STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP965-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CLINTON D. CLUCAS,

Defendant-Respondent.

ON APPEAL FROM A FINAL ORDER PARTIALLY DENYING THE STATE'S MOTION TO ADMIT OTHER ACTS EVIDENCE, IN PORTAGE COUNTY BRANCH 1, THE HON. THOMAS EAGON PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

ISSUES PRESENTED

1. When the legislature has directed that "In a criminal proceeding alleging… domestic abuse… or an offense… subject to the surcharge in Wis. Stat. 973.055… evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim in the similar act," under what circumstances may a trial court exclude prior acts of domestic violence against the same victim and a different victim?

The trial court ruled that the State did not make a sufficient showing as to the admissibility of three of the four other acts referenced in its motion, stating in its decision with regard to acts 1 and 2:

> "…the need for this evidence [Act 1] appears to be low given the facts of the case so the Court will not grant the request to present the Act 1 evidence.
>
> And for similar reasons, the Court is not going to grant the request to use the Act 2 evidence…
>
> It [Act 2] is similar in facts, and does not appear to be essential to proving the State's case."

A-AP 25:7-11, 16-17.

Additionally, the trial court stated with regard to act 3:

> "…the Court will not allow that incident [Act 3] to come into play…"

A-AP 24:10.

In its analysis trial court failed to properly apply the greater latitude standard as required by *Dorsey* and did not make any determination about whether Clucas' fundamental due process rights would be violated by admission of the other acts.

2. Can a trial court order the State present other acts evidence solely through individuals with personal knowledge of the other acts?

In its ruling, the trial court said

> "If circumstances change during the trial, the State may renew the motion. However, the State would need to have witnesses with personal knowledge of these incidents if they want to bring it in."

A-AP 25:20-23.

In its motion, the State proposed proving the other acts evidence by criminal complaints, judgments of conviction, and testimony from the victim. A-AP 39-40.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of this Court's opinion may be appropriate to provide guidance to trial courts in deciding under

what circumstances evidence deemed "admissible" under Wis. Stat. 904.04(2)(b)1 may, nonetheless be excluded.

STATEMENT OF THE FACTS AND CASE

In a criminal complaint filed May 28, 2021, the State of Wisconsin charged Clinton Clucas with Disorderly Conduct with a Domestic Abuse Enhancer and Domestic Abuse Assessments pursuant to Wis. Stat. 973.055 and Misdemeanor Bail Jumping from an incident that occurred on March 8, 2021. A-AP 1, 42. Clucas was also on bond in 20CM180 for Disorderly Conduct with the Domestic Abuse modifier. A-AP 3, 44.

According to the complaint, on March 8, 2021, Clucas and the victim, K.C., were going through a divorce and had been legally separated. A-AP 3, 43. Clucas and K.C. were in the midst of a child exchange when K.C. went to Clucas' home to pick up the kids. *Id*. During that child exchange, Clucas' father asked to say goodbye to the kids so K.C. delayed leaving. *Id*. Clucas then stormed down the stairs and got in K.C.'s face. *Id*. K.C. tried to leave, but Clucas accused her of spreading lies about him, threatened to 'fuck her up', then hit her on the side of her head. *Id*; A-AP 46.

Prior to trial, the State filed a motion to admit other acts evidence relating to past convictions and incidents involving domestic abuse committed by Clucas. A-AP 28-40. The motion quoted the provision of Wis. Stat. 904.04(2)(b)1 that such evidence "is admissible" and requested the trial court allow the State to present evidence of the Clucas' prior other acts involving domestic abuse. A-AP 33-34, 40.

Chronologically, the first other act occurred on June 20, 2013 in 13CF258. A-AP 48-51. At the time, Clucas' girlfriend, E.V., had been speaking with Clucas' father the previous day. A-AP 50. Clucas knew from past experience that when E.V. was speaking with his father she would often confide in him about problems between E.V. and Clucas, including his controlling behavior. *Id*. Clucas became verbally abusive towards E.V. prompting E.V. to leave their home to give him time to cool off. *Id*. When E.V. returned, Clucas again began yelling at her, cursing at her repeatedly and hurling multiple insults towards her. *Id*. Clucas then began threatening to kill E.V. and her kids, saying he would twist her head 'like an owl.' *Id*. Clucas grabbed one of E.V.'s phones and smashed it along with the SIM card, wrapped his arm around E.V.'s neck to put her in a chokehold, twice, and dragged her along the floor away from the front door and into the kitchen to prevent her escape. *Id.*

Clucas was charged with Strangulation Suffocation, Battery, and Disorderly Conduct, all three as Domestic Abuse, as well as Criminal Damage to Property. A-AP 48-49. These acts of domestic abuse were similar in that in both instances Clucas became enraged and lashed out at the victim because the victim was spending time with the defendant's father. This is precisely what happened in the present case.

Clucas pled guilty on October 1, 2013 to charges of Battery and Disorderly Conduct, both subject to the domestic abuse surcharge under Wis. Stat. 973.055. A-AP 52. Clucas pled no contest to a charge of Criminal Damage to Property and a charge of Strangulation Suffocation was dismissed and read in, the latter charge was subject to the Domestic Abuse surcharge under Wis. Stat. 973.055. *Id*.

The trial court excluded this other act due to remoteness in time, the fact it occurred with a different girlfriend, the level of violence in the act compared to the present case, and that it wasn't necessary to prove the State's case. A-AP 24:13-23. Here the trial court failed to consider in its examination that the victim had just interacted with the defendant's father and this enraged Clucas. The trial court did not consider the legislative directive in Wis. Stat. 904.04(2)(b) in the other acts analysis or the greater latitude standard required by *Dorsey*.

The second other act occurred on July 7, 2013 in 13CF274. A-AP 55-58. Clucas, facing multiple charges for the incident on June 20, 2013, again attacked his girlfriend E.V. in their home. A-AP 57. Clucas grabbed E.V. by the arm unprovoked, twisted it, then pushed her across the room onto the couch. *Id*. E.V. was panicking, repeatedly saying 'No, no, no' and Clucas said to her 'my life is going to be ruined' and 'I'm facing seven years, there goes my life.' while he was attacking E.V. *Id*.

Clucas was charged with Battery and Disorderly Conduct, both as Domestic Abuse, and Misdemeanor and Felony Bail Jumping arising from the charges related to the June 20, 2013 incident. A-AP 55-56.

Clucas pled guilty on October 1, 2013 to Battery and Misdemeanor Bail Jumping while charges of Disorderly Conduct and Felony Bail Jumping were dismissed and read in. A-AP 59. The charges of Battery and Disorderly conduct were subject to the Domestic Abuse surcharge under Wis. Stat. 973.055. *Id*.

The trial court excluded this other act for similar reasons why it excluded Act 1, remoteness in time, the level of violence, and the necessity for proving the State's case. A-AP 25:10-13. Again, the circuit failed to consider the legislative directive in Wis. Stat. 904.04(2)(b) and the greater latitude standard required by *Dorsey*.

The third other act occurred on March 30, 2019 when Clucas was referred over for a charge of Disorderly Conduct as a domestic incident. A-AP 61-64. Clucas and K.C., his wife, had an argument and Clucas pushed her and twisted her arm while she was holding their one and a half year old daughter in her arms. A-AP 62. This case was ultimately not charged. A-AP 64.

The trial court excluded this other act because it believed it was not relevant, would be confusing to the jury about the issues, and the prejudicial impact would outweigh the probative value. A-AP 23-24:20-25, 1-12. Again, the circuit failed to

consider the legislative directive in Wis. Stat. 904.04(2)(b) and the greater latitude standard required by *Dorsey*.

The fourth other act occurred on June 23, 2020 in 20CM180. A-AP 65-67. K.C. and Clucas had an argument and Clucas got in her face to try and intimidate her, prevented K.C. from locking herself in the bathroom or bedroom, and prevented K.C. from pushing passed him to escape. A-AP 66.. Clucas repeatedly insulted K.C. and threw a nearly full bottle of water at K.C., hitting her in the collarbone and nearly hitting their 7 month old daughter. *Id*.

Clucas was charged with Disorderly Conduct as Domestic Abuse. A-AP 65.

Clucas pled no contest on October 5, 2021 to a charge of Disorderly Conduct subject to Domestic Abuse Assessments. A-AP 68. The charge of Disorderly Conduct was subject to the Domestic Abuse surcharge under Wis. Stat. 973.055. *Id*.

The trial court admitted this evidence at trial. A-AP 23:18-19.

In its ruling, the trial court said "If circumstances change during the trial, the State may renew the motion. However, the State would need to have witnesses with personal knowledge of these incidents if they want to bring it in." A-AP 25:20-23.

The State's motion sought to bring these four other acts in as evidence at trial for the purposes of establishing a pattern of behavior, buttress the credibility of the victim, Clucas' intent or motive, and absence of mistake or accident. A-AP 28, 36-37.

The trial court did not at any point make a determination that Clucas' fundamental due process rights would have been violated by admission of the first three other acts evidence when it excluded the evidence of the other acts. Nor did the trial court did consider the legislative directive set forth in Wis. Stat. 904.04(2)(b) or the greater latitude standard required by *Dorsey*.

The Court signed a written order[1] on June 8, 2022 and the State filed its Notice of Appeal that same day after the written order was signed. A-AP 81.

The State is contesting the trial court's ruling only as to the first three other acts that were denied and not the fourth other act which has been granted. The State is also contesting the court's ruling limiting the methods of presenting the other acts evidence to the jury by requiring individuals with personal knowledge be present at trial.

STANDARD OF REVIEW

[1] There is a typo in the written order stating the Motion Hearing took place on May 25, 2022 when it actually occurred May 19, 2022. All other details in the order are accurate.

The facts of the other acts are not in dispute, the error occurred due to the trial court's incorrect interpretation of the statute and statutory interpretation presents a question of law that is reviewed *de novo*. *State v. McReynolds*, 2022 WI App 25, ¶ 56, 402 Wis. 2d 175, 210 (citing *State v. Grady*, 2007 WI 81, ¶ 14, 302 Wis. 2d 80, 89).

ARGUMENT

I. The trial court erred when it failed to properly apply Wis. Stat. 904.04(2)(b) by failing to show proper deference to the Legislative directive that other acts evidence involving domestic abuse or subject to the domestic abuse surcharge "is admissible" in domestic abuse cases.

A. The Wisconsin Legislature has the power to adopt evidentiary rules with directory statutes.

In *State v. James*, the Wisconsin Court of Appeals ruled that procedures dictating admissibility and presentation of evidence when such procedures are *defined by the legislature* are binding on trial courts because it "falls within the vast region of shared power between the judiciary and the legislature." 2005 WI App 188 ¶ 19, 285 Wis.2d 783.

The evidence at issue in *James* was admissibility of the video interviews of the child victims of sexual assault by the defendant in lieu of full direct examination of the child victims under Wis. Stat. 908.08. *James*, 2005 WI App 188 ¶ 3. The children would also be made available for cross examination by the defense. *Id*.

The trial court in *James* held a hearing and determined that live testimony from the child victims would have to come prior to playing of the video interviews contrary to Wis. Stat. 908.08(5) which required presentation of the video interviews prior to any live testimony on direct or cross examination. The basis for the court's ruling was a concern that the child victims would freeze during cross examination after the videos had already been played for the jury causing confrontation clause violation under *Crawford* after the court would be required to strike the testimony of the child victims for refusing to testify on cross examination or possibly cause a mistrial. *James*, 2005 WI App 188 ¶ 4 (citing *Crawford v. Washington*, 541 US 36 (2004)). The additional basis for the trial court's decision was rooted in Wis. Stats. 908.08(3)(e), 904.03, and 906.11. *Id*. at ¶ 4-5.

Wis. Stat. 908.08(3)(e) requires a court determine whether the statements on the video interviews would "deprive any party of a fair opportunity to meet the allegations made in the statements" and the court decided that it would be unable to make that determination until meaningful cross examination had taken place at trial. *Id*. at ¶ 5.

The trial court in *James* cited to Wis. Stats. 904.03 and 906.11 which permit judges to control the receipt of evidence expressing concerns about whether the legislature had the power to direct the courts to admit evidence and ultimately ruled that the court had full control over the receipt of evidence. *Id*. at ¶ 6-7.

The Wisconsin Court of Appeals disagreed and concluded the trial court wrongly believed the Legislature had "improperly usurped the court's authority." *Id*. at ¶ 14.

The Court of Appeals explained, "the order of evidence prescribed in the statute furthers the *protective purpose* of the statute and therefore *legitimately qualifies* as an exercise of legislative power to regulate the welfare of the public." *Id*. at ¶ 19, (emphasis added). Further the Court stated, "no one questions the judiciary may legitimately rule on the admissibility of evidence at trial and control the order and presentation of evidence." *Id*. at ¶ 20, (citations omitted). "Courts have inherent authority over their internal operations and to ensure the fair and efficient administration of justice." *Id*, (citation omitted). Further, the Court of Appeals ruled that the statute at issue in *James*, 908.08, fell "within the vast region of shared power between the judiciary and the legislature." *Id*.

Additionally, the Court of Appeals in *James* held "Wis. Stat. 908.08 does not impermissibly interfere with the functioning of the judiciary and constitutes an appropriate exercise of shared judicial and legislative power. First, the essential function of the courts involves deciding controversies on their merits." *Id*. at ¶ 20, (citation omitted). " Although the statute *requires the court to admit* the videotapes once the court has satisfied itself that certain prerequisites have been met and deprives the court of the right to control the order in which this evidence is to be taken, it in no way fetters the fact finder's consideration of the evidence presented. The statute does not determine the result of any case before the court and therefore leaves the judiciary's authority fully intact with respect to its most important function." *Id*, (emphasis added).

Finally, the Court of Appeals contrasted a law categorically *excluding* evidence with the law at issue in *James* which categorically *admitted* evidence and found that requiring admission of evidence is no more intrusive on the authority of the court than requiring exclusion of evidence. *Id*. at ¶ 21, See *State v. Mitchell*, 144 Wis. 2d 596, 618, 424 N.W.2d 698 (1988); See also *Smith v. Rural Mut. Ins. Co.*, 20 Wis. 2d 592, 600, 123 N.W.2d 496 (1963).

Additionally, the Wisconsin State Legislature has in the past enacted valid legislation that determined the admissibility of evidence. In 2011 the Wisconsin Legislature amended Wis. Stat. 907.02 to adopt the *Daubert* standard which determines the admissibility of expert testimony at trial. *See* Wis. Stat. 907.02(1); See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This is *after* the Wisconsin Supreme Court declined to adopt the *Daubert* standard in

2010, determining at the time Wisconsin's old relevancy standard remained the controlling standard. *State v. Fischer*, 2010 WI 6, 322 Wis.2d 265.

These examples show that the Wisconsin Legislature has the power to direct the courts to admit evidence at trial by statute without infringing on the authority of the courts with directory statutes. *James*, 2005 WI App 188 ¶ 20.

B. A directory statute is not unconstitutional unless it violates the defendant's right to fundamental due process as applied in the case at hand.

In *State v. Pulizzano*, the Wisconsin Supreme Court determined that the statute that prohibited the sexual history of victims from being presented at trial was not *per se* unconstitutional, however as applied it violated the defendant's constitutional right to present a defense. 456 N.W. 325, 155 Wis.2d 633 (1990).

The evidence at issue in *Pulizzano* was the admissibility of a child victim's previous sexual assault for a limited purpose of providing an alternative basis for the child victim's sexual knowledge other than the defendant. *Pulizzano*, 155 Wis.2d 633, 638-39.

Wis. Stat. 972.11(2)(b) states "If the defendant is accused of a crime under s. 940.225… if the court finds that the crime was sexually motivated… any evidence concerning the complaining witness's prior sexual conduct… shall not be admitted into evidence during the course of the hearing or trial …."

The trial court in *Pulizzano* denied the defendant the right to cross examine the child victim regarding a prior sexual assault that the child victim suffered for the limited purpose of establishing an alternative source for the child victim's sexual knowledge. *Pulizzano* 155 Wis.2d 633, 640. To support this argument the defendant presented a report from a therapist who had spoken with the child victim and treated him regarding a previous sexual assault the child victim suffered. *Id*. at 639. The defendant also requested the therapist be permitted to testify at trial, which the trial court denied. *Id*. at 648. The basis for the trial court's denial was its interpretation of Wis. Stat. 972.11(2)(b) which the trial court believed prohibited presentation of evidence of a victim's sexual history regardless of the reason for it being offered. *Id*. at 640.

The Wisconsin Supreme Court ruled the statute was constitutional on its face, but that, as applied, Wis. Stat. 972.11(2)(b) violated the defendant's rights to the compulsory process, effective cross examination, right to present a defense, and her rights of confrontation under the Wisconsin Constitution and United States Constitution. *Id*. at 648-49, 655.

The Wisconsin Supreme Court stated that determinations as to the potential unconstitutionality of the law "as applied in other instances is to be resolved on a case-by-case basis." *Id*. at 655.

The United States Supreme Court has also ruled on the applicability of evidence rules when a defendant's Constitutional rights are in conflict with otherwise permissible evidence rules.

In *Chambers v. Mississippi*, the State of Mississippi's voucher rule and hearsay rules prevented the defendant from properly examining a witness who had confessed to the murder for which Chambers had been charged and prohibited the defendant from calling witnesses who had information relating to those confessions. 410 U.S. 284 (1973).

The trial court in *Chambers* limited the ability of the defendant to examine the witness on direct and denied the right of the defendant to cross-examine the witness who had confessed to the crime the defendant was charged with. *Id*. at 294. The trial court made these decisions based on Mississippi's voucher rule and its rules regarding hearsay. *Id*.

The voucher rule was a common law rule in Mississippi where a party who calls a witness "vouches for his credibility" and thus was bound by what that witness may say. *Id*. at 295-97; See *Clark v. Lansford*, 191 So. 2d 123, 125 (Miss. 1966). This limited the defendant's ability to have the witness answer on direct and prohibited the defendant from cross-examining his own witness to counter the witness' repudiation of his confession to the murder the defendant was charged with. *Id*. at 296-97.

Additionally, because of Mississippi's hearsay rules the defendant was prohibited from calling witnesses that had heard confessions from the other witness to counter the testimony that had been presented involving the other witness' repudiation of his prior confessions. *Id*. at 298.

The United States Supreme Court determined that excluding evidence so integral to the defendant's right to present a defense denied him his right to due process. *Id*. at 302.

The rulings from the United States Supreme Court and the Wisconsin Supreme Court show that a directory statute regarding the admissibility of evidence at trial is only unconstitutional if the statute, as applied, would interfere with fundamental due process rights of the defendant.

C. Admission of other acts evidence under Wis. Stat. 904.04(2)(b) does not violate a defendant's rights to fundamental due process.

The United States Supreme Court ruled in *Dowling v. U.S.* that admission of other acts evidence does not violate a defendant's right to due process. 493 U.S. 342 (1990).

In *Dowling*, the issue was, under the Federal Rule of Evidence 404(b)2, whether the trial court properly permitted a witness to testify that she had identified the

defendant as the perpetrator of another similar act even though the defendant was acquitted in that case. *Id*. at 344.

404(b)2 states that other acts evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

In *Dowling*, the defendant was on trial for a bank robbery that had been committed by an individual wearing a ski mask and carrying a small pistol. *Id*. The witness testified that an individual matching that description had also broken into her home two weeks after the bank robbery and she had ripped off his mask during the incident, allowing her to identify him. *Id*. at 344-45. The defendant was acquitted in the case against the witness, but the witness' identification of the defendant matched the description of the bank robbery suspect and also linked the defendant to a suspected co-conspirator in the bank robbery and so the Government used it in the bank robbery trial to further strengthen its case against the defendant. *Id*. at 345-46.

The Supreme Court ultimately ruled that the introduction of the evidence did not violate the due process test of 'fundamental fairness.' *Id*. at 353. The Supreme Court stated that in order for introduction of other acts evidence to violate the defendant's due process rights to fundamental fairness it must be "so extremely unfair that its admission violates the 'fundamental conceptions of justice'" which are defined as being at the "base of our civil and political institutions" and defined by the "community's sense of fair play and decency." *Dowling*, 493 U.S. 342 at 352-53 (citing U.S. v. Lovasco, 431 U.S. 783, 790 (1977); *Mooney v. Holohan*, 2974 U.S. 103, 170 (1952); *Rochin v. California*, 342 US 165, 173 (1952)).

As such the Supreme Court upheld the trial court's decision admitting other acts evidence in *Dowling* because such admission did not violate any of the defendant's due process rights.

The Wisconsin Court of Appeals applied the ruling in *Dowling* in *State v. Gee* when it ruled that Wis. Stat. 904.04(2)(b) was similar to the Federal Rules of Evidence utilized in *Dowling* and due to the Due Process Clause in both the United States Constitution and the Wisconsin Constitution being read similarly the Court determined that *Dowling* controlled. 388 Wis.2d 68 ¶ 35, 931 N.W.2d 287 (2019) (citing *State v. Hezzie R.*, 219 Wis.2d 848, 891, 580 N.W.2d 660 (1998).

In *Gee*, the issue was whether the defendant's rape conviction from 1996 would be permitted to come in at trial under Wis. Stat. 904.04(2)(b)2 which 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) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith." *Gee*, 388 Wis.2d 68 ¶ 11.

The trial court in *Gee* determined that the State would be permitted to bring in the evidence of the defendant's prior conviction in its rebuttal if the defendant testified and that 904.04(2)(b) was constitutional after a thorough analysis of case law from Wisconsin, other States, and the United States Supreme Court. *Id*. at ¶ 12.

After his conviction, the defendant appealed and the Wisconsin Court of Appeals ultimately upheld his conviction. *Id*. at ¶ 47. In doing so, the Court noted Wisconsin has a long common law tradition of applying relaxed standards to the admissibility of other acts evidence in certain sexual assault cases. *Id*. at ¶ 26 (citing *Proper v. State* 85 Wis. 615, 930, 55 N.W. 1035 (1893)). It further noted that the greater latitude rule is codified in Wis. Stat. 904.04(2)b and cited to *Dorsey* describing the rule as "operating to 'facilitate[] the admissibility of… other acts evidence'" when prosecuting certain types of crimes. *Gee*, 388 Wis.2d 68 ¶ 26 (citing *Dorsey*, 379 Wis.2d 386 ¶ 33).

The Court determined that, upon looking at Wisconsin's long tradition of admitting other acts evidence in certain types of cases, it could not conclude that the admission of other acts evidence under 904.04(2)b2 was "so extremely unfair that its admission violates 'fundamental conceptions of justice.'" *Id*. at ¶ 36 (citing *Dowling*, 493 U.S. at 352, 11 S.Ct. 668 (citation omitted)).

The Wisconsin Legislature deliberately included domestic violence offenses alongside serious sex offenses in Wis. Stat. 904.04(2)(b), indicating the Legislature intended other acts involving both types of offenses be treated similarly. "When interpreting provisions within the same statute, [the courts] favor constructions that harmonize them and that do not lead to absurd results." *James*, 2005 WI App 188 ¶ 24 (citing *Wisconsin Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 6, 270 Wis. 2d 318 ("The language of a statute is read in the context in which it appears in relation to the entire statute so as to avoid an absurd result.")).

Based on the ruling in *Gee*, admission of the other acts evidence against Clucas would not have violated any "fundamental conceptions of justice" and should have been deemed admissible under Wis. Stat. 904.04(2)(b)1. 388 Wis.2d 68 ¶ 36 (citing *Dowling*, 493 U.S. at 352, 11 S.Ct. 668 (citation omitted)).

D. Wis. Stat. 904.04(2)(b)1 is a directory statute from the Legislature and is not unconstitutional as applied in the present case.

Wis. Stat. 904.04(2)(b)1 states, "In a criminal proceeding alleging… domestic abuse, as defined in s. 968.075(1)(a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused *is admissible* and is admissible without regard whether the victim of the crime that is the subject of the proceeding is the same as the victim in the similar act." (emphasis added).

The present charge of Disorderly Conduct in the case on appeal is both domestic abuse as defined by Wis. Stat. 968.075(1)(a) and subject to the domestic abuse surcharge defined in Wis. Stat. 973.055. A-AP 1, 42. The other acts referenced in the State's motion include charges that are domestic abuse or subject to the surcharge as referenced in the statute. A-AP 30-33; 48-69.

Under *State ex rel. Kalal v. Circuit Court*, the language in a statute "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." 2004 WI 58 ¶ 45, (citations omitted). "If the meaning of the statute is plain, [the Court would] ordinarily stop the inquiry." *Id*., (citations omitted).

The language in Wis. Stat. 904.04(2)(b)1 plainly states the intent of the Legislature that the evidence of other similar acts involving domestic abuse "is admissible" in cases involving domestic abuse when both the prior acts and current case involve the same defendant even if they do not involve the same victim.

Here, the trial court paid no deference to this legislative directive when evaluating the other acts evidence. Essentially, the trial court's analysis was conducted as though Wis. Stat. 904.04(2)(b)1 had never been enacted. The trial court did not explain how admission of acts one through three would violate Clucas' fundamental due process rights. Furthermore, an independent review of the record does not provide any basis for the trial court's decision to, apparently, discount the Legislative directive that this evidence "is admissible."

In the present case, none of Clucas' fundamental due process rights would be violated. The methods the State proposed to prove the other acts referenced in its motion include testimony from K.C. and presentation of the criminal complaint and judgment of conviction for the fourth other act. A-AP 39-40. The victim would be available for cross examination as to the third other act which was not charged out criminally and the criminal complaint and judgment of conviction can be presented to the jury because they are matters of public record as well as self-authenticating and thus exceptions to the hearsay rule. *Id*; Wis. Stat. 908.03(8). Further, Clucas' guilty pleas in two of the other acts constitute an admission by a party opponent of the facts within the complaint supporting the charges to which he plead guilty. Wis. Stat. 908.01(4)(b)2

Furthermore, the State proposed that the court provide the jury with a cautionary instruction related to other acts evidence and juries are presumed to follow the orders of the court. A-AP 38; See Jury Instruction 275. With these methods and the proposed cautionary instruction, none of Clucas' fundamental due process rights would be violated to the degree that Wis. Stat. 904.04(2)(b)1 would be unconstitutional as applied in this case.

E. The trial court failed to properly apply a greater latitude standard when evaluating the State's motion to admit other acts under Wis. Stat. 904.04(2)(b).

In *State v. Dorsey*, the Wisconsin Supreme Court ruled that, when determining admissibility of other acts evidence under Wis. Stat. 904.04(2)(b)1, the trial court must adhere to a greater latitude standard across *all* aspects of a *Sullivan* analysis. 2018 WI 10, ¶58, 379 Wis.2d 386.

In *Dorsey*, the primary issue was whether the trial court properly granted the State's motion to present other acts evidence at trial under the, at the time, newly enacted Wis. Stat. 904.04(2)(b)1. The trial court ruled the language in Wis. Stat. 904.04(2)(b)1 "provid[es] greater latitude… similar… to the serious sex offense business and making it available more to be able to be used in the case in chief than [the court] would provide." *Id*. at ¶ 10. The trial court then ruled that the evidence was admissible and that "the probative value was not substantially outweighed by the danger of unfair prejudice" because "a *cautionary instruction* would ensure that this information goes 'only to evaluate the defendant's motive and intent.'" *Id*. at ¶ 11 (emphasis added).

The Wisconsin Supreme Court upheld the trial court's ruling because it determined that Wis. Stat. 904.04(2)(b) "permits trial courts to admit evidence of other, similar acts of domestic abuse with greater latitude… under *Sullivan,* because it is the most reasonable interpretation in light of the context and purpose of the statute. *Id*. at ¶¶ 35, 58. The Wisconsin Supreme Court then proceeded to conduct a *Sullivan* analysis of its own using the record from the trial court.

The Supreme Court then found, with regard to the first prong of proper purpose, the State had met its burden because the purposes of motive and intent were appropriate under the statute. *Id*. at ¶ 42 (referencing *State v. Payano*, 2009 WI 86, ¶ 63, 320 Wis. 2d 348 (citing Wis. Stat. § 904.04(2) (2007-08)) ("As long as the proponent identifies one acceptable purpose for admission of the evidence that is not related to the forbidden character inference, the first step is satisfied. Consequently, this first step is hardly demanding." (Footnote omitted.) (Citations omitted.)). Furthermore, the Supreme Court incorporated the ruling in *State v. Marinez* that "permissible purposes under *Sullivan* are not limited to those listed in the statute or to those recognized in previous cases" in its citation. *Dorsey*, 2018 WI 10, ¶ 42.

The Supreme Court then moved onto the second prong to determine relevancy of the other acts to the permissible purposes. *Id*. at ¶ 44. The Supreme Court ultimately agreed with the analysis by the trial court stating, "[w]hether other-acts evidence has probative value asks whether the other acts are similar, that is, whether they are near "in time, place, and circumstance[,] to the alleged crime or to the fact or proposition sought to be proved." *Id*. at ¶ 49, (citing *Sullivan*, 216 Wis. 2d at 786,

(citation omitted)). The Wisconsin Supreme Court pointed out in *Dorsey* how the *defendant's behavior* where he became violent in response to feeling like he was being disrespected or lied to was proof that the other acts evidence had probative value and were relevant. *Dorsey*, 2018 WI 10, ¶ 49.

The Supreme Court completed its analysis by evaluating the third step, whether the probative value was substantially outweighed by the risk of unfair prejudice. *Id*. at ¶ 52. The Supreme Court again agreed with the analysis conducted by the trial court noting that the defendant didn't meet his burden to show that there was a substantial risk of unfair prejudice outweighing the probative value. *Id*. at ¶ 56.

Importantly, the Supreme Court pointed out that the trial court's inclusion of a cautionary instruction to the jury relating to the other acts evidence minimized any risk of prejudice because juries are presumed to follow the instructions of the court. *Id*. at ¶ 55, (citing *State v. Marinez*, 331 Wis. 2d 568, 604 (Wis. 2011)).

In the present case, the trial court failed to properly apply *Dorsey* during its analysis of the other acts evidence. With regard to Act 1, the trial court improperly considered the timing of the other acts in relation to the present case, the level of violence in those other acts, and whether the other acts were necessary to prove the State's case. A-AP 24:13-23. Additionally, the trial court only considered *one* of the State's purposes for the admission of other acts evidence when it determined because the present case was just "a disorderly conduct charge" and so the other acts probative value was substantially outweighed *in showing a motive*. A-AP 25:4-9. The trial court ruled on Act 2 for similar reasons. A-AP 24:10-13. With regard to Act 3, the trial court deemed the incident where Clucas grabbed the victim's arm during a domestic dispute not relevant and that "the prejudicial impact exceeds the probative value" and refused to permit the State to present this other acts evidence. A-AP 23-24:20-25, 1-12.

This ruling was incorrect for a variety of reasons. First, with regard to Act 3, while it had not been charged, the incident falls within the purview of Wis. Stat. 904.04(2)(b)1 because it is a "similar act" of domestic abuse by the same defendant and thus *is admissible* by direction of the Legislature unless *Clucas* could prove that the risk of prejudice was so substantial it outweighed the probative value. A-AP 23-24:20-25, 1-12, *Dorsey*, 2018 WI 10, ¶ 52. Next, with regard to Acts 1 and 2, the trial court impermissibly considered the timing of the other acts, the necessity of those other acts in proving the State's case, the level of violence of those other acts in relation to the present case, the fact those previous acts involved a different girlfriend, and only addressed one of the multitude of purposes the State argued for presenting the other acts evidence at trial. A-AP 24:13-23; 25:4-13.

The State had shown that the evidence was admissible under Wis. Stat. 904.04(2)(b)1 because each of the other acts was an incident of domestic abuse that was similar to the charged offense. A-AP 48-69. The burden was then on *Clucas* to

show that these other acts were so prejudicial that admitting them *substantially* outweighed the probative value. Defense counsel failed to meet that burden.

In the present case, the State presented sufficient evidence for a reasonable jury to find, by a preponderance of the evidence, that Clucas committed every other act the State sought to present at trial. A-AP 30-33; 48-69. Each other act was, or would be, either domestic abuse as defined by statute or subject to the domestic abuse surcharge. *Id*. The evidence was offered for multiple proper purposes. A-AP 36-37.

In its motion, the State detailed each incident regarding how Clucas violently lashed out at a domestic partner when he felt the relationship was failing. A-AP 30-33, 36. The other acts evidence the State sought to admit was specifically sought due to the similarities of the incidents to the present case. A-AP 36-37.

The trial court failed to show proper deference to the legislative directive in its decision when it failed to properly apply Wis. Stat. 904.04(2)(b)1 to the other acts evidence the State outlined in its motion. A-AP 24-25.

In the present case, Defense counsel made arguments that virtually mirrored the defendant's in *Dorsey*. Defense counsel argued that buttressing the credibility of the victim was an improper purpose, so did the defendant in *Dorsey*. A-AP 18:6-8, *Dorsey* 2018 WI 10, ¶ 52. Defense counsel also argued that presenting these other acts would cause confusion for the jury, so did the defendant in *Dorsey*. A-AP 17:19-25; *Dorsey* 2018 WI 10, ¶ 52.

Defense counsel made additional arguments relating to the remoteness and time and age of Clucas in the present compared to when the other acts occurred. A-AP 19:18-22.

The trial court and Wisconsin Supreme Court in *Dorsey* found the arguments relating to confusion of the jury and improperly buttressing the credibility of the victim unpersuasive. *Dorsey*, 2018 WI 10, ¶¶ 55-56. The remoteness in time of the other acts is not a relevant factor, and Defense counsel's argument regarding Clucas' age is singularly unpersuasive because by definition other acts almost exclusively happen when a defendant is younger than they are in the present case. See *State v. Hurley*, 2015 WI 35, 361 Wis. 2d 529 (stating "events that are dissimilar or that do not occur near in time may still be relevant to one another." (citation omitted)); See also *State v. Mink*, 146 Wis.2d 1, 16, 429 N.W.2d 99 (Ct.App.1988) (where other acts from between thirteen and twenty-two years were found admissible).

The behavior of Clucas which the State sought to admit was similar in each of the other acts because, just as he did in the present case, he reacted violently and abusively to signs of his current relationship failing and that he was losing control over his domestic partner. A-AP 48-69. It was for these similarities that the State sought to have this evidence admitted. A-AP 36-37. The trial court even declared,

with regard to Act 2, that the facts were similar. A-AP 25:16. Due to these similarities in Clucas' behavior in the other acts and the present case, the remoteness in time is not a relevant factor the trial court should have considered.

Defense counsel made further arguments that the State's proposed methods of presenting the other acts evidence was insufficient. A-AP 17:1-6.

This is legally inaccurate because the criminal complaints and guilty pleas contained in the judgments of conviction are permissible methods of presenting other acts evidence. Wis. Stat. 908.03(8). Furthermore, because Clucas pled *guilty* in the previous convictions, he adopted the facts outlined in the criminal complaint and thus those become statements of a party opponent by the rule of adoptive admission. Wis. Stat. 908.01(4)(b)2. The victim in the present case is the same victim as in Act 3 and she would be available for cross examination at trial. All of these methods are sufficient to prove other acts at trial.

The present case is distinguishable from *Dorsey* in two ways. First, the issue in the present case is a *denial* on a State's motion to admit other acts evidence when Wis. Stat. 904.04(2)(b) otherwise declares the other acts admissible.

And second, the trial court *failed* to show proper deference to the Legislative directive that the evidence the State sought to admit was admissible by statute when it failed to determine that any of Clucas' fundamental due process rights would have been violated. Finally, a cautionary instruction from the trial court would minimize the risk of the prejudicial impact the presentation of these other acts would provide. *Dorsey*, 2018 WI 10, ¶ 55.

The State proved that the other acts evidence was admissible under Wis. Stat. 904.04(2)(b)1 in its motion and at the motion hearing. Defense counsel then failed to meet the burden to show that the other acts evidence being admitted at trial would violate any of Clucas' fundamental due process rights. The trial court erred by denying the State's motion as to the first three other acts.

II. The trial court erred when it ruled that the State needs to have witnesses with personal knowledge of events to present other acts evidence at trial.

A. The State does not need witnesses with personal knowledge to present other acts evidence.

In its ruling, the trial court said "If circumstances change during the trial, the State may renew the motion. However, the State would need to have witnesses with personal knowledge of these incidents if they want to bring it in." A-AP 25:20-23.

In *Huddleston v. U.S.*, the United States Supreme Court ruled that in order to prove other acts under the Federal Rules of Evidence 404(b), the Government need only provide enough evidence so that the "jury can reasonably conclude that the act

occurred and that the defendant was the actor." *Huddleston v. U.S.*, 485 U.S. 681 (1988). And it is proper to read Wis. Stat. 904.04(2)(b) as requiring the same as the Federal Rules of Evidence 404(b). *State v. Hezzie R.*, 219 Wis.2d 848, 891, 580 N.W.2d 660 (1998).

In its motion and argument, the State's primary method of presenting the other acts evidence is criminal complaints and judgments of conviction containing guilty pleas by Clucas for the first two other acts and testimony from the victim in the present case as to the latter two because those both involved her as the victim. A-AP 39-40. This would be sufficient under *Huddleston* because each of these methods proves Clucas committed these other acts to the degree that a reasonable jury could find "these other acts occurred and that the defendant committed them." *Huddleston v. U.S.*, 485 U.S. 681 (1988).

Should the Court overturn the trial court's ruling, the State would renew its motion in regard to the presentation of the other acts evidence at trial and ask that the State not be required to have witnesses with personal knowledge to present the other acts evidence.

CONCLUSION

It is for the reasons and argument stated above that the State respectfully requests the Court of Appeals overturn the trial court's decision denying the State the chance to present the first three other acts as evidence at trial and permit the State to introduce its evidence through documentation without requiring witnesses with personal knowledge.

Dated this 12th day of September, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8359 words.

Dated this 12th day of September, 2022.

Electronically signed by:
Andy Mutchler
Assistant District Attorney
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of September, 2022.

Electronically signed by:
Andy Mutchler
Assistant District Attorney
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with the content requirements of Wis. Stat. § 809.19(2)(b); which contains at a minimum, a table of contents, the findings or opinion of the trial court, a copy of any unpublished opinion cited under § 809.23, and portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in this appendix are reproduced using first names and last initials or first and last initials instead of full names of persons, specifically including juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record[2].

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of September, 2022.

Electronically signed by:
Andy Mutchler
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INDEX TO APPENDIX

[2] In the Appendix victim names have been redacted in accordance with victim rights under Marsy's Law on A-AP 2-3, 11, 43-46, 49-51, 55, 57-58, 62-63, 66-67. Names of Minors have been redacted on A-AP 45, 62.