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.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT AND SUPPLEMENTAL APPENDIX

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INTRODUCTION

The parties agree on the standard of review that applies here. The parties agree that Wis. Stat. § 904.04(2)(b)2. sets forth a three-part test for admissibility of evidence of a prior conviction and allows a conviction that satisfies the test to be used as propensity evidence. The parties agree that a conviction that satisfies the statutory test is relevant evidence under Wis. Stat. § 904.01.

The parties also agree that in this case, Hill's 1984 conviction satisfies the first two parts of sub. 2(b)2.'s three-part test.

The parties disagree on two points: 1) When the greater latitude rule is applied, does Hill's 1984 conviction satisfy the "similar" requirement in the third step of the sub. (2)(b)2. test? 2) Has Hill met his burden to show that if the conviction is admissible evidence under sub. (2)(b)2., it is nevertheless barred under section 904.03 because the danger of unfair prejudice substantially outweighs its probative value?

The State satisfied all three conditions for the admissibility of Hill's 1984 conviction for use as propensity evidence under sub. (2)(b)2. In defending the circuit court's decision to exclude the evidence, Hill argues that the court properly relied on an unauthored, *per curiam* decision of this Court. (Hill's Br. 15.) He is wrong. Hill argues that the State's objection to the court's failure to apply the greater latitude rule means the State seeks an "absolute latitude" rule. (Hill's Br. 12.) He is wrong. Hill argues that the circuit court "rightfully" excluded the proffered evidence on grounds that its probative value was low and the danger of unfair prejudice high. (Hill's Br. 22-23.) He is wrong. As explained below, controlling precedent and persuasive precedent support each of the State's arguments. This Court should reverse.

ARGUMENT

The circuit court's decision denying the State's motion to admit Hill's 1984 conviction under Wis. Stat. § 904.04(2)(b)2. does not comport with legal principles.

A. The circuit court failed to apply the greater latitude rule to the question of whether the proffered conviction evidence was for a "similar" offense for purposes of admissibility under sub. (2)(b)2.

The circuit court's conclusion that the 1984 conviction was not for a "similar" offense and was therefore not admissible under Wis. Stat. § 904.04(2)(b)2. does not comport with legal principles.

Under sub. (2)(b)2., Hill's 1984 conviction for child sexual assault is admissible as propensity evidence to show that he sexually assaulted his young granddaughter in 2020 if three statutory requirements are met: (1) Does the present criminal proceeding allege a violation of Wis. Stat. §§ 940.225(1) or 948.02(1)? (2) Was the defendant convicted of first-degree sexual assault in violation of Wis. Stat. §§ 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction? and (3) Is the conviction for an offense that is "similar to the alleged violation" in the present proceeding? (State's Br. 19.) The parties agree that the first two parts of the three-part test for admissibility of a conviction offered under sub. (2)(b)2. are satisfied. (Hill's Br. 16-17.) They disagree only on whether the State met the third requirement involving the "similar" analysis. (Hill's Br. 17-18.)

The circuit court erred in failing to apply the greater latitude rule to the "similar" analysis. Before concluding that Hill's 1984 conviction was not "similar" for purposes of sub. (2)(b)2., the circuit court noted that the 1984 and 2020 incidents both involved "a child victim (approximately the

same age)," "unlawful sexual touching and penetration of the victims' vaginas with [Hill's] finger," and Hill's explicit command to each victim not to disclose the assault. (R.72:4, 6.) It compiled a list of the differences between the two incidents. (R.72:4-6.) Its only reference to the greater latitude rule was to say that the rule did not mean "total or absolute latitude." (R.72:6.)

Hill accuses the State of arguing that the rule "requires courts to grant 'absolute latitude'" in this type of case. (Hill's Br. 11-12.) That is not true. Absolute latitude would presumably do away with the similarity requirement in the statute; it is not arguing for absolute latitude to argue that under the greater latitude rule, assaults that involved victims of the same age and sex, unlawful digital penetration of their vaginas, and commands not to tell anyone are "similar" for purposes of sub. (2)(b)2.

Simply compiling a list of factual differences between assaults cannot be a reasonable application of the greater latitude rule. To start, greater latitude does not demand that the acts are similar with respect to all details. As the State noted in its brief-in-chief, that imposes a "signature crime" analysis that requires a level of similarity in modus operandi that Wisconsin courts have never required. (State's Br. 25.)

Indeed, the greater latitude rule as codified in Wis. Stat. § 904.04(2)(b)1. recognizes that the proffered evidence need not involve the same victim; implicit in that recognition is that acts involving a different victim would involve a different location and different details. Distinguishing incidents on the ground that Hill "removed the victim's . . . underpants" during one assault while in the other he "pulled [the victim's] pants down so [he] could touch [the victim's] vaginal area" (R.72:5), as the circuit court did here, is as insignificant a difference under greater latitude as the fact that the assaults occurred on different dates and in different locations.

Hill also argues that the court's dismissive reference to the greater latitude rule means that the court "considered" it. (Hill's Br. 11-12.) But courts have recognized that reciting the proper legal standard is not the same as applying the proper legal standard; reviewing courts look for an indication that the standard was *applied*. *See, e.g., Baldwin-Woodville Area Sch. Dist. v. W. Cent. Educ. Ass'n-Baldwin Woodville Unit*, 2009 WI 51, ¶37, 317 Wis.2d 691, 766 N.W.2d 591 ("[W]hile paying lip service to the deferential standard of review afforded to arbitration awards, the court of appeals substituted its own preferred construction of 'the facts underlying the grievance.'"). There is no such indication here.

B. The circuit court's decision to rely on an unauthored *per curiam* decision and apply the *Sullivan* test to its sub. 2(b)2. analysis does not comport with legal principles.

The circuit court also incorrectly applied *Sullivan*'s test for sub. (2)(a) evidence to sub. (2)(b)2. evidence, and it impermissibly based its analysis on an unauthored *per curiam* opinion of this Court.[1]

As the State noted in its brief-in-chief (State's Br. 20–21), *Sullivan*, with its emphasis on identifying a proper, non-propensity purpose for proffered evidence under sub. (2)(a), cannot logically apply to proffered propensity evidence under sub. (2)(b)2.

Hill argues that the circuit court was correct to apply the *Sullivan* test because it was "well within its authority to find the [*per curiam*] decision as persuasive under Wis. Stat. § 809.23(3)(b)." (Hill's Br. 15.) He's wrong. That statute

[1] The circuit court stated that it was relying on *State v. Mitchell*, No. 2021AP606-CR, 2022 WL 2443307, ¶13 (Wis. Ct. App. July 6, 2022) (unpublished) (A-App. 19) for the proposition that the *Sullivan* analysis is applicable to Wis. Stat. § 904.04(2)(b)2.

expressly excludes *per curiam* opinions from use as persuasive authority. The statute applies to courts as well as parties. Our supreme court has gone so far as to admonish this Court for *discussing* (not following) an uncitable case in a footnote in an opinion and thereby "implicitly" acknowledging that the case did "indeed have persuasive authority" contrary to the statute—and it directed this Court to strike the offending language from its opinion. *City of Sheboygan v. Nytsch*, 2008 WI 64, ¶5, 310 Wis.2d 337, 750 N.W.2d 475 (holding that the court of appeals impermissibly gave persuasive effect to a case that had no precedential or persuasive authority).

Under the rule set forth in Wis. Stat § (Rule) 809.23(3)(b), unauthored decisions are not permitted for use as persuasive authority: the statute permits citing to an "unpublished opinion . . . authored by a member of a three-judge panel or by a single judge. . . . for its persuasive value," but it states that "[a] per curiam opinion . . . is not an authored opinion for purposes of this subsection." *Id.* This Court has, on this particular issue, unauthored opinions[2] that reach opposite conclusions about the legal standard that applies to sub. (2)(b)2. evidence. *Compare State v. Olds*, No. 2021AP1909-CR, 2023 WL 2591521, ¶18 (Wis. Ct. App. 2023) (unpublished) (Reply App. 21) ("Logically—given subsec. (2)(b)2.'s nature as an exception to the general prohibition on character evidence being used to prove conduct—it follows that a full *Sullivan* analysis is not necessary to determine the admissibility of other-acts evidence proffered under subsec. (2)(b)2., but this appears to be as yet undecided."), *with State v. Mitchell*, No. 2021AP606-CR, 2022 WL 2443307, ¶13 (Wis.

[2] In accordance with Wis. Stat. § (Rule) 809.23(3) and *Brandt v. LIRC*, 160 Wis.2d 353, 364, 466 N.W.2d 673 (Ct. App. 1991), the State does not cite this and other unpublished cases here for any legal rationale but merely for "informational purposes" to show that the decisions exist.

Ct. App. July 6, 2022) (unpublished) (A-App. 19) ("We conclude that the *Sullivan* analysis is applicable to WIS. STAT. § 904.04(2)(b)2. for the same reasoning employed in *State v. Dorsey*, 2018 WI 10, 379 Wis.2d 386, 906 N.W.2d 158.").

Under the rule set forth in the statute and the rule set forth in *City of Sheboygan*, the circuit court wrongly gave persuasive effect to a case that is not citable for that purpose.

C. The circuit court's decision that the danger of unfair prejudice substantially outweighed the conviction's probative value does not comport with legal principles.

The circuit court's decision that the danger of unfair prejudice substantially outweighed the conviction's probative value also does not comport with legal principles. The State agrees that evidence that's admissible under sub. (2)(b)2. is, "[l]ike all evidence," "subject to the balancing test of Wis. Stat. § 904.03."[3] Hill has the burden to show that the admissible evidence under sub. (2)(b)2. should nevertheless be excluded under section 904.03.[4]

The circuit court's section 904.03 analysis was flawed in two respects. It misidentified the evidence in question. And, contrary to the guidance of precedent related to similar cases,

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[3] *State v. Davidson*, 2000 WI 91, ¶34, 236 Wis.2d 537, 613 N.W.2d 606.

[4] *See State v. Hunt*, 2003 WI 81, ¶¶53, 69, 263 Wis.2d 1, 666 N.W.2d 771 ("[I]t is the opponent of the admission of the evidence who must show that the probative value of the evidence is substantially outweighed by unfair prejudice."); *State v. Speer*, 176 Wis.2d 1101, 1114, 501 N.W.2d 429 (1993) ("If relevancy for an admissible purpose is established, the evidence will be admitted unless the opponent of the evidence can show that the probative value of the other crimes [or acts] evidence is substantially outweighed by the danger of undue prejudice.").

it understated the probative value and overstated the danger of unfair prejudice.

The circuit court focused not on the "evidence that [Hill] was convicted" of a prior sexual assault, which the State sought to admit under sub. (2)(b)2., but to the details underlying the conviction. Hill argues that the circuit court "rightfully identified" unfair prejudice in light of the "low probative value" of the proffered evidence. (Hill's Br. 22-23.) But he doesn't respond to the State's argument (State's Br. 32) that the circuit court misapprehended what evidence sub. (2)(b)2. makes admissible, namely "evidence that [Hill] was convicted." Instead, the circuit court wrongly considered "the offered evidence" to be "forced vaginal intercourse with and forced fellatio performed by an 11-year-old girl on adult stranger, followed by Defendant ejaculating on the victim's chin, neck and upper chest area"—and it concluded this would "arouse [the jury's] horror and contempt." (R.72:9.)

The circuit court also relied for its conclusion on irrelevant case law. It quoted language from *McGowan*: "[t]he slim reeds of probative value identified . . . crumble here under the weight of prejudice to the defendant." (R.72:9.) Hill doesn't respond to the State's argument (State's Br. 33) that the circuit court wrongly relied on *McGowan*. That case is irrelevant because 1) it involved other act evidence, *not* a prior conviction under (2)(b)2., and 2) its analysis centered on non-propensity evidence that should not be used as propensity evidence, *not* propensity evidence that is being introduced for that specific purpose.

The 1984 conviction's probative value is high.

McGowan's holding is especially inapposite for a (2)(b)2. analysis in light of our supreme court's statement that a conviction has a "high degree of reliability [that] increase[s] its probative value." *State v. Davidson*, 2000 WI 91, ¶77, 236 Wis.2d 537, 613 N.W.2d 606 ("[U]nlike the other crimes at

issue in *Friedrich*, the Cindy P. assault was a charged, convicted crime, to which the defendant had pled guilty. The high degree of reliability of the evidence of the Cindy P. assault increased its probative value.").

As stated in the State's brief-in-chief, the federal rule, which is the basis for sub. (2)(b)2., "is based on the premise that evidence of other sexual assaults is *highly relevant* to prove propensity to commit like crimes." (State's Br. 28 (emphasis added) (quoting *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998)).) Our supreme court said that "[e]vidence that is highly relevant has great probative value, whereas evidence that is only slightly relevant has low probative value." *State v. Payano*, 2009 WI 86, ¶81, 320 Wis.2d 348, 786 N.W.2d 832.

The proffered evidence was a conviction. It relates to propensity. Its probative value is high.

The danger of unfair prejudice does not substantially outweigh the conviction's probative value.

As for the determination of unfair prejudice, that determination "must be made with great care because '[n]early all evidence operates to the prejudice of the party against whom it is offered. . . . The test is whether the resulting prejudice of relevant evidence is *fair or unfair*.'" *Payano*, 320 Wis.2d 348, ¶88 (citation omitted).

An authored, unpublished opinion of this Court, citable as persuasive authority under section 809.23(3)(b), shows an example of a section 904.03 analysis for five uncharged acts the State offered under section 904.04(2)(b)1., which permits evidence of "any similar acts by the accused." In *State v. Coria-Granados*, No. 2019AP1989-CR, 2021 WL 503323 (Wis. Ct. App. Feb. 11, 2021) (unpublished) (Reply App. 3-18), this Court reversed the circuit court's ruling that the proffered evidence's probative value was substantially outweighed by the risk of unfair prejudice. *Id.* ¶78. Noting the State's

argument that the proffered evidence "helps to bolster the credibility of [two victims]," the court stated that the evidence was "reasonably necessary for the presentation of the prosecution's case." *Id.* ¶81. It further noted, "[W]e must consider the difficulty of prosecuting child sexual assault cases and the importance of corroborating victims' testimony against credibility challenges." *Id.* On that basis, this Court concluded that the evidence "is admissible even when balanced against the risk that the jury may use such evidence to find that [the defendant] has committed the charged offenses." *Id.* The same reasoning applies in this case and should result in the same reversal.

The specific danger of unfair prejudice when using other acts evidence "is the potential harm in a jury's concluding that because an actor committed one bad act, he necessarily committed the crime with which he is now charged." *State v. Fishnick*, 127 Wis.2d 247, 261-62, 378 N.W.2d 272 (1985). The circuit court's job is to ensure that the jury will not "prejudge a defendant's guilt or innocence in an action because of his prior bad act." *Id.* at 262.

A prior conviction for a similar assault has high probative value. The conviction evidence (as opposed to the details underlying the conviction) is not *unfairly* prejudicial. This compels the conclusion that the sub. (2)(b)2. evidence is not barred under section 904.03. One reason for the balancing test is the risk of improper use of evidence for propensity purposes—but that is not in play in the situation where evidence is offered under sub. (2)(b)2. context because the statute specifically permits its use as propensity evidence.

"The term 'substantially' indicates that *if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted*." *Payano*, 320 Wis.2d 348, ¶80 (quoting *State v. Speer*, 176 Wis.2d 1101, 1115, 501 N.W.2d 429 (1993)). In light of the high probative value of the 1984 conviction and the fact that the risk of unfair prejudice

is diminished by the fact that it will be directly offered as propensity evidence under sub. (2)(b)2., at best the value and effect are close or equal, and in that case, the conviction evidence "must be" admitted.

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As noted in the State's brief-in-chief (State's Br. 19), the three conditions for admitting a conviction offered under sub. (2)(b)2. are as follows:

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

Second, was the defendant convicted of 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 conviction for an offense that is "similar to the alleged violation" in the present proceeding?

Hill's 1984 conviction satisfies those three conditions for admissibility if the greater latitude rule is properly applied to the third condition.

And Hill has not met his burden to show that though admissible under sub. (2)(b)2., the evidence of the conviction should nevertheless be barred as unfairly prejudicial. He cannot do so in light of the high probative value of the conviction and the not-unfair prejudice of admitting the limited evidence of the fact that he "was convicted of . . . a comparable offense in another jurisdiction." *See* Wis. Stat. § 904.04(2)(b)2.

CONCLUSION

This Court should reverse the circuit court's order denying the State's motion to admit the fact that Hill was convicted in 1984 of a comparable offense in another jurisdiction as propensity evidence under sub. (2)(b)2.

Dated this 4th day of August 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 2,979 words.

Dated this 4th day of August 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 Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 4th day of August 2023.

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