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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

Case No: 2022AP1718-CR

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 OF DEFENDANT-RESPONDENT

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INTRODUCTION

The State charged Kenneth W. Hill with one count of violating Wis. Stat. § 948.02(1)(e). 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. Section 904.04(2)(b)2 generally provides that, in a criminal proceeding alleging a violation of Wis. Stat. § 948.02(1), evidence of a defendant’s prior conviction for a violation of § 948.02(1) (or a comparable offense in another jurisdiction) “that is similar to the alleged violation” may be admitted at trial “as evidence of the person’s character in order to show that the person acted in conformity therewith.”

Based upon the application of the 3-prong analysis set forth in *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998), the circuit court found that the 1984 Minnesota criminal conviction was inadmissible. In short, the court found that factual dissimilarities between the incident involving the 1984 Minnesota criminal conviction and the criminal charge (now pending in the case at bar) were “clearly significant, compelling and strong.” For these reasons, the circuit court found that the 1984 Minnesota criminal conviction was inadmissible at trial

because the proffered “other acts” evidence did not satisfy the 3-prongs under the *Sullivan* analysis.

The State appeals, arguing that the circuit court’s opinion does not comport with legal principles for admitting evidence in child sexual assault cases. In particular the State argues that because the circuit court failed to apply the greater latitude rule to its sub. (2)(b)2. “similar” analysis, it misapplied the *Sullivan* test.

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 no.

(b) Did the circuit court apply an incorrect standard of law when it applied the *Sullivan* 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 no.

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 no.

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, in violation of Wis. Stat. § 948.02(2)(e) for digitally penetrating his granddaughter's vagina. (R 2: 1-2) The granddaughter alleged 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.

By pretrial filing, 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 circuit court denied the State’s motion.

The circuit court issued a written decision and order denying the State’s Motion. (R: 72). The Court’s applied Wis. Stat. § 904.04(2)(b)2 and the *Sullivan* other acts analysis to the propensity evidence offered under sub. (2)(b)2. (R. 72).

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). The Court 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: 2). It noted that Wis. Stat. § 904.04(2)(b)2 “does not required 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 evidence was subject to the *Sullivan* test, as Hill had argued. (R. 72: 2). The Circuit court acknowledged that this court has 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 *State v. Mitchell*, No. 2021AP606-CR. 2022 WL 2443307, 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 as well. (R. 72: 2)

The circuit 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.’” (quoting *State v. Mitchell*, No. 2021AP606-CR. 2022 WL 2443307, ¶15 (R. 72: 2).

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 involved unlawful sexual touching and penetration of the victims’ vaginas with Defendant’s finger”; and
- In both instances, Hill told the victim not to tell anyone about the assaults.

(R. 72: 4).

However the circuit court pointed to the “collective factual dissimilarities” between the facts underlying the conviction and the allegations at bar and found them “clearly significant, compelling, and strong.” (R. 72: 4).

It cited these factual differences:

- 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 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 *Sullivan*. (R. 72: 7). The Court indicated that the State did not meet “the first prong of the *Sullivan* analysis” because it was dissimilar. (R. 72: 7). The circuit court also noted “the remoteness in the time of the 1984 incident” as a factor in the conviction’s “low probative value.” (R. 72: 7). The circuit court concluded “the second prong of the *Sullivan* analysis would not be satisfied.” (R. 72: 7). The

circuit court further concluded that admitting the conviction “would certainly result in unfair prejudice to Mr. Hill” because it would “certainly arouse horror and contempt for Defendant.” (R. 72: 9).

The circuit court acknowledged that it was required to apply the greater latitude rule. (R. 72: 6). It then stated that “the rule does not mean ‘total or absolute latitude.’” (R. 72: 6). Based on the holding of the Court, 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 NW 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. Sarnowski*, 2005 WI App 48, ¶ 11, 280 Wis. 2d 243, 694 NW 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 NW 2d 824 (Ct. App. 1996). However, the circuit court did not misapply the law, and thus the circuit court decision should be affirmed.

ARGUMENT

I. This Court should affirm because the circuit court applied a proper standard of law to the evidence under subsection (2)(b)2 of Wis. Stat. §904.04.

A. The circuit court gave adequate consideration to the greater latitude rule.

As the State pointed out in its brief, the circuit court considered the greater latitude rule. (Brief of Appellant: 11). The greater latitude rule requires courts to 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). In practice, the greater latitude rule simply permits courts to employ a more liberal interpretation of the rules regarding other crimes evidence in sexual assault cases. *Davidson*, 236 Wis. 2d 537, ¶ 52.

However, the circuit court correctly stated that “greater latitude is not ‘total or absolute latitude.’” The circuit court considered the greater latitude rule, and in doing so, determined that the other acts evidence that the State sought to introduce against Mr. Hill was so dissimilar, and would be so prejudicial to him if introduced, that even a more liberal interpretation of the rules would not permit such evidence to be entered into evidence. (R. 72: 9, emphasis added). The court

rightfully assessed that it is within its discretion to determine whether “other acts” evidence is too remote, and here, it found the evidence was too remote, even when giving greater latitude consideration. *See State v. Hurley*, 361 Wis. 2d 529, 581, 861 N.W.2d 174 (2015). The State appears dissatisfied with the court’s level of consideration, but cites to no authority suggesting how much consideration would be appropriate, simply that “abandoning it” would be erroneous (which the court patently did not do). (Brief of Appellant: 16).

It would set a dangerous precedent (and essentially rewrite legislation) if this court were to adopt the State’s position that the greater latitude rule requires courts to grant “absolute latitude” of other acts evidence when a defendant is accused of a sex crime.

B. The circuit court properly applied subsection (2)(b)2 of Wis. Stat. §904.04 because it properly identified the dissimilarity in the prior conviction with the issue at bar.

Following this court’s guidance under *State v. 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.’” (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 involved unlawful sexual touching and penetration of the victims’ vaginas with Defendant’s finger”; and
- In both instances, Hill allegedly told the victim not to tell anyone about the assaults.

(R. 72: 2-6)

However, the circuit court pointed to the “collective factual dissimilarities” between the facts underlying the conviction and the allegations at bar and found them “clearly significant, compelling, and strong.”

It cited these factual differences as follows:

- Hill was 21 when he assaulted the first victim and was “57/58” when he allegedly 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 allegedly 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 allegedly told the second victim not to tell without threatening to kill her.

(R. 72: 2-6)

Based 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)

C. The circuit court applied the proper standard of law to the sub. (2)(b)2 evidence.

1. The circuit court adequately applied the greater latitude rule.

As discussed in greater depth *supra*, the circuit court correctly stated that “greater latitude is not ‘total or absolute latitude.’” (R. 72: 6). The circuit court considered the greater latitude rule, and in doing so, determined that the other acts evidence that the State sought to introduce against Mr. Hill was so dissimilar, and would be so prejudicial to him if introduced, that even a more liberal interpretation of the rules would not permit such evidence to be entered into evidence. (R. 72: 6).

- 2. The circuit court was reasonably persuaded by *Mitchell* to exclude propensity evidence offered under sub. (2)(b)2 when the *Sullivan* standard is not met.**

The circuit court's decision to exclude propensity evidence offered under sub. (2)(b)2 was founded, not of the precedent set, but in the analysis of the court's decision in *State v. Mitchell*. The *Mitchell* court held that it would apply the reasoning of the greater latitude rule to evidence offered under sub. (2)(b)2, and identified "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." *State v. Mitchell*, No. 2021AP606-CR, 2022 WL 2443307, ¶ 13 (Wis. Ct. App. July 6, 2022) (per curiam) (unpublished) (A-App. 19). Though the circuit court was not bound by the *Mitchell* court, it "found (and continues to find) the *Mitchell* decision to be persuasive," and was "unaware of any other published or unpublished appellate decision which has also analyzed the interplay of the *Sullivan* decision and Wis. Stat. § 904.04(2)(b)2." (R72:2) The court was therefore well within its authority to find the *Mitchell* decision as persuasive under Wis. Stat. § 809.23(3)(b).

- D. The State did not satisfy the three-part test for sub. (2)(b) evidence.**

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

The State is correct in pointing out that 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 Mr. Hill with first degree sexual assault of a child, a violation of Wis. Stat. § 948.02(1). The State is correct in their manifestation that the first part of the test is satisfied.

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

The State is also correct in that when moving 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 admittedly satisfied this requirement. The State offered proof of Hill’s 1984 Minnesota child sexual assault conviction as character evidence under sub. (2)(b)2. The circuit court properly concluded that the Minnesota conviction was for a violation of a comparable statute in another jurisdiction.

3. The State failed to satisfy the “similar to the alleged violation” requirement.

Following this court’s guidance under *State v. 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.’” (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 involved unlawful sexual touching and penetration of the victims’ vaginas with Defendant’s finger”; and

- In both instances, Hill allegedly told the victim not to tell anyone about the assaults.

(R. 72: 2-6).

However, the circuit court pointed to the “collective factual dissimilarities” between the facts underlying the conviction and the allegations at bar and found them “clearly significant, compelling, and strong.”

It cited these factual differences as follows:

- Hill was 21 when he assaulted the first victim and was “57/58” when he allegedly 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 allegedly 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 allegedly told the second victim not to tell without threatening to kill her.

(R. 72: 2-6).

Based 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: 2-7).

This Court should therefore affirm the circuit court decision, as the circuit court applied the correct standard of law to the State’s proffered evidence, adequately considered the evidence, mindful of its greater latitude, and properly identified the dissimilarity in the prior conviction with the issue at bar.

II. The circuit court applied the correct 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 it 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.

The State is correct in stating that propensity evidence is, by its nature, relevant evidence. *See United State 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”)). An alleged “natural tendency” to commit a first-degree sexual assault is obviously relevant in determining whether a person committed the offense of first-degree sexual assault.

The State is correct in identifying that 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 State is also accurate in that the federal rule is instructive because this Court observed in *Gee* that the greater latitude statute was based on the federal rule. *Gee*, 388 Wis. 2d 68, ¶ 36.

The State correctly notes that 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.

However, though the proffered evidence is relevant (and perhaps admissible in federal court), it is barred both under the *Sullivan* test, as discussed *supra*, and under a general relevance balancing test, as its risk of prejudice substantially outweighs its probative value.

C. Hill’s conviction is barred as unduly prejudicial because its risk of prejudice substantially outweighs its probative value.

The probative value of the 1984 Conviction is substantially outweighed by the danger of unfair prejudice. The probative value of the evidence is substantially reduced by its remoteness in time and factual similarities. 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 involved unlawful sexual touching and penetration of the victims’ vaginas with Defendant’s finger”; and
- In both instances, Hill allegedly told the victim not to tell anyone about the assaults.

(R. 72: 2-6).

However, the circuit court pointed to the “collective factual dissimilarities” between the facts underlying the conviction and the allegations at bar and found them “clearly significant, compelling, and strong.”

It cited these factual differences as follows:

- Hill was 21 when he assaulted the first victim and was “57/58” when he allegedly assaulted the second;
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- Hill stripped the first victim naked but allegedly 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 allegedly told the second victim not to tell without threatening to kill her.

(R: 72: 2-6).

In addition to the numerous factual dissimilarities, the circuit court noted 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 such, the circuit court rightfully identified that

admitting the conviction would result in unfair prejudice to Mr. Hill that outweighed its low probative value and did not permit the evidence.

Resultantly, this Court should find that the circuit court properly applied the correct standards of law under Wis. Stat. §§ 904.02 and 904.03.

CONCLUSION

This Court should affirm that 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 29th day of June, 2023.

Respectfully Submitted,

Electronically Signed by Nathan M. Cockerham
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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 font. The length of this brief is 4,126 words.

Dated this 29th day of June, 2023.

Electronically Signed by Nathan M. Cockerham

Nathan M. Cockerham
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Attorney for Defendant-Respondent

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 29th day of June, 2023.

Electronically Signed by Nathan M. Cockerham

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