STATE OF WISCONSIN

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

DISTRICT III

Case No. 2022AP1718-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KENNETH W. HILL,

Defendant-Respondent.

APPEAL FROM AN ORDER DENYING THE STATE'S MOTION TO ADMIT OTHER ACT EVIDENCE ENTERED IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, THE HONORABLE GEORGE L. GLONEK PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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INTRODUCTION

The State charged Kenneth W. Hill with sexually assaulting his young granddaughter in 2020. It moved to admit Hill's 1984 conviction for first-degree sexual assault of a young child to show his propensity for sexually assaulting children, as permitted by Wis. Stat. § 904.04(2)(b)2.

In 2006, the legislature created this avenue for the admission of such a conviction as propensity evidence—"evidence of the person's character in order to show that [he] acted in conformity therewith"—if the prior crime "was similar to the alleged violation." When the legislature codified in 2014 the century-old greater latitude rule for admissibility of like occurrences in child sexual abuse cases, it included the new propensity exception under the greater latitude umbrella. The creation of sub. (2)(b)2. represented a seismic shift, eliminating the prohibition against propensity evidence in this category of cases. Until then evidence of such a prior conviction was permitted *only* if the State first established a non-propensity purpose for it under the *Sullivan*[1] test.

The circuit court barred the prior conviction because it was not "similar to the alleged violation" and because it did not meet the test for non-propensity other acts evidence set out in *Sullivan*. The circuit court's decision does not comport with legal principles in statute and case law for admitting evidence in child sexual assault cases because: (1) it completely failed to apply the greater latitude rule to its sub. (2)(b)2. "similar" analysis; (2) it applied the *Sullivan* test for Wis. Stat. § 904.04(2)(a) evidence to section 904.04(2)(b)2. evidence; and (3) it failed to use the correct legal standard for its Wis. Stat. § 904.02 relevance and Wis. Stat. § 904.03 prejudice analyses.

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[1] *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998).

ISSUES PRESENTED

1. The circuit court's sub. (2)(b)2. analysis:

(a) Did the circuit court, in failing to apply the greater latitude rule, apply an incorrect standard of law to its analysis of whether the 1984 conviction was "similar to the alleged violation" for purposes of admissibility under 904.04(2)(b)2.?

This Court should answer yes.

(b) Did the circuit court apply an incorrect standard of law when it applied *Sullivan*'s test for non-propensity other act evidence offered under sub. (2)(a)[2] to propensity evidence offered under sub. (2)(b)2.?

This Court should answer yes.

2. Did the circuit court apply an incorrect standard of law to its analysis of whether the evidence should be excluded under sections 904.02 and 904.03 on the grounds that it was not relevant and that its probative value was substantially outweighed by the danger of unfair prejudice?

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument.

Publication is warranted because there is no published guidance on the proper analysis to apply to admissibility questions about prior convictions offered under Wis. Stat. § 904.04(2)(b)2. as propensity evidence. The question is one of great significance in child sexual assault prosecutions across the state. In *Gee*,[3] this Court stated that there was "no legal

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[2] *Sullivan*, 216 Wis. 2d at 772–73.

[3] *State v. Gee*, 2019 WI App 31, ¶ 43 & n.3, 388 Wis. 2d 68, 931 N.W.2d 287.

authority" for the proposition that "other acts evidence sought to be admitted under Wis. Stat. § 904.04(2)(b)2. is subject to the *Sullivan* test" that states the test for non-propensity other act evidence. But *Gee* did not present the question, and the court did not reach it. Thus, the question remains undecided.

STATEMENT OF THE CASE

The State charged Hill with first-degree sexual assault of a child.

The State charged Hill with first-degree sexual assault for digitally penetrating his granddaughter's vagina. (R. 2:1–2.) The granddaughter disclosed that Hill had sexually assaulted her in this manner "pretty much every time" she visited his house over a period of about a year starting in 2020, when she was 12. (R. 2:2.) The sexual abuse occurred from 2020 to 2021. (R. 65:2–3.)

The State moved to admit evidence of Hill's prior first-degree child sexual assault conviction.

At a pretrial hearing, the State moved to admit proof of Hill's 1984 Minnesota conviction for first-degree criminal sexual assault, with penetration, of an 11-year-old child. (R. 68; 69.) In the Minnesota case, Hill was convicted for having "put both his finger and his penis inside [the victim's] vagina." (R. 68:1.) "This child was a babysitter at a residence next door to where Hill was attending a party. The victim said that Hill called her by name when he assaulted her, indicating that he knew her." (R. 65:2–3.)

The State sought to introduce the conviction as evidence of Hill's character "in order to show that [Hill] acted in conformity therewith," as permitted by Wis. Stat. § 904.04(2)(b)2. (R. 89:19–20.) The State argued that under section 904.04(2)(b)2., "this is a similar violation and it is admissible as evidence of the person's character." (R. 89:21.)

The State argued that requirements of sub. (2)(b)2. were met.[4] The State noted that Hill had been convicted of an offense "comparable" to Wis. Stat. § 948.02(1) in another jurisdiction, Minnesota. (R. 65:1.) The State also argued that the conviction is "similar" to the charged offense. (R. 65:1.) The State argued that the permissible purpose step was satisfied by "the plain language of 904.04(2)(b)2." (R. 65:1–2.)

The State identified similarities between the sexual assaults of the two victims: "Hill's 1984 conviction was for forcible penetration of an 11 year old's vagina with both his finger and his penis. . . . Hill's granddaughter was 12 when she reported that he was digitally penetrating her vagina when she was at his home. (R. 65:2–3.) With regard to the 1984 conviction, Hill had "also forced his penis into the mouth of the 11 year old." (R. 65:2–3.)

The State noted the similarities between the circumstances of the two sexual assaults. (R. 65:2–3.) He assaulted both children in residences. In the 1984 conviction, he isolated the child victim in a bedroom. (R. 65:2–3.) The only other person present was a three-year-old that the victim was babysitting. (R. 65:2–3.) He similarly isolated his granddaughter from others when he assaulted her. (R. 65:2–3.) The abuse took place on the couch while Hill was watching TV. (R. 65:2–3.) In both instances, Hill threatened or discouraged the victims from seeking help. In the 1984 conviction, Hill "threatened her to keep her from calling out

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[4] 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) 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.

or leaving the room." (R. 65:2–3.) He similarly told his granddaughter "not to tell about the abuse." (R. 65:2.)

The State argued the "1984 conviction . . . [is] highly relevant to the defendant's ongoing and pervasive sexual attraction to children." (R. 65:2–3.) Recognizing "[t]hough some of the circumstances of the 1984 conviction are different, the similarity of the age of the child, the fact that the child was known to the defendant, the vaginal penetration and the fact the child was secluded from others all bears a unique 'brand' for Hill." (R. 65:2–3.)

The State argued in the alternative that the proffered evidence also satisfied the steps of the *Sullivan* test for other act evidence when the greater latitude rule was applied. (R. 65:1.) It argued under this alternative argument that the evidence had other permissible purposes (motive, intent, absence of mistake and modus operandi, and corroboration of the victim's report). (R. 65:2.)

The State argued that the evidence should not be excluded under section 904.03 on the ground of unfair prejudice because the law's "bias . . . is squarely on the side of admissibility" (quoting *State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399), and the evidence "must be admitted" if the prejudice and probative value are close: "[i]f the probative value is close to or equal to its unfair prejudicial effect, the evidence must be admitted" (quoting *State v. Hurley*, 2015 WI 35, ¶¶ 87, 90, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted)). (R. 65:3.)

The State concluded, "It is counter to logic that by persistently sexually offending against 11 and 12 year old girls over a period of 35 years the defendant can just claim that the evidence he has left in his wake is simply 'too prejudicial' for it to be held against him." (R. 65:3.)

Hill argued without citation to authority that a *Sullivan* analysis must be applied to the conviction evidence offered under sub. (2)(b)2.:

> [The 1984 conviction] falls under the *Greater Latitude* provision of other crimes, wrongs, or acts under Wis. Stat. § 904.04(2). *Sub. 1 under the Greater Latitude subsection clearly requires the Court to take into account the Sullivan factors* in making a finding as to whether the other acts evidence should be admissible.

(R. 67:1 (emphasis added).)

Hill further argued that the probative value of the 1984 conviction was diminished by its remoteness in time and by some differences between the incidents:

> In the 1984 Complaint, it is alleged that the defendant forced his penis into the mouth of the victim and that he ejaculated on her chin, neck, and upper chest area. It is also alleged that this happened in front of another child. Moreover, the act was apparently done while the defendant was not in a custodial role for the minor child victim.
>
> To the contrary, the allegations in the case at bar do not involve the defendant utilizing his penis in any manner. There is also no allegation of ejaculation. While it alleged that the defendant touched the victim insider her vagina, *that is apparently the only similarity between the two cases*. Additionally, the victim alleges that this occurred while she was alone with the defendant and while the defendant was in a custodial role for the minor victim.

(R. 67:2 (emphasis added).)

Hill argued that in light of some dissimilarities between the 1984 conviction and the 2021 charge, the probative value of the prior conviction was substantially outweighed by the risk of unfair prejudice, such that the evidence must be excluded. (R. 67:2.)

The circuit court denied the State's motion.

The circuit court issued a written decision and order denying the State's motion. (R. 72:1–9.) The court's decision applied both the statute's test and the *Sullivan* other acts analysis to the propensity evidence offered under sub. (2)(b)2.

Starting with the text of the sub. (2)(b)2. statute, the circuit court agreed with the State that the prior Minnesota conviction was a "comparable" statute in another jurisdiction within the meaning of subsection (2)(b)2. (R. 72:1–2.) The circuit court noted that Hill's 1984 Minnesota conviction was for Criminal Sexual Conduct in the First Degree contrary to Minn. Stat. § 609.342(c). (R. 72:1–2.) It noted that the 1984 Complaint stated that the crime was committed "under circumstances which caused said child to have a reasonable fear of imminent great bodily harm." (R. 72:1.) It noted that Wis. Stat. § 904.04(2)(b)2 "does not require that the offenses be 'identical'; it requires that the offenses be 'comparable.'" (R. 72:2.) The court found that the 1984 Minnesota conviction met this requirement of Wis. Stat. § 904.04(2)(b)2. (R. 72:2.)

The court next considered whether the sub. (2)(b)2. evidence was subject to the *Sullivan* test, as Hill had argued. The circuit court acknowledged that this Court had not answered the question of *Sullivan*'s application to sub. (2)(b)2. in *State v. Gee*. (R. 72:2.) But it then noted that *Mitchell*,[5] a *per curiam* opinion from this Court, subjected sub. (2)(b)2. evidence to the other act analysis set forth in *Sullivan*, and said "[t]herefore" it would do so. (R. 72:2.)

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[5] *State v. Mitchell*, No. 2021AP606-CR, 2022 WL 2443307, ¶ 13 (Wis. Ct. App. July 6, 2022) (per curiam) (unpublished) (A-App. 19) ("While the *Dorsey* court only addressed subdivision one [of 904.04(2)(b.)], we can apply its reasoning and see that the requirement of permissible purpose still applies to subdivision two, along with the consideration of the greater latitude rule with regard to the admissibility of evidence.").

The court noted that the first question under *Sullivan* is whether the evidence is offered for a permissible purpose. (R. 72:2.) Following *Mitchell*, the court explained that to determine whether evidence offered under subsection (2)(b)2. satisfies the permissible purpose requirement, the court must "focus[ ] on the level of 'similarity of the prior conviction and the alleged violation.'" (R. 72:2 (quoting *State v. Mitchell*, No. 2021AP606-CR, 2022 WL 2443307, ¶ 15 (Wis. Ct. App. July 6, 2022) (per curiam) (unpublished) (A-App. 20) .)

The court agreed with the State that there were at least some similarities between the two cases:

- "all incidents involve a child victim (approximately the same age)";
- "all incidents involve unlawful sexual touching and penetration of the victims' vaginas with Defendant's finger"; and
- in both instances, Hill told the victims not to tell anyone about the assaults.

(R. 72:3, 4.)

Nevertheless, the circuit court continued its analysis by pointing to "the collective factual dissimilarities" between the facts underlying the conviction and the allegations by Victim 1 and finding them "clearly significant, compelling, and strong." (R. 72:4.)

It cited the factual differences as follows:

- Hill was 21 when he assaulted the first victim and was "57/58" when he assaulted the second;
- Hill's first victim was a non-relative and the second was a relative;
- Hill assaulted the first victim in her bedroom and the second in Hill's living room;

- Hill stripped the first victim naked but assaulted the second with her clothes on;
- Hill kissed the first victim all over her body but did not do so with the second victim;
- Hill ejaculated on the face and body of the first victim but did not do so with the second victim; and
- Hill told the first victim not to tell or he would kill her, and he told the second victim not to tell without threatening to kill her.

(R. 72:4–6.)

Based solely on its view of the "dissimilarities" between the 1984 assault and the charged offense, the circuit court concluded that the State had failed to show that the prior conviction "satisfies both the requirements of Wis. Stat. § 904.04(2)(b)2." (R. 72:7.)

The circuit court ruled that the prior conviction was also inadmissible under each of the three-parts of *Sullivan*. (R. 74:7–8.) The court thought it didn't meet "the first prong of the *Sullivan* analysis" because it was dissimilar. (R. 72:6–7.) The circuit court also noted "the remoteness in time of the 1984 incident" as a factor in the conviction's "low probative value." (R. 72:7–8.) The circuit court concluded "the second prong of the *Sullivan* analysis would not be satisfied." (R. 72:8.) The circuit court further concluded that admitting the conviction "would indeed result in unfair prejudice to him" because it would "certainly arouse horror and contempt for Defendant." (R. 72:8–9.)

The circuit court acknowledged that it was required to apply the greater latitude rule. It then stated that "the rule does not mean 'total or absolute latitude.'" (R. 72:6.) It cited no supreme court cases in which the greater latitude rule has been applied to the analysis of a prior conviction for child sexual assault. The State appeals.

STANDARD OF REVIEW

"Whether the circuit court applied the proper legal standards . . . presents a question of law subject to independent appellate review." *Pinczkowski v. Milwaukee Cty.*, 2005 WI 161, ¶ 15, 286 Wis. 2d 339, 706 N.W.2d 642. Although this Court "will uphold a circuit court's evidentiary rulings if it examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach," *id.*, it reviews "*de novo* whether that decision comports with legal principles," *State v. Sarnowksi*, 2005 WI App 48, ¶ 11, 280 Wis. 2d 243, 694 N.W.2d 498. So "[a] trial court's admission or exclusion of evidence is a discretionary decision that [this Court] will sustain if it is consistent with the law," *id.*, but a court that misapplied the law has erroneously exercised its discretion. *State v. Smith*, 203 Wis. 2d 288, 295, 553 N.W.2d 824 (Ct. App. 1996).

ARGUMENT

I. This Court should reverse because the circuit court did not apply a proper standard of law to the sub. (2)(b)2. evidence.

A. The greater latitude rule is so well established that "[i]t would be patently erroneous and usurpative" for a court to ignore it.

In sexual assault cases, admissibility of other acts evidence, regardless of whether it is propensity or non-propensity evidence, is especially favored under the greater latitude rule. 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).

The Wisconsin Supreme Court described the rule by saying that it "is not so much a matter of relaxing the general rule . . . as it is a matter of placing testimony concerning other acts or incidents within one of the well established exceptions to such rule." *Hendrickson v. State*, 61 Wis. 2d 275, 279, 212 N.W.2d 481 (1973). Three of the reasons for applying the rule in child sexual assault cases are: (1) "the difficulty sexually abused children experience in testifying"; (2) "the difficulty prosecutors have in obtaining admissible evidence in such cases"; and (3) "the need to corroborate the victim's testimony against credibility challenges." *State v. Marinez*, 2011 WI 12, ¶ 20 n.15, 331 Wis. 2d 568, 797 N.W.2d 399 (quoting *Davidson*, 236 Wis. 2d 537, ¶¶ 40, 42).

In practice, the greater latitude rule allows for the "more liberal admission of other crimes evidence." *Davidson*, 236 Wis. 2d 537, ¶ 52. In a case involving a sexual assault of a child under 13, evidence offered to show that the defendant assaulted another such child 11 years earlier was admissible even though the supreme court "agree[d] that the other acts evidence in this case was graphic, disturbing, and extremely prejudicial." *State v. Veach*, 2002 WI 110, ¶ 91, 255 Wis. 2d 390, 648 N.W.2d 447. The court nevertheless affirmed the circuit court's decision to admit the evidence, citing the greater latitude rule, because "the evidence also had tremendous probative value." *Id.* It did so despite the fact that it agreed with the defendant that there were "dissimilarities between the incidents," such as that the prior offense was "more intrusive, aggressive, and egregious" than the charged offense. *Id.* ¶ 83 (citation omitted).

The rule is so well established in Wisconsin jurisprudence that "[i]t would be patently erroneous and usurpative for [a lower court] to reexamine the rule of 'greater latitude' and abandon it." *State v. Tabor*, 191 Wis. 2d 482, 486, 529 N.W.2d 915 (Ct. App 1995). "In a sex crime case, the admissibility of other acts evidence must be viewed in light of

the greater latitude rule." *State v. Hammer*, 2000 WI 92, ¶ 23, 236 Wis. 2d 686, 613 N.W.2d 629.

B. Subsection (2)(b) of Wis. Stat. § 904.04 contains provisions for two types of evidence in sexual assault prosecutions: non-propensity and propensity.

The greater latitude rule is codified in Wis. Stat. § 904.04(2)(b), titled "Greater latitude." It contains two subsections.

The first, subsection (2)(b)1., concerns other acts evidence in cases of serious sex offense, domestic abuse, and a crime against a child. It states, "evidence of any similar acts by the accused is admissible." The supreme court has held that section 904.04(2)(b)1. "allows for the admission of other, similar acts of domestic abuse with greater latitude under a *Sullivan* analysis." *State v. Dorsey*, 2018 WI 10, ¶ 26, 379 Wis. 2d 386, 906 N.W.2d 158. *Dorsey* pertained to an act of domestic abuse; the same allowance applies for similar acts of a serious sex offense or crime against a child under the plain language of subsection (2)(b)1.

The second, subsection (2)(b)2.—the provision under which Hill's conviction was offered—states that in a first-degree sexual assault case, section 904.04(1) and (2)(a) do not prohibit evidence of a prior conviction of first-degree sexual assault of a child "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." To be admissible for this purpose, the conviction must be for "a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction." Wis. Stat. § 904.04(2)(b)2.

This second subsection is specifically referenced, as the sole exception to the provision that forbids admitting "evidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show that [he] acted in

conformity therewith." Wis. Stat. § 904.04(2)(a). That well established prohibition is prefaced with the phrase, "[e]xcept as provided in par. (b)2." Wis. Stat. § 904.04(2)(a).

By the second subsection's plain language, a circuit court presented with a motion to admit a prior conviction under subsection (2)(b)2. must answer three questions.

First, does the present criminal proceeding allege a violation of Wis. Stat. §§ 940.225(1) or 948.02(1)?

Second, was the defendant convicted for first-degree sexual assault in violation of Wis. Stat. §§ 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction?

Third, is the convicted violation "similar to the alleged violation" in the present proceeding?

C. The circuit court erroneously exercised its discretion because it applied an incorrect standard of law to the sub. (2)(b)2. evidence.

1. The circuit court did not apply the greater latitude rule.

The circuit court's decision contains an acknowledgement of the greater latitude rule but no application of it. (R. 72:6.) It stated that it was "aware that it must consider the State's Motion in the context of the 'greater latitude rule.'" (R. 72:6.) It stated the rule. It then simply stated that the "rule does not mean 'total or absolute latitude.'"[6] (R. 72:6.)

Well settled precedent requires the circuit court to apply the greater latitude rule in this case. There is ample case law showing the application of the rule in highly similar

[6] The court also stated it had "a duty to ensure that the other acts evidence" satisfies the requirements for sub. (2)(a) other act evidence as set forth in *Sullivan*. (R. 72:6.) For the reasons set forth in the next subsection, *infra* I.C.2., that was not correct.

cases. Because the circuit court did no more than state the rule and say what it did not mean, it failed to apply the proper standard of law to its analysis regarding the admissibility of a prior conviction as sub. (2)(b)2. propensity evidence.

2. The circuit court incorrectly applied *Sullivan* to exclude propensity evidence offered under sub. (2)(b)2.

The circuit court conducted its statutory analysis under the *Sullivan* test. But *Sullivan* is a test for other act evidence offered for a permissible non-propensity purpose under section 904.04(2)(a). *Sullivan*, 216 Wis. 2d at 781, 785, 789. This Court already has called into question a trial court using *Sullivan* for sub. (2)(b)2., having found no legal authority for such a proposition. *State v. Gee*, 2019 WI App 31, ¶ 43, 388 Wis. 2d 68, 931 N.W.2d 287.

The circuit court's use of *Sullivan* is wrong for two reasons, both of which are evident under the plain language of the statute.

First, the focus of *Sullivan* and its first step is identifying a proper, non-propensity, purpose for *other act evidence offered under section 904.04(2)(a)*:

> Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?

State v. Sullivan, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998).

The balance of *Sullivan* is simply the application of general rules of evidence under Wis. Stat. §§ 904.01 and 904.03. *Id.* That the general rules of evidence apply to all evidence does not turn the analysis for sub. (2)(b)2. propensity evidence into a *Sullivan* analysis and graft onto it the test for sub. (2)(a) other act evidence.

Because the plain language of subsection (2)(b)2. permits admission of evidence for the purpose of showing propensity, it is plainly incompatible with an analysis premised on identifying a non-propensity purpose for evidence offered under a different section of the statute.

Second, the legislature amended the other act statute provision to make clear that evidence of a conviction used for propensity evidence is not subject to the rules for other act evidence. Specifically, the legislature added to the other act part of the statute the following words:

> (2) Other crimes, wrongs, or acts. (a) General admissibility. *Except as provided in par. (b)2.,* evidence of other crimes, wrongs, or acts 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.

Wis. Stat. § 904.04(2)(a).

The circuit court subjected evidence offered under sub. (2)(b)2. to a legal test that applies to a different category of evidence under (2)(a) despite the fact that the statute makes a distinction between the two types of evidence. It therefore did not use the proper legal standard.

This Court should conclude that *Sullivan* does not apply to evidence offered under sub. (2)(b)2. It already questioned such an approach in an earlier case though resolution of that issue wasn't required at that time. *Gee*, 388 Wis. 2d 68, ¶ 43. Such clarity is needed here. This Court should conclude the *Sullivan* test used for sub. (2)(a) evidence is not the test for propensity evidence offered under sub. (2)(b)2.

3. This Court reviews *de novo* the legal principles the circuit court applied to an evidentiary question.

A circuit court's "misapplication of the law is an erroneous exercise of discretion." *Smith*, 203 Wis. 2d at 295. Whether to admit a prior conviction as evidence typically is a matter within the discretion of the trial court. *Id*. But a circuit court has failed to properly exercise discretion when it misapplied the law. *Id*.

This Court should conclude under its *de novo* review that the circuit court's decision to exclude evidence of the prior conviction did not comport with the legal principles in sub. (2)(b)2. *See Sarnowksi*, 280 Wis. 2d 243, ¶ 11 ("review *de novo* whether that decision comports with legal principles"). The circuit court failed to properly apply the greater latitude rule, *supra* I.C.1. And it misapplied the *Sullivan* test used for sub. (2)(a) evidence for the propensity evidence offered under sub. (2)(b)2., *supra* I.C.2.

D. The State satisfied the three-part test for sub. (2)(b)2. evidence, especially in light of the greater latitude rule.

The State satisfies the three-part test for admitting propensity evidence. The plain language of sub. (2)(b)2. lays out the test, *supra* 1.B. Wis. Stat. § 904.04(2)(b)2. First, the present criminal proceeding must allege a violation of first-degree sexual assault under either Wis. Stat. §§ 940.225(1) or 948.02(1). Wis. Stat. § 904.04(2)(b)2. Second, the defendant must have been convicted of first-degree sexual assault under either Wis. Stat. §§ 940.225(1) or 948.02(1) or, alternatively, a comparable offense in another jurisdiction. *Id*. Third, the conviction is similar to the alleged charged violation. *Id*. Had the circuit court applied the proper test under the greater latitude rule, it should have concluded the evidence was admissible.

1. The State satisfied the "criminal proceeding alleging a violation of s. 940.225(1) or 948.02(1)" requirement.

A court presented with a motion to admit a prior conviction under sub. (2)(b)2. must confirm the present criminal proceeding alleges a violation of Wis. Stat. §§ 940.225(1) or 948.02(1). This is a necessary first step because sub. (2)(b)2. "is limited to cases where first-degree sexual assault or first-degree sexual assault of a child is the crime being prosecuted." *Gee*, 388 Wis. 2d 68, ¶ 28.

The information charged Hill with first degree sexual assault of a child, a violation of Wis. Stat. § 948.02(1). (R. 24:1.) The first part of the test is satisfied.

2. The State satisfied the "comparable offense in another jurisdiction" requirement.

In a motion to admit a conviction under sub. (2)(b)2., the State must establish the defendant "was convicted of a violation of s. 940.225 (1) or 948.02 (1) or a comparable offense in another jurisdiction." Wis. Stat. § 904.04(2)(b)2. This is required because sub. (2)(b)2. is limited to only other acts resulting in a conviction for first degree sexual assault or comparable conviction in another jurisdiction, "opposed to a conviction for a lesser degree of sexual assault, or charges for sexual assault that did not result in a conviction." *Gee*, 388 Wis. 2d 68, ¶ 36.

Here, the State satified this requirement. The State offered proof of Hill's 1984 Minnesota child sexual assault conviction as character evidence under sub. (2)(b)2. (R. 89:19–20.) The circuit court properly concluded that the Minnesota conviction was for a violation of a comparable statute in another jurisdiction. (R. 72:1–2.) Hill did not dispute that.

3. The State satisfied the "similar to the alleged violation" requirement when greater latitude is properly applied.

The circuit court correctly identified what made the conviction similar to the alleged violation. If the greater latitude is properly applied, as it has been in similar cases by our supreme court, the conviction is "similar to the alleged violation" for purposes of admissibility under sub. (2)(b)2.

The circuit court acknowledged that there were at least "some level of similarities between" the conduct underlying the Minnesota conviction and the conduct alleged in this case: "[A]ll incidents involve a child victim (approximately the same age) and all incidents involve unlawful sexual touching and penetration of the victims' vaginas with Defendant's finger." (R. 72:4.) It also noted that Hill had told both Victim 1 and the Minnesota victim not to tell anyone about the assaults. (R. 72:3.)

Instead of recognizing the application of the greater latitude rule to the question of similarity, the circuit court instead ignored the similarities and focused on what it called "the collective factual dissimilarities" between the facts underlying the conviction and the allegations by Victim 1. (R. 72:4–6.) It concluded that those dissimilarities were "clearly significant, compelling, and strong." (R. 72:4.) It concluded that the State had failed to meet its burden to establish that the proffered evidence satisfied the requirements of sub. (2)(b)2. (R. 72:7.) The circuit court's analysis is flawed in three respects.

First, it minimized the substantive similarities between the conviction and the alleged offense. Similarity in age of victims, for example, is a common and significant fact that courts consider. *See Hurley*, 361 Wis. 2d 529, ¶ 67 (noting "the victims were similar in age. J.G. was assaulted between the ages of 8 and 10 years old, and M.C.N. was assaulted between

the ages of 6 and 11 years old"). So is the nature of the assaults. *Id.* ¶ 65 (noting "both sets of assaults involved digital penetration").

Second, it highlighted and focused on meaningless dissimilarities that, if relied on to exclude evidence, would make any attempt to admit such evidence impossible. The circuit court's list of "dissimilarities" included the fact that Hill assaulted the first victim in her bedroom and the second in Hill's living room; that Hill stripped the first victim naked but assaulted the second with her clothes on; and that Hill kissed the first victim all over her body but did not do so with the second victim. It also included the minor difference that although he told both victims not to tell, he threatened to kill only one of them if she did. The circuit court's analysis is not a "similar to the alleged violation" analysis but a "signature crime" analysis that would require a level of similarity in modus operandi and victim that has never been required by Wisconsin courts in cases involving child sexual assault. Such an approach is foreclosed by the requirement that the greater latitude rule be applied to evidentiary decisions in sexual assault cases.

There are two significant dissimilarities the circuit court identified: Hill's age at the time of each offense and, relatedly, the remoteness in time. But it is clear that when courts apply the greater latitude rule, these factors are not given sufficient weight to defeat admissibility where there are relevant similarities such as those in this case. *See Hurley*, 361 Wis. 2d 529, ¶ 69 (fact that defendant "was younger when he assaulted J.G., and he was much closer to J.G. in age" did not defeat admissibility). Remoteness in time of many years has also not defeated admissibility where there has been similarity in age of victims and nature of assault. *See id.* ¶ 85 (25 years); *State v. Plymesser*, 172 Wis.2d 583, 493 N.W.2d 367 (1992) (13 years); *State v. Kuntz*, 160 Wis. 2d 722, 467

N.W.2d 531 (1991) (16 years); *Veach*, 255 Wis. 2d 390, ¶¶ 83–84 (11 years).

Simply stated, such dissimilarities, properly considered under the greater latitude rule, have consistently been held not sufficient to defeat admissibility. Even given the significant dissimilarities that were addressed in *Veach,* where the supreme court acknowledged that the defendant's prior sexual acts "were much more intrusive, aggressive, and egregious that the charged acts," it nevertheless concluded that they had probative value. *Veach*, 255 Wis. 2d 390, ¶¶ 83–84 (citation omitted).

The circuit court's conclusion that the prior conviction was not "similar to the alleged offense" failed to apply the correct standard of law. The 1984 conviction, when viewed under the greater latitude rule, satisfies the standard for admissibility under sub. (2)(b)2. The circuit court's failure to apply the rule does not "comport[ ] with legal principles" that govern questions of evidence in sexual assault cases. *Sarnowksi*, 280 Wis. 2d 243, ¶ 11.

This Court should conclude Hill was convicted of a violation in Minnesota that is "similar to the alleged violation" in the pending criminal proceeding, particularly in light of the greater latitude rule. The "rule applies to the entire analysis of whether [to admit] evidence of a defendant's other crimes." *Davidson*, 236 Wis. 2d 537, ¶ 51. Under proper application of the greater latitude rule, a sufficient similarity exists; evidence of Hill's conviction should be admitted as propensity evidence under sub. (2)(b)2.

II. The circuit court applied an incorrect standard of law to its determinations under sections 904.02 and 904.03.

A. All evidence is subject to exclusion if it is not relevant or if its probative value is substantially outweighed by the danger of unfair prejudice.

"*Like all evidence*, other crimes evidence also must be relevant under Wis. Stat. § (Rule) 904.01, and is subject to the balancing test of Wis. Stat. § (Rule) 904.03." *Davidson*, 236 Wis. 2d 537, ¶ 34 (emphasis added) (footnote omitted). Evidence which is not relevant is not admissible. Wis. Stat. § 904.02. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Wis. Stat. § 904.03.

B. Hill's 1984 conviction is relevant evidence under federal and state case law.

Propensity evidence is, by its very nature, relevant evidence. *See United States v. Guardia*, 135 F.3d 1326, 1328 (10th Cir. 1998) (quoting *Old Chief v. United States*, 519 U.S. 172, 181 (1997) ("Propensity evidence is relevant")). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. "Propensity" means a "natural tendency to behave in a particular way; esp[ecially], the fact that a person is prone to a specific type of bad behavior." *Propensity*, Black's Law Dictionary (11th ed. 2019). A natural tendency to commit a first-degree sexual assault certainly is relevant to determine

whether a person committed the offense of first-degree sexual assault for which he stands charged.

Common law recognized the relevance of propensity evidence. *United States v. Rogers*, 587 F.3d 816, 821 (7th Cir. 2009). It excluded propensity evidence as improper. *Id*. But it wasn't excluded as irrelevant; to the contrary, propensity evidence exemplifies that rules of evidence may prohibit otherwise relevant evidence. *Id*.; *cf. Davidson*, 236 Wis. 2d 537, ¶ 42 (evidence may be relevant to propensity). If propensity evidence were not relevant, then there would be no need to expressly exclude it under an evidentiary rule.

The prohibition against propensity evidence ended for some sexual assault cases, starting with a federal rule and now with the state rule in sub. (2)(b)2. The federal rule is instructive because, as this Court observed in *Gee*, the state rule in sub. (2)(b)2. was based on this federal rule. *Gee*, 388 Wis. 2d 68, ¶ 36.

Under the federal rule, "[i]n a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault." Fed. R. Evid. 413(a). "The rule expressly allows the government to use a defendant's prior conduct to prove the defendant's propensity to commit the types of crime described in the rule . . . to permit the trier of fact to draw inferences from propensity evidence." *Rogers*, 587 F.3d at 821.

The federal rule "is based on the premise that evidence of other sexual assaults is *highly relevant* to prove propensity to commit like crimes." *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998) (emphasis added). Congress created this rule intending "that rules excluding this relevant evidence be removed." *Id*. The federal legislative and judicial branches both recognized the relevance to propensity evidence of a prior sexual assault in the prosecution of a similar crime.

Even before prior sexual assault convictions were permitted under statute as propensity evidence, courts had concluded that a similar act of sexual conduct was relevant evidence. The relevance depends on "the similarity between the charged offense and the other act." *Davidson*, 236 Wis. 2d 537, ¶ 67 (quoting *State v. Gray*, 225 Wis. 2d 39, 58, 590 N.W.2d 918 (1999)). In a case where the prior sexual assault involved a child of similar age to the child in the charged offense, the supreme court concluded that the evidence of the earlier assault was probative of "whether any touching occurred" (citing *State v. Friedrich*, 135 Wis. 2d 1, 23, 398 N.W.2d 763 (1987)); "whether any touching that occurred was accidental or done by mistake" (citing *Gray*, 225 Wis. 2d at 56); "whether any touching was for the purpose of sexual gratification" (citing *Davidson*, 236 Wis. 2d 537, ¶ 65). It quoted *Friedrich*, 135 Wis. 2d at 27–28, for the proposition that a defendant's prior conduct is relevant because "[t]he average juror could well find it incomprehensible that one who stands before the court on trial could commit such an act." *Veach*, 255 Wis. 2d 390, ¶ 84.

Here, the circuit court failed to recognize the relevant nature of the propensity evidence. The circuit court concluded that "the significant and compelling factual dissimilarities of the incidents as already discussed (as well as the remoteness in time of the 1984 incident) lead this Court to conclude that the 1984 Minnesota incident has low probative value" and that the second prong of the *Sullivan* analysis—the question of whether the evidence is relevant under 904.02—had not been satisfied. (R. 72:7–8.)

The State has found no case where a court properly applying the greater latitude rule has reached the conclusion that a conviction for the same criminal offense charged in the present case is not relevant. The circuit court's analysis of the lack of probative value is inconsistent with the law cited above.

The circuit court reached the conclusion that a prior conviction for assaulting a child was not "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Wis. Stat. § 904.01. Evidence of a prior conviction does have a tendency to make it more probable that Hill committed the current offense, especially given that sub. (2)(b)2. now permits its introduction as propensity evidence.

Hill's sexual assault conviction is relevant evidence. In reaching its conclusion, the circuit court failed to apply a proper standard of law, consider the relevant facts, and reach a reasonable decision. Under proper application of the law, the evidence is relevant.

C. Hill's conviction is not barred as unduly prejudicial because its probative value is so great.

This Court should undertake its review of prejudice "in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible." *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997). *LeCompte* and other opinions interpreting the federal rule are instructive here because, as this Court recognized in *Gee*, the federal rule formed the basis for the state rule in sub. (2)(b)2. *Gee,* 388 Wis. 2d 68, ¶ 36.

Under the federal rule, there is a "presumption in favor of admission." *Enjady*, 134 F.3d at 1431. Although a court must perform the same prejudice "analysis that it does in any other context," it does so "with careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under [the federal rule]." *Guardia*, 135 F.3d at 1330. The "premise that evidence of other sexual assaults is highly relevant to prove propensity to commit like crimes . . . often justifies the risk of unfair

prejudice." *Enjady*, 134 F.3d at 1431. If such evidence were always too prejudicial, then the rule would never lead to the introduction of evidence. *Guardia*, 135 F.3d at 1330.

The state rule in sub. (2)(b)2. differs from the federal rule in a critical aspect that makes it unlikely that the probative value of Hill's 1984 conviction is substantially outweighed by the danger of unfair prejudice under the state rule.

The state rule in sub. (2)(b)2. "is more restrictive than FED. R. EVID. 413, upon which it was based." *Gee*, 388 Wis. 2d 68, ¶ 36. The state rule in sub. (2)(b)2. "is limited to only the most serious sexual assault cases—*first-degree* sexual assault or *first-degree* sexual assault of a child, and the other acts evidence must be for *a conviction of the same crime*." *Id.* (emphasis added). In contrast, the federal rule includes propensity evidence for "a conviction for a lesser degree of sexual assault, or charges for sexual assault that did not result in a conviction." *Id.*

In a first-degree sexual assault case, a defendant's prior conviction is not the sort of evidence to result in unfair prejudice when balanced against its probative value. When "the nature of the crimes was highly sensitive to begin with," the danger of unfair prejudice related to sexually explicit other acts evidence is dramatically reduced because the charged crime in itself will "provoke[ ] a strong reaction from the jury." *State v. DeRango*, 229 Wis. 2d 1, 24, 599 N.W.2d 27 (Ct. App. 1999).

Even where a court considered the other acts evidence in a case "graphic, disturbing, and extremely prejudicial," it nevertheless held that the evidence had "tremendous probative value." *Veach*, 255 Wis. 2d 390, ¶ 91. The court concluded that such evidence was not inadmissible "particularly in light of the greater latitude rule." *Id.*

The circuit court concluded that admitting the prior conviction would arouse the jurors' "senses of horror and punishment" because there are "many . . . graphic and disturbing facts involved in the 1984 incident." (R. 72:9.)

As an initial matter, in this case, the State sought to admit evidence that Hill was convicted of violating a statute in another jurisdiction that is comparable to Wisconsin's first-degree sexual assault of a child statute. (R. 65:1.) The State sought to use that evidence for the purpose stated in sub. (2)(b)2. (R. 65:1.) Under the statute, the evidence that comes in is "evidence that a person was convicted." Wis. Stat. § 904.04(2)(b)2. The State does not argue that this statute permits admitting all of the underlying details of the case. To the extent that the circuit court decided that the underlying details were too graphic and disturbing, it was improperly treating the State's sub. (2)(b)2. motion as an other acts motion under sub. (2)(a).

Even assuming that the limited evidence of a prior conviction for first-degree sexual assault is considered prejudicial without the underlying details, the law favors admitting it in these cases. In the balancing of prejudice and probative value, "[t]he bias . . . is squarely on the side of admissibility." *Marinez*, 331 Wis. 2d 568, ¶ 41 (citation omitted); *see also Hurley*, 361 Wis. 2d 529, ¶ 87 (emphasis added) ("If the probative value is close to or equal to its unfair prejudicial effect, the evidence *must be admitted*.").

Any analysis of a section 904.03 challenge to evidence proffered under sub. (2)(b)2. should also recognize that the statute reflects the intent of the legislature that despite the obviously prejudicial nature of a prior conviction for first-degree sexual assault, the admission of such a conviction as propensity evidence was contemplated by the legislature.

In holding that the danger of unfair prejudice to Hill substantially outweighed the probative value of the prior conviction, the circuit court quoted a case from this Court, *State v. McGowan*, 2006 WI App 80, ¶ 22, 291 Wis. 2d 212, 715 N.W.2d 631, for the proposition that "[t]he slim reeds of probative value identified [. . .] crumble here under the weight of prejudice to the defendant." (R. 72:9.)

But *McGowan* is inapposite. Most importantly, the evidence at issue in *McGowan* was not simply a prior *conviction*, as here offered under sub. (2)(b)2., but was other acts that included the fact that the defendant had forced his young cousin "to perform oral sex on him and [he] urinated in her mouth." *McGowan*, 291 Wis. 2d 212, ¶ 9. The other act evidence concerned conduct that occurred when the defendant was ten years old. *Id.*

Also significantly, in *McGowan*, this Court stated that the danger of unfair prejudice was that the other act evidence was going to be improperly used as "proof of the defendant's character":

> Given the obvious probable prejudice to the defendant, the probative value of the evidence to prove a legitimate fact of consequence—which is *not proof of the defendant's character*—should be strong indeed.

Id. ¶ 23 (emphasis added).

But there is nothing unfair under sub. (2)(b)2. about using Hill's prior conviction as propensity evidence. That is precisely what the statute allows. Thus, *McGowan* offers no support for the conclusion that the probative value of the conviction in this case, offered for the purpose permitted by the legislature, is substantially outweighed by the danger of unfair prejudice. It should therefore be admitted, "particularly in light of the greater latitude rule." *See Veach*, 255 Wis. 2d 390, ¶ 91.

Even assuming *arguendo* that the probative value of evidence is substantially outweighed by unfair prejudice, a court should remedy the prejudice through the least restrictive means, such as reading a cautionary instruction to the jury. *See State v. Hunt*, 2003 WI 81, ¶ 73, 263 Wis. 2d 1, 666 N.W.2d 771 (ruling that any confusion "caused by the admittance of the other-acts evidence [can be] substantially mitigated by the circuit court's cautionary instructions to the jury"); *see also Hammer*, 236 Wis. 2d 686, ¶ 36 (holding that "[c]autionary instructions eliminate or minimize the potential for unfair prejudice"); *State v. Speer*, 176 Wis. 2d 1101, 1118, 501 N.W.2d 429 (1993) (a cautionary instruction to the jury helps "alleviate and limit the potential for unfair prejudice"); *State v. Anderson*, 230 Wis. 2d 121, 132, 600 N.W.2d 913 (Ct. App. 1999) ("a cautioning instruction is normally sufficient to cure any adverse effect attendant with the admission of other acts evidence"); *State v. Kourtidias*, 206 Wis. 2d 574, 582–83, 557 N.W.2d 858 (Ct. App. 1996) ("By delivering a cautionary instruction, the trial court can minimize or eliminate the risk of unfair prejudice.").

Here, there already is a jury instruction available to reduce any danger or risk of unfair prejudice. *See* Wis. JI–Criminal 276 (2016) (prior conviction admissible to prove character under sub. (2)(b)2.). A circuit court may eliminate any potential prejudicial effect by reading this instruction because "jurors are presumed to follow such cautionary instructions." *State v. Kimberly B.*, 2005 WI App 115, ¶ 41, 283 Wis. 2d 731, 699 N.W.2d 641.

* * * * *

The ordinarily deferential standard of review for evidentiary decisions has a caveat: the question of "[w]hether the circuit court applied the proper legal standards . . . presents a question of law subject to independent appellate review." *Pinczkowski*, 286 Wis. 2d 339, ¶ 15. The circuit court applied the legal test for the wrong kind of evidence; it

concluded that a prior child sexual assault conviction *was not even relevant* to a new charge for the same crime; and it applied a prejudice analysis that is unsupported by any law. The State asserts that a decision that rests on these flawed determinations does not "comport[ ] with legal principles," *Sarnowksi*, 280 Wis. 2d 243, ¶ 11; that is a question subject to *de novo* review. *Id.* Because the circuit court did not apply a proper standard of law to the question of the admissibility of the conviction under sub. (2)(b)2., this Court should review its decision *de novo* and reverse.

CONCLUSION

This Court should reverse the order of the circuit court denying the State's motion to admit evidence of Hill's 1984 conviction and remand the matter for trial.

Dated this 13th day of March 2023.

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 8,367 words.

Dated this 13th day of March 2023.

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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 13th day of March 2023.

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