, 2019 WI App 49, ¶ 19, 388 Wis. 2d 581, 933 N.W.2d 681. An erroneous exercise of discretion occurs when the circuit court applies the wrong legal standard or the facts

in the record do not support its decision. *State v. Sarfraz*, 2014 WI 78, ¶ 35, 356 Wis. 2d 460, 851 N.W.2d 235.

This Court "generally look[s] for reasons to sustain the [circuit] court's discretionary decisions." *State v. Lock*, 2012 WI App 99, ¶ 43, 344 Wis. 2d 166, 823 N.W.2d 378. When the circuit court does not explain its reasoning, this Court "may search the record to determine if it supports the [circuit] court's discretionary decision." *Id.* (citation omitted). This Court may also uphold the circuit court's decision to admit evidence for acceptable purposes other than those that the circuit court contemplated. *State v. Hurley*, 2015 WI 35, ¶ 29, 361 Wis. 2d 529, 861 N.W.2d 174. Thus, when the record contains a reasonable basis for the circuit court's ruling, this Court will not find an erroneous exercise of discretion. *State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis. 2d 686, 613 N.W.2d 629.

C. Admission of other acts is favored, particularly when greater latitude applies.

To determine whether to admit evidence of other acts, courts employ the three-step analytical framework outlined in *State v. Sullivan*, 216 Wis. 2d 768, 771–72, 783, 576 N.W.2d 30 (1998). First, the evidence must be offered for an admissible purpose under Wis. Stat. § 904.04(2)(a), such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, although this list is not exhaustive or exclusive. *Sullivan*, 216 Wis. 2d at 772. Mode or method of operation ("modus operandi"), while not specifically enumerated in section 904.04(2), is one of the factors "that tends to establish the identity of the perpetrator." *State v. Hall,* 103 Wis. 2d 125, 139 n.6, 307 N.W.2d 289 (1981) (quoting *Francis v. State*, 86 Wis. 2d 554, 560, 273 N.W.2d 310 (1979)). Courts have also admitted other-act evidence to show the context of the crime, to provide a complete explanation of the case, and to establish

the credibility of victims and witnesses. *State v. Hunt*, 2003 WI 81, ¶¶ 58, 59, 263 Wis. 2d 1, 666 N.W.2d 771.

Second, the evidence must be relevant, which means it must both be of consequence to the determination of the action, and it must also tend "to make the consequential fact or proposition more probable or less probable than it would be without the evidence." *Sullivan*, 216 Wis. 2d at 772. Courts assess probative value in part based on the similarity of the charged offense to the other acts in terms of nearness of time, place, and circumstances. *Hammer,* 236 Wis. 2d 686, ¶ 31.

When the party seeking admission of the other-acts evidence establishes these two prongs by a preponderance of the evidence, the burden shifts to the opposing party for the third prong of the test. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399. This prong requires the court to weigh whether the probative value of the evidence is substantially outweighed by the risk of unfair prejudice or confusion to the jury under Wis. Stat. § 904.03. *Id.*

Wisconsin Stat. § 904.04 provides core evidentiary requirements that the parties must satisfy to permit the use of other-acts evidence. Wisconsin Stat. § 904.04(2) "favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993).

In addition, admissibility is especially favored when the greater latitude rule applies. Greater latitude is a "longstanding principle that in sexual assault cases . . . courts permit a 'greater latitude of proof as to other like occurrences.'" *State v. Davidson*, 2000 WI 91, ¶ 36, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted). This evidentiary rule is codified in Wis. Stat. § 904.04(2)(b)1. and applies when the charges involve a "serious sex offense." *State*

v. Dorsey, 2018 WI 10, ¶¶ 31–33, 379 Wis. 2d 386, 906 N.W.2d 158. The rule applies to each prong of the *Sullivan* analysis. *Marinez*, 331 Wis. 2d 568, ¶ 20.

D. The trial court properly admitted the other-acts evidence.

1. The evidence was admissible for a permissible purpose.

The first prong of the *Sullivan* analysis is a low bar for the proponent to overcome. *Marinez*, 331 Wis. 2d 568, ¶ 25. "Identifying a proper purpose for other-acts evidence is not difficult and is largely meant to develop the framework for the relevancy examination." *Hurley*, 361 Wis. 2d 529, ¶ 62. Here, the State sought to admit the evidence for "proof of motive, intent, absence of mistake or accident, and context." (R. 8:7–8.)[9] And, the postconviction court determined that the other-acts evidence was properly admitted because they "were clearly similar to the current offense in terms of their *modus operandi* as all three offenses involved [Jemison] sexually taking advantage of sleeping victims, and therefore, the other acts were relevant to the issue of identity." (R. 112:2.)

Jemison argues that identity was not a proper purpose because his identity "was not truly at issue." (Jemison's Br. 25.) He's wrong. Identity, within the meaning of Wis. Stat. § 904.04(2)(a), relates to a defendant's signature or imprint that would allow the perpetrator of a crime in a particular case to be identified through his modus operandi in connection to a separate crime he was known to have committed. *See* Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 404.7 at 212–13 (3d. ed. 2008).

In this case, the facts show that the offenses are so similar in nature that they constitute the "imprint" of

[9] *See also supra*, note 4.

Jemison. In all cases, the victim was asleep—in her own home—and awoken by Jemison sexually assaulting them. (R. 65:119–22.) In all cases, Jemison was a family friend. (*Id.*) While it was different types of sexual assault (breast touching, vagina touching, buttocks touching, anal penetration), in all cases, Jemison took advantage of the opportunity of a sleeping victim to sexually abuse her. (*Id.*)

Further, as the prosecutor argued during closing argument, "with this other act evidence you can use it for purposes of such things as identity. That is whether the prior conduct of [Jemison] is so similar to the offense charged that it tends to identify [Jemison] as the one who committed the offense charged." (R. 66:34.) The prosecutor continued: "this wasn't an accident. This wasn't consent. It wasn't [Teresa] identifying the wrong individual. Based on [Jemison's] prior acts, it certainly shows an identity that it's certainly similar, if not exactly similar, to what he did to [Teresa] in 2016." (R. 66:34.)

And, as the postconviction court determined, the other-acts evidence was "clearly similar" in "terms of their *modus operandi*" because they involved Jemison "sexually taking advantage of sleeping victims, and therefore, the other acts were relevant to the issue of identity." (R. 112:2.) The court was correct. The other-acts evidence was admissible to prove mode or method of operation because of the similarity between the other assaults and the assault at hand. *See Hall*, 103 Wis. 2d at 139 (comparing the similarity in method of operation between two crimes). The mode or method of operation in this case established Jemison's identity. The other-acts evidence was admitted for a proper purpose.

2. The evidence was relevant.

Relevance, the second *Sullivan* 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. Since other-acts evidence always has the potential to operate as impermissible character or propensity evidence, the core question is whether the other act is relevant to prove anything other than character and propensity. *State v. Payano*, 2009 WI 86, ¶ 67, 320 Wis. 2d 348, 768 N.W.2d 832; *Hurley*, 361 Wis. 2d 529, ¶ 76.

Again, "[t]his is not a high hurdle; evidence is relevant if it 'tends to cast any light' on the controversy." *State v. White*, 2004 WI App 78, ¶ 14, 271 Wis. 2d 742, 680 N.W.2d 362 (citation omitted). Evidence is relevant if it: (1) "relates to a fact or proposition that is of consequence to the determination of the action"; and (2) "has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." *Hurley*, 361 Wis. 2d 529, ¶ 77 (quoting *Sullivan*, 216 Wis. 2d at 785–86).

To determine whether the evidence relates to a fact of consequence, "the court must focus its attention on the pleadings and contested issues in the case." *Payano*, 320 Wis. 2d 348, ¶ 69. A defendant's motive and intent are always facts of consequence when they are elements of the crime charged. *State v. Veach*, 2002 WI 110, ¶ 78, 255 Wis. 2d 390, 648 N.W.2d 447. "There is no doubt that sexual assault, involving either sexual contact or sexual intercourse, requires an intentional or volitional act by the perpetrator." *Hurley*, 361 Wis. 2d 529, ¶ 73 (citation omitted). Because one element of sexual assault is a defendant's intent to achieve sexual arousal or gratification, motive and intent are facts of consequence in these cases. *Id.* ¶¶ 73–74, 83. Evidence providing context can bolster a witness's credibility, which is always a fact of consequence. *See Marinez*, 331 Wis. 2d 568, ¶¶ 28, 34.

The second part of the relevancy analysis—whether the proffered evidence tends to make a consequential fact more or less likely—focuses on the evidence's probative value. *Hurley*,

361 Wis. 2d 529, ¶ 79. "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." *Id.* (citation omitted). "Similarity is demonstrated by showing the 'nearness of time, place, and circumstance' between the other-act and the charged crime." *Id.* (citation omitted). "The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." *Id.* (citation omitted). Further, "events that are dissimilar or that do not occur near in time may still be relevant to one another." *Id.* ¶ 80. It is within a circuit court's discretion to determine whether other-acts evidence is too remote. *Hough v. State,* 70 Wis. 2d 807, 814, 235 N.W.2d 534 (1975).

Here, the evidence was relevant because it showed that Jemison preyed on sleeping victims, who were sleeping in their own beds, were family friends, and whom Jemison then sexually assaulted. But Jemison argues that the other acts were "too remote." (Jemison's Br. 21–24.) He notes that "[t]he sexual assault against E.F. took place nearly 23 years prior to the offense here and the offense against V.W. took place almost 13 years prior." (Jemison's Br. 23 (citing R. 65:119–22).) First, even when evidence may be considered too remote, the evidence is not necessarily rendered irrelevant if the remoteness is balanced by the similarity in the incidents. *See State v. Mink,* 146 Wis. 2d 1, 16, 429 N.W.2d 99 (Ct. App. 1988). And here, as described above, the incidents were similar. Second, courts in other cases have upheld the admission of other-acts evidence with similar time-frames. *See State v. Plymesser,* 172 Wis. 2d 583, 596, 493 N.W.2d 367 (1992) (upholding the admissibility of 13-year-old evidence); *State v. Kuntz,* 160 Wis. 2d 722, 749, 467 N.W.2d 531 (1991) (upholding the admissibility of 16-year-old evidence).

Jemison also argues that the other-acts evidence is dissimilar because: (1) Teresa was an adult and the other two victims were children; and (2) the other acts involved Jemison

touching the victims with his hand, versus touching Teresa with his penis. (Jemison's Br. 23.) But these are insignificant distinctions given the similarities discussed above. The other-acts evidence was not too remote, and certainly is balanced by the similarity between the assaults.

Next, the other-acts evidence here absolutely related to facts of consequence. Jemison's motive was a consequential fact because his purpose was an element of the crime of sexual assault. *See Hurley*, 361 Wis. 2d 529, ¶¶ 73–74, 83. Regarding whether the proffered evidence tends to make a consequential fact more or less likely, Teresa's credibility was a central determination for the jury. *See Marinez*, 331 Wis. 2d 568, ¶ 34. The State's other-acts evidence provided context behind Jemison's conduct with Teresa and bolstered Teresa's credibility.

Finally, the greater latitude rule supports the conclusion that this other-acts evidence satisfies the *Sullivan* relevance prong. "[O]ne of the reasons behind the [greater latitude] rule is the need to corroborate the victim's testimony against credibility challenges." *Davidson*, 236 Wis. 2d 537, ¶ 40 (citation omitted). Another reason is "difficult proof issues" in sexual assault cases. *Marinez*, 331 Wis. 2d 568, ¶ 34. Those cases often lack physical evidence, *id.* ¶ 28, and prosecutors have difficulty obtaining admissible evidence to prove the elements of those crimes. *Davidson*, 236 Wis. 2d 537, ¶ 42.

These concerns ring true here. Teresa and Jemison were the only witnesses to the sexual assault. Proof issues, combined with the State's need to corroborate Jemison's credibility, require a liberal application of the *Sullivan* other-acts test.

Dorsey is instructive on these points. There, the claim was that Dorsey abused his girlfriend, and the circuit court admitted testimony from a former girlfriend that Dorsey was

verbally and physically abusive to her a few years prior to the charged acts of abuse. *Dorsey*, 379 Wis. 2d 386, ¶¶ 16–17. There, the evidence was "of consequence" because it related to "the ultimate facts and links in the chain of inferences that are of consequence to the case." *Id.* ¶ 48 (quoting *Sullivan*, 216 Wis. 2d at 786). To that end, the evidence of Dorsey's abuse of his former girlfriend was relevant to intent and motive because the two acts were similar in those respects, "namely that, in both instances, Dorsey became violent when he felt like he was being disrespected or lied to, and he isolated his victims and restricted their movements immediately prior to the assaults." *Id.* ¶ 49. Further, in *Dorsey*, the evidence was admissible to bolster the victim's credibility, which "is always consequential" under Wis. Stat. § 904.01 and which is particularly probative when the case is a credibility contest. *Id.* ¶¶ 50, 51.

That reasoning in *Dorsey* likewise applies to this case. Here, the trial court was correct: the other-acts evidence was relevant. (R. 112:2.) In sum, the other-acts evidence was relevant because it related to a fact of consequence in this case, and it had probative value.

3. Jemison fails to show that the risk of unfair prejudice substantially outweighed the probative value of the evidence.

Finally, Jemison does not meet his burden under *Sullivan*'s third prong. A court may exclude otherwise admissible evidence "only if the evidence's probative value is *substantially outweighed* by the danger of unfair prejudice." *Marinez*, 331 Wis. 2d 568, ¶ 41. This means that the scale tilts "squarely on the side of admissibility. Close cases should be resolved in favor of admission." *Id.* (citation omitted). Moreover, the greater latitude rule applies to the third prong of the *Sullivan* test. *See Dorsey*, 379 Wis. 2d 386, ¶¶ 35, 36.

Thus, a scale that already tilts toward admission tips even further in that direction when greater latitude applies.

In assessing the unfair-prejudice balancing test, the court must consider the State's need to present the other-acts "evidence given the context of the entire trial." *Hurley*, 361 Wis. 2d 529, ¶ 87. "Evidence that is relevant 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.'" *Id.* (quoting Wis. Stat. § 904.03 (2011–12)). "Essentially, probative value reflects the evidence's degree of relevance. Evidence that is highly relevant has great probative value, whereas evidence that is only slightly relevant has low probative value." *Id.* (citation omitted). So, the assessment of probative value duplicates the relevancy analysis done under the second step of the *Sullivan* test. *See id.* ¶¶ 79, 91. "Prejudice 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.'" *Id.* ¶ 87 (citation omitted). This Court is to "keep in mind the greater latitude rule when balancing probative value against unfair prejudice." *Hammer*, 236 Wis. 2d 686, ¶ 35.

Here, the other-acts evidence has probative value because of its similarity to the acts themselves. During each incident, Jemison woke his sleeping victims, whom he knew, and then sexually assaulted them. While Jemison argues that the other-acts evidence "lacked probative value due to the other acts' remoteness and distinct dissimilarity" (Jemison's Br. 23), the State rebuked that argument above. They are not too remote, and they have distinct *similarities*. Further, as the postconviction court determined, "any danger of unfair prejudice was minimized or eliminated by the court's cautionary instruction." (R. 112:2.) *See Hunt,* 263 Wis. 2d 1, ¶¶ 72–73 (explaining that cautionary instructions help to limit any unfair prejudice that may result from other-acts evidence); *see also State v. Johnston*, 184 Wis. 2d 794, 822, 518

N.W.2d 759 (1994) (providing that juries are presumed to follow the instructions given to them). This Court should therefore affirm the postconviction court: Jemison failed to establish that "the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice." (R. 112:2.)

Given that the evidence was admissible for a proper purpose, was relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice, the trial court did not erroneously exercise its discretion in admitting the other-acts evidence. The court's exercise of discretion was surely not erroneous given the greater latitude rule. And, because there was no erroneous exercise of discretion, Jemison cannot meet his even higher burden of proving that the trial court committed plain error.

E. The trial court did not commit a fundamental, obvious, and substantial error when it admitted evidence of Jemison's prior convictions.

Jemison next argues that the court's admission of his convictions was improper because that statute "only allows 'evidence of other crimes, wrongs, or acts,'" but not prior *convictions*. (Jemison's Br. 27.) Jemison is wrong.

First, a prior conviction *is* "evidence of other crimes." Second, both this Court and the Wisconsin Supreme Court have allowed other-acts evidence of convictions. *See Davidson*, 236 Wis. 2d 537, ¶ 80[10]; *see also State v. Opalewski*,

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[10] In *Davidson,* the defendant was convicted of second-degree sexual assault of his 13–year–old niece. At trial, under the greater latitude rule, the circuit court allowed evidence of a previous conviction for sexual assault to be introduced, with a cautionary instruction given to the jury. This Court reversed, but the Wisconsin Supreme Court held that admitting evidence of

2002 WI App 145, ¶ 32, 256 Wis. 2d 110, 647 N.W.2d 331 (prior criminal convictions of sexual assault was allowed to be presented for the purpose of other-acts evidence, and a cautionary instruction was given); *State v. Gray*, 225 Wis. 2d 39, 65, 590 N.W.2d 918 (1999) (prior conviction for obtaining a controlled substance by misrepresentation was admissible to show identity, plan, proof of motive, and absence of mistake); *State v. Tabor*, 191 Wis. 2d 482, 492, 529 N.W.2d 915 (Ct. App. 1995) (a prior sexual assault conviction was allowed to be presented as other-acts evidence and a cautionary instruction provided); *Plymesser*, 172 Wis. 2d at 587–88 (a prior criminal conviction of sexual assault was allowed to be presented for the purpose of other-acts evidence, and a cautionary instruction was given).

Third, Wis. Stat. § 904.04(2)(a) provides that "evidence of other crimes . . . 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." (Emphasis added). And here, the court properly admitted his prior convictions. Further, the greater latitude rule, Wis. Stat. § 904.04(2)(b)1., applies in this case, because it involves a "serious sex offense." *Dorsey*, 379 Wis. 2d 386, ¶¶ 31–33.

While Jemison notes that he did not testify and so his convictions were not offered for impeachment (Jemison's Br. 27), that does not make his prior convictions inadmissible. Again, the evidence of his other-acts (his convictions) was

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defendant's prior conviction for sexual assault was not an erroneous exercise of discretion. *State v. Davidson*, 2000 WI 91, ¶ 5, 236 Wis. 2d 537, 613 N.W.2d 606.

properly admitted to show identity, modus operandi, and motive; the evidence was relevant; and the danger of undue prejudice did not substantially outweigh the probative value under Wis. Stat. § 904.03.

While Jemison cites *Marinez,* 331 Wis. 2d 568, for the proposition that Wis. Stat. § 904.04(2)(a) "specifically prohibits admission of a defendant's prior bad acts" for the purpose of showing that "he acted in conformity therewith," again, that is *not* why Jemison's prior convictions were offered or admitted. (R. 8; 66:22.) Further, the court specifically instructed the jury (as the court did in *Marinez,* 331 Wis. 2d 568, ¶ 44 n.22), that it could *not* consider the other-acts evidence "to conclude that [Jemison] has certain character or certain character traits that [Jemison] acted in conformity with that trait or character with respect to the offense charged in this case." (R. 66:22.)

The trial court did not commit a fundamental, obvious, and substantial error when it admitted evidence of Jemison's prior convictions.

F. The trial court did not commit plain error when it allowed the State to read the allegations from the complaints.

Jemison next argues that allowing the State to read the criminal complaints into the record, as opposed to requiring witnesses to *testify*, was "improper."[11] (Jemison's Br. 28–29.) According to Jemison this violated his right to confrontation because he "was not given the opportunity to confront and cross-examine the witnesses against him from the two prior

[11] Again, because all of Jemison's "other-acts" arguments are in front of this Court on a plain-error analysis, the correct test is not whether the trial court's admission was "improper." (Jemison's Br. 28.) The burden is *much* higher. Jemison must prove that the court's error was fundamental, obvious, and substantial. *State v. Jorgensen*, 2008 WI 60, ¶¶ 21, 23, 310 Wis. 2d 138, 754 N.W.2d 77.

cases." (Jemison's Br. 29.) Jemison is wrong. The information in the complaints was not testimonial; by pleading guilty in those cases, the information was an *admission*.

The Confrontation Clause applies only to testimonial statements giving testimonial evidence against the accused. *Crawford v. Washington*, 541 U.S. 36, 53–56 (2004). Statements that are not created for the purpose of trial testimony do "not implicate the Confrontation Clause" and are admissible so long as the rules of evidence permit their admission. *State v. Reinwand*, 2019 WI 25, ¶ 23, 385 Wis. 2d 700, 924 N.W.2d 184 (citing *State v. Nieves*, 2017 WI 69, ¶ 29, 376 Wis. 2d 300, 897 N.W.2d 363) (providing that "the admissibility of a [nontestimonial] statement is the concern of state and federal rules of evidence not the Confrontation Clause" (citation omitted)).

Contrary to Jemison's argument, the information in the criminal complaints was not testimonial. (*See* Jemison's Br. 30.) Here, the certified criminal complaints were self-authenticating documents under Wis. Stat. § 909.02(12), and so no authentication or foundation is required for their admissibility. The Wisconsin Supreme Court has held that "[a]n attorney presenting self authenticating evidence to the trier of fact . . . is not acting in the same capacity as a witness delivering testimonial evidence." *Deutsche Bank Nat'l Tr. Co. v. Wuensch*, 2018 WI 35, ¶ 30, 380 Wis. 2d 727, 911 N.W.2d 1. Self-authenticating evidence is not testimonial evidence. A statement qualifies as testimonial if the "primary purpose" is to "creat[e] an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). Certified criminal complaints were not created for that primary purpose of a substitute for trial testimony, and therefore are not testimonial. The postconviction court agreed. It determined that "the primary purpose of the complaints created for separate criminal actions was not as an out-of-court substitute for trial testimony in this case." (R. 112:3.)

Further, the Confrontation Clause is satisfied so long as the evidence bears "particularized guarantees of trustworthiness." *State v. Manuel*, 2004 WI App 111, ¶ 26, 275 Wis. 2d 146, 685 N.W.2d 525 (citation omitted). A certified public record, such as a certified publicly-filed criminal complaint, to which Jemison pled guilty, has a particularized guarantee of trustworthiness.

Next, as the postconviction court determined, Jemison's "right to confrontation as to the complaints was waived by his guilty pleas in those cases." (R. 112:3.) This is true because a plea is an admission of a party opponent under Wis. Stat. § 908.01(4)(b). *See United States v. Maestas*, 941 F.2d 273, 278 (5th Cir. 1991) ("It is well settled that a guilty plea is admissible in a subsequent collateral criminal trial as evidence of an admission by a party-opponent."). This is not a case where the defendant disputed guilt at the time of the pleas, nor was it an *Alford* plea. Jemison does not dispute that he *admitted* the allegations in the complaints. So by pleading guilty, Jemison gave up his right to confront the witnesses in those cases.

In sum, the criminal complaints that were read into the record to the jury in this case were certified, self-authenticating, public records that were used for the purpose of establishing the other-acts evidence that had been admitted. They were non-testimonial in nature as they were not created for the primary purpose of providing testimony against Jemison. As they are non-testimonial, the Confrontation Clause did not apply. It cannot be said that the trial court committed a fundamental, obvious, and substantial error when it allowed the State to read the complaints to the jury.

G. If there was plain error in admitting the other-acts evidence, the error was harmless.

Should this Court determine that the circuit court committed plain error when it admitted the other-acts evidence, it should still affirm Jemison's convictions because the error was harmless.

The circuit court's erroneous admission of other-acts evidence is subject to harmless error analysis. *Sullivan*, 216 Wis. 2d at 792. "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction," *id.*, "or had such slight effect as to be *de minimus*." *State v. Thoms*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999) (quoting *State v. Dyess*, 124 Wis. 2d 525, 542, 370 N.W.2d 222 (1985)). The party that benefits from the error must prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *State v. Monahan*, 2018 WI 80, ¶ 33, 383 Wis. 2d 100, 913 N.W.2d 894. In this case, even if the other-acts evidence was erroneously admitted for identity purposes, another permissible basis existed for admitting the other-acts evidence. It was therefore harmless.

Here, evidence of Jemison's other convictions was permissible for the purpose of establishing a plan or scheme because there was a concurrence of common elements between the incidents. *See State v. Friedrich,* 135 Wis. 2d 1, 24, 398 N.W.2d 763 (1987); *State v. Spraggin,* 77 Wis. 2d 89, 99, 252 N.W.2d 94 (1977). Here, the circumstances of the two other-acts incidents bear striking similarities to Teresa's. In both assaults, the victim was particularly vulnerable. They were unconscious, they were sleeping in their own bed, Jemison was a family friend, and they awoke to find Jemison sexually assaulting them. (R. 65:119–122.) Therefore, an alternative permissible purpose existed for the admission of the other-acts evidence.

But even if there were *no* basis to introduce the other-acts evidence, there is not a reasonable possibility that the admission of the convictions or reading of the complaints contributed to the conviction. The evidence against Jemison was overwhelming. In addition to Teresa's testimony detailing the assault, Teresa's step-father testified on July 26, 2016, he woke to Teresa knocking on his door, and she was "crouching real tight" and crying. (R. 65:72.) Teresa told him that Jemison "just tried to rape her." (R. 65:73.)

The SANE nurse read from her report, which provided that Teresa told the SANE nurse that she woke up "between one and two a.m. realizing that she was being assaulted." (R. 65:87.) Jemison was "trying to push it in there." (R. 65:87.) "[H]er anus was being penetrated by" Jemison's penis. (R. 65:87.) Teresa complained "of pain to her anus." (R. 65:88.) Finally, the DNA analyst testified to a reasonable degree of scientific certainty that Jemison was the source of the semen. (R. 65:116.) Any error in admitting the other-acts evidence was harmless.

III. Jemison was not entitled to a *Machner* hearing because the record conclusively demonstrates that he is not entitled to relief.

Jemison's final issue on appeal is that the circuit court erroneously denied his claim that counsel was ineffective for failing to object to the introduction of the other-acts evidence without first holding an evidentiary hearing. (Jemison's Br. 31.) Because the record conclusively demonstrates that he is not entitled to relief, he is wrong.

A. Standard of Review

Whether the circuit court erroneously exercised its discretion when it denied Jemison's postconviction motion without an evidentiary hearing is a mixed standard of

appellate review. *State v. Ruffin*, 2022 WI 34, ¶ 26, 401 Wis. 2d 619, 974 N.W.2d 432.

First, this Court determines "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *Id.* ¶ 27. This is a question that this Court reviews independently of the circuit court. *Id.* "Whether the record conclusively demonstrates that the defendant is entitled to no relief is also a question of law [this Court] review[s] independently." *Id.* "If the motion does not raise facts sufficient to entitle the defendant to relief, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id.* ¶ 28.

B. A defendant has a high burden to show ineffective assistance.

To succeed on a claim of ineffective assistance of counsel a defendant must show both that his counsel's performance was deficient and that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985) (holding that *Strickland* applies to guilty-plea challenges). Because a defendant is required to make both showings, a reviewing court may reject an ineffective-assistance claim based on a failure in either showing. *Strickland,* 466 U.S. at 686, 697.

To show deficient performance, a defendant must overcome a high burden to show that his counsel's performance was unreasonable. Showing deficient performance requires showing "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Courts reviewing counsel's performance "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that counsel "made all significant decisions in

the exercise of reasonable professional judgment." *Id.* at 689–90. And trial counsel is "not ineffective for failing or refusing to pursue feckless arguments." *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

The defendant's burden to show prejudice is also a high bar. To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

C. The record conclusively demonstrates that Jemison is not entitled to relief.

Jemison argues that the information alleged in his motion was sufficient to establish that counsel was ineffective. (Jemison's Br. 33.) He argues that "[b]ecause the other acts were not properly admitted, it was deficient for defense counsel not to object to their introduction into evidence at trial." (Jemison's Br. 33.) He also argues that he "was prejudiced by the introduction of the other acts and the manner in which they were introduced." (Jemison's Br. 33.) Essentially, for all the reasons Jemison argues plain error on the part of the trial court, he argues ineffective assistance on the part of trial counsel. (Jemison's Br. 33–35; *see also* R. 102:15–20.)

Here, the postconviction court denied Jemison's request for an evidentiary hearing in part because the other-acts evidence was properly admitted, and so Jemison "cannot demonstrate that he was prejudiced." (R. 112:4.) The court, it noted, would have overruled defense counsel's objection to the admission of the other-acts evidence. (R. 112:4.)

In other words, here, the record conclusively demonstrates that Jemison is not entitled to relief. As argued above, and to avoid redundancy:

- The other-acts evidence was admissible under the *Sullivan* test, both for showing identity and plan or scheme (and especially so applying the greater latitude rule).
- Jemison's *convictions* were properly permitted under Wis. Stat. § 904.04(2)(a) because a prior conviction is "evidence of other crimes."
- The criminal complaints were certified, self-authenticating public records that were used for the purpose of establishing the other-acts evidence. They were non-testimonial, and so the Confrontation Clause did not apply.

Because of these factors, the record conclusively demonstrates that defense counsel was not ineffective for failing to object to the other-acts evidence. And as the postconviction court determined, it would have denied any objection. As this court has determined, counsel cannot be ineffective for failing to raise a meritless argument. *See State v. Luedtke*, 2014 WI App 79, ¶ 28, 355 Wis. 2d 436, 851 N.W.2d 837; *State v. Golden*, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994).

The trial court properly exercised its discretion when it denied Jemison's claim of ineffective assistance of counsel without a hearing.

CONCLUSION

The State requests that this Court affirm Jemison's judgment of conviction and the court's order denying postconviction relief.

Dated this 8th day of September 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,693 words.

Dated this 8th day of September 2022.

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER

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 8th day of September 2022.

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER