STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP2207-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

ALVIN JAMES JEMISON, JR.,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING A PETITION FOR REVIEW

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INTRODUCTION

Alvin James Jemison, Jr., seeks reversal of the court of appeals' opinion that affirmed his conviction of second-degree sexual assault of an unconscious person in *State v. Alvin James Jemison, Jr.*, 2021AP2207-CR, 2023 WL 4569684 (Wis. Ct. App. July 18, 2023) (unpublished). (Pet-App. 3–21.) On appeal, Jemison argued that (1) the State failed to prove by sufficient evidence that he had sexual intercourse with the victim, (2) the circuit court erroneously admitted other-acts evidence, and (3) the court erred when it denied his claim of ineffective assistance of counsel. (Pet-App. 3–4.)

The court of appeals first determined that there was not only *sufficient* evidence, but "abundant" evidence that Jemison had sexual intercourse with the victim. (Pet-App. 11.)

Next, the victims in the other-acts incidents were, just like the victim in this case, (1) family friends of Jemison's, (2) sleeping in their own bed, and (3) unconscious at the time of Jemison's sexual assaults. The court of appeals determined that the other-acts evidence (Jemison's prior convictions) was admissible under *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). (Pet-App. 16–17.) The court of appeals further "embrac[ed]" the applicability of the greater-latitude rule. (Pet-App. 16.) Addressing the *manner* in which the other-acts evidence was presented (by reading portions of the complaints to the jury), the court of appeals determined that the complaints "were not created as evidentiary substitutes for trial testimony," and so they were "not, by their nature, testimonial." (Pet-App. 18.) But "most compellingly," the court determined, Jemison waived his right-to-confrontation argument *by pleading guilty* in those cases, because "a plea is, by its nature, an admission of a party opponent." (Pet-App. 19.)

Finally, the court of appeals noted that the postconviction court denied Jemison's request for a *Machner* hearing on the grounds that the other-acts evidence was properly admitted, that the admission of Jemison's convictions was proper, and that the State did not violate Jemison's right to confrontation. (Pet-App. 20–21.) Therefore, it was "clear that Jemison would have been unable to show that he was prejudiced by the conduct of his attorney." (Pet-App. 21.)

In reaching its conclusions, Jemison does not dispute that the court of appeals applied the correct standard of review and controlling caselaw to the facts of the case. Accordingly, this Court should deny Jemison's petition.

ARGUMENT

This Court should deny the petition for the additional following reasons:

1. Jemison seeks review so this Court can "develop the law on the admission of other acts evidence." (Pet. 4.) Specially, he argues that the State reading portions of the prior criminal complaints (cases in which he plead guilty) to the jury were testimonial, and that this violated his right to confrontation. (Pet. 13–18.) He's wrong for multiple reasons. ***First***, both this Court and the court of appeals have allowed other-acts evidence of convictions. *State v. Davidson*, 2000 WI 91, ¶ 80, 236 Wis. 2d 537, 613 N.W.2d 606; *State v. Opalewski*, 2002 WI App 145, ¶ 32, 256 Wis. 2d 110, 647 N.W.2d 331; *State v. Gray*, 225 Wis. 2d 39, 65, 590 N.W.2d 918 (1999); *State v. Tabor*, 191 Wis. 2d 482, 492, 529 N.W.2d 915 (Ct. App. 1995); *State v. Plymesser*, 172 Wis. 2d 583, 587–88, 493 N.W.2d 367 (1992). ***Second,*** contrary to Jemison's argument, the information in the criminal complaints was *not* testimonial. As the court of appeals noted, the certified criminal complaints were self-authenticating documents under Wis. Stat. § 909.02(12), and so no authentication or

foundation was required for their admissibility. (Pet-App. 18.) Self-authenticating evidence is not testimonial evidence. ***Third,*** 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. ***Fourth***, Jemison's right to confrontation as to the complaints was *waived* by his guilty pleas in those cases because, as the court of appeals noted, a plea is an admission of a party opponent. (Pet-App. 19 (first citing Wis. Stat. § 908.01(4)(b); and then *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cr. 1993)).) Here Jemison does not dispute that he admitted the allegations in the complaints. By pleading guilty, Jemison gave up his right to confront the witnesses in those cases.

2. Next, Jemison argues that the other acts were improperly admitted to prove identity. (Pet. 19–20.) But the court of appeals concluded that (1) "based upon the evidence presented at trial, that *all* of the identified other-acts categories provide bases for admission under WIS. STAT. § 904.04(2)(a), as the State proposed and argued"; *and,* (2) that "the other-acts evidence here unmistakably goes to assessments of Jemison's intentional or volitional acts." (Pet-App. 14–15.) Wisconsin Stat. § 904.04(2)(a) "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."

3. Nor were Jemison's other acts too remote or dissimilar. (Pet. 20–22.) As the court of appeals found, "the similarities between the behaviors upon which the prior convictions were premised and the conduct alleged in this case are *compelling*." (Pet-App. 15 (emphasis added).) As the court noted, "[i]n each, Jemison's victims were sleeping in

their own beds and were family friends who he sexually assaulted." (Pet-App. 15.) Further, as the court of appeals noted (Pet-App. 16), the greater latitude rule, Wis. Stat. § 904.04(2)(b)1., applies in this case, because it involves a "serious sex offense." *State v. Dorsey*, 2018 WI 10, ¶¶ 31–33, 379 Wis. 2d 386, 906 N.W.2d 158. And here, "Jemison and [the victim] were the only witnesses to the sexual assault, rendering proof issues, including assessments of the credibility of these two by the jury, pivotal and so justifying a more liberal, justice-based application of the *Sullivan* standards." (Pet-App. 16.)

4. Next, Jemison agues plain error in admitting the other acts and ineffective assistance of counsel. (Pet. 22.) But as argued above, there was no error in admitting the other acts, and so counsel was not ineffective for failing to raise a meritless argument.

5. Next, Jemison argues that the State did not provide sufficient evidence that Jemison had "sexual intercourse" with the victim. (Pet. 23–26.) As indicated above, the court of appeals found the evidence against Jemison not only sufficient, but "abundant." (Pet-App. 11.) Here, Jemison "expressly *conceded* at trial that he had sex with [the victim]." (Pet-App. 11 (emphasis added).) But even beyond that concession, the victim provided "graphic testimony" which "provided the jury with a factually sufficient basis upon which to conclude that Jemison had sexual intercourse with [the victim]." (Pet-App. 11.) Further, the SANE nurse read from her report, in which the victim told her, "I woke up and he was trying to push it in there. [The victim] states that her anus was being penetrated by the assailant's penis." (R. 65:87.) As the court of appeals correctly concluded, Jemison was unable to carry his "heavy burden to show [that] the evidence could not reasonably have supported a finding of guilt." (Pet-App. 11 (quoting *State v. Beamon,* 2013 WI 47, ¶ 21, 347 Wis. 2d 559, 830 N.W.2d 681).)

6. Finally, in his petition Jemison does not argue that the court of appeals misapplied any caselaw, nor does he really challenge the court of appeals' decision. (Pet. 1–27.) His petition merely rehashes the arguments that he made in his court of appeals brief, without explaining how the *court of appeals* misapplied any law. Any review would be for error correction, but there is no error.

CONCLUSION

This Court should deny and dismiss Jemison's petition for review.

Dated this 23rd day of August 2023.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,296 words.

Dated this 23rd day of August 2023.

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of August 2023.

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER
Assistant Attorney General