STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP002207-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALVIN JAMES JEMISON, JR.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

ISSUES PRESENTED

1. Was the other acts evidence introduced at Mr. Jemison's trial properly admitted?

2. Did the State present sufficient evidence to prove beyond a reasonable doubt that Mr. Jemison had "sexual intercourse" with T.S.?

CRITERIA FOR REVIEW

This Court should accept review of this case to develop the law on the admission of other acts evidence at trial. Wis. Stat. §809.62(a) and (1r)(c). More specifically, it will allow the court to address for the first time whether the State is permitted to introduce other acts evidence by reading the factual portion of a criminal complaint from a prior conviction to the jury, as opposed to presenting witness testimony at trial. It will also allow this court to address whether the State is permitted to introduce prior convictions when admitting other acts, admit other acts when the purpose of introducing those other acts is not at issue at trial, and present evidence of remote and dissimilar other acts.

Additionally, this Court should accept review to clarify the evidence the State is required to present at trial to prove "sexual intercourse." Wis. Stat. §809.62(1r)(c).

STATEMENT OF FACTS

The State charged Mr. Jemison with second-degree sexual assault of an unconscious person, contrary to Wis. Stat. §940.225(2)(d). (1:1). Additionally, the State alleged Mr. Jemison was a persistent repeater, under Wis. Stat. §939.62(2m)(b)1, requiring a life imprisonment sentence upon conviction for that offense. (6:1).

According to the criminal complaint, on July 26, 2016, T.S. was out celebrating with family and friends. At the end of the night, she returned home and fell asleep. (1:1). She was awoken by a man—who she identified as Mr. Jemison, a family friend—with his penis in her anus. (1:1).

Prior to trial, the State filed a motion to present other acts evidence. (8:1). Specifically, the State sought to introduce evidence of two prior incidents in which Mr. Jemison was convicted of second-degree sexual assault—one in 1993 and one in 2003. (8:3-5).[1] The State asked to introduce these other bad acts to prove "motive, intent, absence of mistake or accident, and context." (8:7-8).

At multiple hearings before trial, defense counsel, Attorney Daniel Mitchell, indicated he could

[1] The State also sought to introduce three additional other acts from incidents which did not involve convictions. Ultimately, the State did not introduce these other acts at trial. (8:3-5).

not object to the State introducing the other acts at trial because the other acts resulted in convictions for second-degree sexual assault. (43:9; 54:2; 55:4; App. 23). Therefore, the court found the other acts admissible at trial. (54:2-5; App. 23-26).

Mr. Jemison's case proceeded to trial, beginning on December 4, 2017, at which Mr. Jemison was represented by Attorney Marcella De Peters. (42:3). In addition to the second-degree sexual assault charge, the State also pursued a burglary charge against Mr. Jemison for his entry into T.S.'s home without permission. (42:7-8).

During defense counsel's opening statement, she told the jury that the question the jury had to decide was whether Mr. Jemison and T.S. had consensual or non-consensual sex. (65:15-16). She explained that T.S. and Mr. Jemison were friends who went out drinking together, and they then had consensual sex. (65:15-16).

The State's first witness was T.S. She testified that Mr. Jemison was a family friend whom she had been drinking alcohol with on July 26, 2016, while celebrating her aunt's birthday. (65:18, 23-27). At the end of the night, Mr. Jemison drove T.S. home from her aunt's house and he left T.S.'s residence. (65:28-29). T.S. then went to sleep and, after she fell asleep, she woke to a "forced feeling" in her "anal." (65:35). When the prosecutor asked her to describe this statement, T.S. stated, "I woke up to him trying to put his stuff inside of my butt, and it was--It was just like.

It was just a restraining. It was just a pound against my back area on like--He was almost in there, but not quite in my anal." (65:36). T.S. then jumped out of bed and saw Mr. Jemison. (65:36).

The State also called Allison Lopez, a nurse who examined T.S. (65:82). Nurse Lopez testified that T.S. told her that she woke up to Mr. Jemison "trying to push it in there" and "that her anus was being penetrated" by Mr. Jemison's penis. (65:87).

In addition, a DNA analyst verified that Mr. Jemison's semen was on several swabs taken from T.S.'s body, including swabs from her anus and vagina. (65:115-116). A police detective also confirmed that Mr. Jemison, who was on GPS monitoring at the time of the alleged offenses, was at T.S.'s house during the alleged assault for 30 minutes. (65:100).

After the State called its last witness, it read the criminal complaints from Mr. Jemison's two prior convictions for sexual assault to the jury:

> *THE STATE*: In case F-934215 the defendant pled guilty to a charge of second degree sexual assault of a child. The complaint in that case reads as follows: On November 27th of 1993, at 5717 West Birch, City of Milwaukee, did have sexual contact with a person who had not attained the age of 16, to wit: [E.F.], contrary to Wisconsin Statutes Section 948.02(2). Complainant states that he is a City of Milwaukee Police Detective and that he makes this complaint based on the information and belief as follows: Upon the statement of [E.F.], a juvenile citizen, born August

28th, 1980, who stated on the above-stated date she was sleeping in her own bed in her home, located at the above-stated address, when she was awakened by pressure on her chest. That she opened her eyes and saw a man standing by her bed with his hand cupped around and massaging her left breast. That the man was [Alvin Jemison], who had been visiting at her home when she went to bed. That she, [E.F], screamed mama, mama, This man's in here. That her mother then came running into her bedroom.

…

Judge, also in case 2003-CF-6751 the defendant pled guilty to second degree sexual assault of an unconscious victim.

In that case the complaint reads that on November 20th, 2003, at 8835 North Swan Road in the City of Milwaukee, did have sexual contact with [V.W.], date of birth 11-13-1987, whom the defendant knew was unconscious, contrary to Wisconsin Statutes Section 940.225(2)(d).

…

Officer Cornelius Taylor interviewed citizen/victim [V.W.], who was born on November 13, 1987. She states that she was at her residence at 8835 North Swan Road in the City of Milwaukee on November 20th, of 2003. She was asleep on a futon along with her sisters. The defendant, Alvin Jemison, who was present in the residence. He is a family friend. [V.W.] relates that she was awakened by Jemison who had his hand inside of her pajamas between her legs and was rubbing on her vagina. Up to this point she

> was completely asleep. [V.W.] states that she kind of jerked her body as a result of being startled of being awakened in this way, and she observed Jemison remove his hand and tried to slide under the bed. [V.W.] states that she pretended to be asleep because she was so shocked and didn't know what to do. So she then wrapped a blanket around her and held it tightly. Jemison then began to pull at the blanket, but she moved away to make him think she was waking up. When she stopped moving, he again began touching her, this time rubbing her buttocks over the blanket. [V.W.] states that she then crossed over her sister and got next to the wall, still pretending to be in a sleeping state. [V.W.] states that she did not want Jemison to be touching her.

(65:119-122).

Mr. Jemison chose not testify. (66:3-4).

Regarding the other acts evidence, the court instructed the jury:

> *THE COURT*: Specifically evidence has been presented that the defendant pled guilty to the charge of second degree sexual assault of a child in case 93CF934215 and pled guilty to the charge of second degree sexual assault of an unconscious victim in 03CF6751.
>
> If you find that this conduct did occur, you should consider only on the issue of identity, that is, whether the prior conduct of the defendant is so similar to the offense charged that it tends to identify the defendant as one who committed the offense charged…

> You may not consider this evidence to conclude that the defendant has certain character or certain character traits that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.

(66:21-22).

During closing argument, the State further described the other acts evidence to the jury:

> *THE STATE*: At the close of the case, I talked about some prior conduct the defendant had in the past. Two cases in which he pled guilty. One he pled guilty to second degree sexual assault of a child. In that case the victim was a girl by the name of [E.F.] who was born in 1980. This offense occurred in 1993. She would have been approximately thirteen years of age…
>
> But there is another case as well. This one was in 2003 in which he pled guilty to second degree sexual assault of an unconscious victim…
>
> In this case [V.W.] was born in 1987. This occurred in 2003. So she is probably 15 around 16 years of age 16--17…
>
> [V.W] in 2003. [E.F.] in 1993--both completely asleep when this man comes in and sexually assaults them. [T.S.] the same thing. The judge has just read you instructions that with this other act evidence you can use it for purposes of such things as identity. That is whether the prior conduct of the defendant is so similar to the offense charged that it tends to identify the defendant as the one who committed the offense charged.

(66:34).

The jury convicted Mr. Jemison of both counts and the court, the Honorable Jeffrey Wagner presiding, sentenced Mr. Jemison to life imprisonment, as required by law. (66:53; 39:1-4).

After sentencing, Mr. Jemison filed a postconviction motion, requesting a new trial. (102:1). The motion alleged that the circuit court committed plain error when it allowed the State to introduce the other acts evidence at trial of his two prior sexual assault convictions. (102:7-15). The motion also alleged that trial counsel was ineffective for not objecting to the introduction of the other acts and requested a *Machner* hearing. (102:15-20). The circuit court denied the motion in writing without an evidentiary hearing, finding that the other acts evidence was properly admitted at trial. (112:1-4; App. 32-35).

Mr. Jemison appealed the circuit court's denial of his postconviction request for a new trial and also challenged the sufficiency of the evidence in this matter, and the court of appeals affirmed his convictions. *State v. Jemison*, 2021AP2207-CR, opinion and order (WI App. July 18, 2023) (App. 3-21).

ARGUMENT

I. This Court should accept review and determine that the other acts evidence was not properly admitted at Mr. Jemison's trial.

The Fourteenth Amendment of the United States Constitution and Article I, Section 8 of the Wisconsin Constitution "prohibits the government from depriving a person of due process of law." Due process includes the right to a fair trial. *See State v. Lettice*, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996).

The general rule is that other acts are not admissible at trial. *Whitty v. State*, 34 Wis. 2d 278, 291, 149 N.W.2d 557, 563 (1967). However, Wis. Stat. §904.02(2) allows for the admission of other acts evidence if used for specific purposes, such as intent or motive. Nonetheless, "[e]vidence of prior crimes or occurrences should be sparingly used by the prosecution and only when reasonably necessary. Piling on such evidence as a final 'kick at the cat' when sufficient evidence is already in the record runs the danger, if such evidence is admitted, of *violating the defendant's right to a fair trial* because of its needless prejudicial effect on the issue of guilt or innocence." *Whitty*, 34 Wis. 2d 278, 297 (emphasis added).

In *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), the Wisconsin Supreme Court adopted a three-part test to determine the admissibility of other acts evidence. Other acts are

admissible if: (1) the other acts evidence is offered for an acceptable purpose under Wis. Stat. Sec. 904.04(2), (2) the other acts evidence is relevant, meaning the evidence is of consequence to the determination of the action and does have probative value, and (3) the probative value of the other acts evidence substantially outweighs the danger of unfair prejudice, confusion of the issues, or undue delay. *State v. Cofield*, 2000 WI App 196, ¶9, 238 Wis. 2d 467, 618 N.W.2d 214.

The "probative value of the other acts evidence…depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." *Sullivan*, 216 Wis. 2d at 786.

This case presents this Court with an opportunity to address the admission of other acts evidence and whether the State is permitted to introduce: 1) other acts evidence by reading a criminal complaint to the jury, as opposed to presenting witness testimony at trial, 2) prior convictions when admitting other acts, 3) other acts when the purpose of introducing those other acts is not at issue at trial, and 4) evidence of remote and dissimilar other acts.

A. Allowing the State to read the criminal complaints associated with Mr. Jemison's prior convictions to the jury was improper.

"The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront the witnesses against

them." *State v. Hale*, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637. Specifically, the Sixth Amendment of the United States Constitution states, "[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." Similarly, Article I, Section 7 of the Wisconsin Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right…to meet the witnesses face to face."

The Confrontation Clause was designed to prevent "the use of ex parte examinations as evidence against the accused." *State v. Reinwand*, 2019 WI 25, ¶21, 385 Wis. 2d 700, 924 N.W.2d 184 (internal citation and quotes omitted). The clause's purpose is to ensure the reliability of testimony by allowing the accused to challenge a witness's statements "in the crucible of cross-examination." *Id*. (citation omitted).

"Testimonial hearsay statements are admissible against a criminal defendant only if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *Id*. at ¶22. "A statement is testimonial only if in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony." *Id*. at ¶24 (internal quotes and citation omitted).

In this case, the court did not require the State to call witnesses to testify about Mr. Jemison's prior bad acts related to his two prior convictions for second-degree sexual assault. Instead, the court allowed the

State to read the criminal complaints associated with those convictions to the jury at the close of the State's case. (65:119-122). As such, Mr. Jemison was not given the opportunity to confront and cross-examine the witnesses against him from the two prior cases.

The information within the two criminal complaints consisted of statements from the victims in those matters made to law enforcement. (65:119-122). Those statements were testimonial, as they were given to police in order to prosecute Mr. Jemison for the other acts offenses. *Davis v. Washington*, 547 U.S. 813, 821-22 (2006); *State v. Rodriguez*, 2006 WI App 163, ¶18, 295 Wis. 2d 801, 722 N.W.2d 136. Furthermore, the criminal complaints were testimonial because they were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009). The criminal complaints were used as a substitute for the witnesses from the other acts cases testifying at trial in this matter. Accordingly, Mr. Jemison's right to confrontation was violated when the State read the criminal complaints to the jury.

Furthermore, Mr. Jemison's guilty pleas to the two prior acts did not waive his right to confrontation. It is the factual details of a defendant's prior acts and conduct that proves one of the proper purposes for the admission of the other acts. A defendant's guilty plea does not in itself admit all of the facts within a criminal complaint so as to allow the State to simply read those facts to a jury in a future case.

The "opportunity to question one's accusers is central to our adversarial system. Without confrontation, potential errors, mistakes of fact, and ambiguities are neither examined nor tested by opposing counsel." *State v. Jorgensen*, 2008 WI 60, ¶36, 310 Wis.2d 138, 754 N.W.2d 77. Because witnesses were not required to testify regarding Mr. Jemison's prior bad acts, Mr. Jemison was deprived of his right to test the accuracy of the details within the criminal complaints in the context of this case and his constitutional right to confrontation was violated.

B. Mr. Jemison's prior convictions for second-degree sexual assault were improperly admitted.

Generally, juries are only permitted to hear that "prior convictions exist and the number of offenses when the defendant decides to testify because of the presumption that the number of convictions speaks to the credibility of the witness." *State v. Coleman*, 2015 WI App 38, ¶42, 362 Wis. 2d 447, 865 N.W.2d 190; *State v. Kuntz*, 160 Wis. 2d 722, 752, 467 N.W.2d 531 (1991). Under Wis. Stat. §908.03(22), the State can only introduce a judgment of a previous conviction, without it being a hearsay violation, if it is offered to "prove any fact essential to substantiate the judgment" or for impeachment.

Regarding prior convictions, this Court recognized that allowing evidence of prior convictions:

> [H]as a great potential for abuse. The court is aware that the jury might well take such evidence

> to mean a good deal more than the mere fact that the defendant is a person of doubtful veracity. The jury may conclude that if he has committed all those other crimes, then he probably committed the one he is on trial for also, or if he didn't, he ought to be convicted anyway because his past acts show him to be a bad and dangerous character who ought to be incarcerated.

Nicholas v. State, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971).

In this matter, Mr. Jemison's prior convictions were not offered for impeachment, as Mr. Jemison did not testify, or to prove an element of the charges he faced. (66:3-4). Mr. Jemison concedes that "evidence of other crimes, wrongs, or acts" is admissible if that evidence is admitted for a proper purpose—such as to prove motive or intent. Wis. Stat. §904.04(2)(a). However, Wis. Stat. §904.04(2)(a) only allows "evidence of other crimes, wrongs, or acts." That statute does not specifically permit the introduction of a defendant's prior *convictions*.

Wis. Stat. §904.04(2)(a) does not specifically state that prior convictions are admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, nor does it define "evidence of other crimes" to include prior convictions. And, notably, when Wis. Stat. §904.04 intends for prior convictions to be admissible, it specifically says that prior convictions—as opposed

to just "evidence of other crimes"—are admissible. *See* Wis. Stat. 904.04(2)(b)2.[2]

In reality, a defendant's conviction for a crime in itself is not relevant to prove one of the proper purposes under Wis. Stat. §904.04(2). That is because it is the details of a defendant's acts and conduct that prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, and not the fact of conviction. The only purpose that a *conviction* in itself serves, in a case like this one where Mr. Jemison did not testify, is to show that he acted in conformity therewith. However, Wis. Stat. 904.04(2)(a) specifically prohibits admission of a defendant's prior bad acts for this purpose. *State v. Marinez*, 2011 WI 12, 331 Wis. 2d 568, 797 N.W.2d 399.

Thus, the specific introduction of Mr. Jemison's guilty pleas and conviction of to two prior second-degree sexual assault charges was improper and not permitted under Wis. Stat. §904.04(2) and undermined Mr. Jemison's due process right to a fair trial. *See Whitty*, 34 Wis. 2d 278 at 297.

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[2] Wis. Stat. §904.04(2)(b)2 states: "In a criminal proceeding alleging a violation of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was *convicted* of a violation of s. 940.225(1) or 948.02(1)…as evidence of the person's character in order to show that the person acted in conformity therewith." (emphasis added).

C. The other acts were improperly admitted to prove "identity."

In this case, the State requested to introduce the other acts evidence related to Mr. Jemison's prior sexual assaults for four reasons—to show proof of motive, intent, absence of mistake or accident, and context. (8:7-8). Yet, during the closing jury instructions, the circuit court instructed the jury:

> THE COURT: If you find that this conduct did occur, you should consider only on the issue of *identity*, that is, whether the prior conduct of the defendant is so similar to the offense charged that it tends to identify the defendant as one who committed the offense charged.

(66:21-22) (emphasis added). Thereafter, during its closing argument, the State told the jury it could consider the other acts to prove "identity":

> THE STATE: The judge has just read you instructions that with this other act evidence you can use it for purposes of such things as *identity*. That is whether the prior conduct of the defendant is so similar to the offense charged that it tends to identify the defendant as the one who committed the offense charged.

(66:34) (emphasis added).

"Identity" was not a proper purpose for the submission of the other acts to the jury because Mr. Jemison's identity was not truly at issue. Mr. Jemison conceded that he was present when T.S. was assaulted, a GPS monitoring device placed him at

T.S.'s home at the time of the assault, Mr. Jemison's DNA was found on T.S., and T.S. identified Mr. Jemison as the perpetrator. (65:15-16, 36, 100, 115-116; 66:36).

Considering that "identity" was not even an issue at Mr. Jemison's trial, the admission of the other acts for this purpose was unfairly prejudicial—as the jury was unnecessarily informed about prior acts of sexual assault against children—and violated Mr. Jemison's due process right to a fair trial. *See Whitty*, 34 Wis. 2d 278 at 297.

D. The other acts were too remote and dissimilar to the offense here.

Before trial here, the circuit court did not conduct the *Sullivan* analysis when deciding if the State could admit Mr. Jemison's other bad acts related to the prior sexual assaults because defense counsel did not object to the admission of those other acts. (43:9; 54:2-5; 55:4; App. 23-26). Postconviction, the circuit court found that the other acts were appropriately admitted at trial, as the other acts "were clearly similar to the current offense in terms of their *modus operandi* as all three offenses involved the defendant sexually taking advantage of sleeping victims…" (112:2; App. 33).

For multiple reasons, under *Sullivan*, the other acts information regarding Mr. Jemison's two prior sexual assaults was inadmissible.

First, the other acts and this case were dissimilar in multiple ways. Both of the other acts the State introduced at trial involved children victims. (65:119-122). In Case F-934215, E.F. was 13 years old and, in Case 2003CF6751, V.W. was 16 years old. (65:119-122) To the contrary, T.S. was an adult when Mr. Jemison was alleged to have sexually assaulted her. (65:17). Further, both other acts cases involved Mr. Jemison sexually assaulting victims while he was staying at or invited into the residence where the assaults occurred. (65:119-122). Whereas here, Mr. Jemison was alleged to have entered T.S.'s home without permission and without her knowledge before committing the sexual assault. (65:32). Lastly, the two other acts involved Mr. Jemison touching victims with his hand, while the offense here involved alleged penis to anus sexual intercourse. (65:35-36, 119-122).

Second, the other acts offenses were too remote. The 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. (65:119-122).

Accordingly, the other acts admitted at trial lacked probative value due to the other acts' remoteness and distinct dissimilarity between the circumstances surrounding the offense here.

Moreover, the remoteness of the other acts along with the other acts' factual dissimilarities to this case diminished the probative value of the other acts to the point where the probative value did not substantially outweigh the prejudice of their admission. Most

importantly, the jury was unnecessarily told that Mr. Jemison committed prior sexual assaults against children in a case that did not involve a child sex assault.

Because the other acts were improperly admitted, their introduction violated Mr. Jemison's due process right to a fair trial "because of its needless prejudicial effect on the issue of guilt or innocence." *Whitty*, 34 Wis. 2d 278 at 297.

E. The circuit court committed plain error when it admitted the other acts evidence and trial counsel was ineffective for not objecting to the admission of the other acts.

An error constitutes a "plain error" where it is "obvious and substantial." *Jorgensen*, 310 Wis.2d 138 at ¶21. It is an error "so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *State v. Sonnenberg,* 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984). Plain error occurs when "a basic constitutional right has not been extended to the accused." *Jorgensen,* 310 Wis.2d 138 at ¶21 (citing *Virgil v. State,* 84 Wis. 2d 166, 195, 267 N.W.2d 852 (1978)).

Here, for the reasons discussed above, Mr. Jemison's constitutional right to confrontation was violated when the State was simply permitted to read the criminal complaints related to his prior convictions to the jury without calling any witnesses. Additionally, his due process right to a fair trial was violated when

the jury was improperly informed that he was convicted of prior sexual assaults against children. Because of these significant violations of Mr. Jemison's constitutional rights, the circuit court committed plain error when it allowed the State to introduce the other bad acts of Mr. Jemison's prior convictions for second-degree sexual assault at trial.

Similarly, because the other acts evidence was inadmissible for the reasons previously described, Mr. Jemison's trial attorneys were ineffective when they failed to object to the introduction of the other bad acts. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *State v. Artic*, 2010 WI 83, ¶24, 327 Wis. 2d 392, 768 N.W.2d 430.

Thus, Mr. Jemison asks this Court to accept review of this case to develop the law on the admission of other acts evidence at trial. Wis. Stat. §809.62(a) and (1r)(c).

II. This Court should accept review and determine whether the State met its burden to show Mr. Jemison had "sexual intercourse" with T.S.

In order to prove Mr. Jemison guilty of second-degree sexual assault of an unconscious victim, the State was required to prove three elements beyond a reasonable doubt: (1) Mr. Jemison had "sexual intercourse" with T.S.; (2) T.S. was unconscious at the time of the sexual intercourse; and (3) Mr. Jemison knew that T.S. was unconscious at the time of the sexual intercourse. (22:1). Wis. JI—Criminal 1213.

"Sexual intercourse" means "any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another." (22:1). Wis. JI—Criminal 1200B.

This case centers on the first element. The issue is whether the State proved beyond a reasonable doubt that Mr. Jemison had "sexual intercourse" with T.S.

The Due Process Clause of the United States Constitution guarantees that a person accused of a crime is presumed innocent and that the burden of proof is upon the State to establish guilt of every essential fact beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-64 (1970). As such, "[i]n order to overcome the presumption of innocence accorded a defendant in a criminal trial, the [S]tate bears the burden of proving each essential element of the crime charged beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

"It is the function of the trier of fact…to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* at 506. "An inference is reasonable if it can fairly be drawn from the facts in evidence." *State v. W.T.D.*, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988). But an "inference cannot be based on speculation or conjecture[.]" *Id.* The law requires that a criminal verdict rest upon more than a guess, even if it is a good guess. *Volk v. State*, 184 Wis. 286, 288, 199 N.W. 151 (1924).

Here, the State did not produce sufficient evidence to demonstrate beyond a reasonable doubt that Mr. Jemison had "sexual intercourse" with T.S.

During trial, T.S. testified that she woke up to Mr. Jemison "trying" to put his penis in her anus. (65:36). However, T.S. stated that Mr. Jemison's penis "was almost in [her anus]" but was "not quite in [her] anal." (65:36). Thus, T.S. testified that Mr. Jemison's penis was not actually in her "anal opening"—it almost was. *See* Wis. JI—Criminal 1200B. Consequently, her testimony was insufficient to prove "sexual intercourse," as "sexual intercourse" required Mr. Jemison's penis to actually enter T.S.'s "anal opening." (22:1). Wis. JI—Criminal 1200B.

Although Nurse Lopez testified that T.S. told her at the hospital that Mr. Jemison's penis "penetrated" her anus, this testimony, in light of T.S.'s trial testimony, was also insufficient for the State to meet its burden to show that Mr. Jemison had "sexual intercourse" with T.S. (65:87). During her testimony, T.S. never explained her conflicting statements—her testimony at trial and her statement to the nurse—and did not clarify if Mr. Jemison's penis entered her anus.

Therefore, at most, the jury could only have *speculated* that T.S.'s statement to Nurse Lopez was accurate and her actual trial testimony was not. Since any inference the jury made that Mr. Jemison's penis entered T.S.'s anus was merely speculative, the State did not meet its burden to prove that "sexual

intercourse" took place, as a jury's inferences "cannot be based on speculation or conjecture." *W.T.D.*, 144 Wis. 2d 621 at 636.

Even though Mr. Jemison's lawyer conceded that Mr. Jemison had sex with T.S. during her opening statement and closing argument, trial counsel's opening statement and closing argument were not evidence. *State v. McDowell*, 2004 WI 70, ¶63 n. 19, 272 Wis. 2d 488, 681 N.W.2d 500. As such, the State was still required to prove through evidence that Mr. Jemison had "sexual intercourse" with T.S.

Accordingly, the State failed to prove that Mr. Jemison had "sexual intercourse" with T.S.—an essential element necessary to convict him of second-degree sexual assault of an unconscious victim. For this reason too, Mr. Jemison asks this Court to accept review of this matter. Wis. Stat. §809.62(1r)(c).

CONCLUSION

For the reasons stated above, Mr. Jemison respectfully asks that this Court grant review of the court of appeals' decision.

Dated this 17th day of August, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 5,262 words.

CERTIFICATION AS TO APPENDIX

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

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

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

Dated this 17th day of August, 2023.

Signed:
Electronically signed by
Christopher D. Sobic
CHRISTOPHER D. SOBIC
Assistant State Public Defender