STATE OF WISCONSIN

SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs. Case No: 2022AP1718-CR

KENNETH W. HILL,

Defendant-Respondent.

APPEAL FROM THE ORDER IN THE COURT OF APPEALS REVERSING THE CIRCUIT COURT'S ORDER DENYING THE STATE'S MOTION TO ADMIT OTHER ACT EVIDENCE

DOUGLAS COUNTY - THE HONORABLE GEORGE L. GLONEK PRESIDING

PETITION FOR REVIEW

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PETITION FOR REVIEW

The Defendant-Respondent, Kenneth W. Hill, by his attorneys, Ledin, Olson & Cockerham, by Nathan M. Cockerham, hereby petitions the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. § 808.10 and Wis. Stat. § 809.62 to review the decision of the Court of Appeals, District III, in *State of Wisconsin v. Kenneth W. Hill*, case no. 2022AP1718-CR, filed on August 6th, 2024, reconsideration denied on August 30th, 2024.

ISSUES PRESENTED FOR REVIEW

The issues the Defendant-Respondent presents for review are:

1. In order to determine whether an offense in another jurisdiction is "comparable" to first-degree sexual assault of an adult or child in Wisconsin for the purposes of Wis. Stat. § 904.04(2)(b)(2), what information does a circuit court consider, and what is required for an offense in another jurisdiction to be "comparable" to first-degree sexual assault of an adult or child in Wisconsin?
    a. The Court of Appeals decided that in order to determine whether an offense in another jurisdiction is "comparable" to first-degree sexual assault of an adult or child in Wisconsin, the circuit court should conduct an elements-based analysis, comparing the elements of the criminal statutes at issue and determining if they are "worthy of being considered equivalent or categorically similar" but not "identical". Decision ¶ 21, Aug. 6, 2024, No. 2022AP1718-CR. The Court of Appeals decided that the 1984 version of Minn. Stat. § 609.342 was comparable because "both…address criminal sexual conduct in the first degree," and that "both statutes criminalize conduct as a first-degree crime, both statutes criminalize sexual penetration/intercourse, both statutes contain an age element, and

both statutes contain provisions addressing the use or threat of force or violence and bodily harm." *Id*. at ¶ 58.

2. In order to determine whether the prior conviction is "similar to the alleged violation", what information does a circuit court consider, and what is required for a previous act to be "similar to the alleged violation"?

    a. The Court of Appeals decided that a court must conduct a facts-based analysis to compare how the prior conviction and the current charges were perpetrated to determine whether the circumstances are "similar." *Id.* at ¶ 31. The Court of Appeals admitted that "[t]he [circuit] court appropriately acknowledged 'some level of similarities between' the 1984 conviction and the current allegations", but "set the similarity bar too high when viewed under the umbrella of the greater latitude rule". *Id.* at ¶ 59-61.

3. Is the other-acts evidence analysis developed under *Sullivan* and its progeny for § 904.04(2)(a) evidence the appropriate test for the admissibility of evidence of a prior conviction offered under § 904.04(2)(b)(2)?

    a. The Court of Appeals decided that prior-conviction evidence offered under § 904.04(2)(b)(2) is "not subject to a traditional *Sullivan* analysis as that test has developed under *Sullivan* and its progeny", and is instead only subject to the requirements of § 904.01 and overcomes the § 904.03 balancing test. *Id* at ¶ 38.

4. Was it erroneous for the circuit court to determine that the Defendant-Appellant's 1984 conviction is a "comparable offense" to first-degree sexual assault of an adult or child in Wisconsin?
    a. The Court of Appeals decided that the circuit court "properly determined that the 1984 conviction is a 'comparable offense in another jurisdiction.'" *Id.* at ¶ 54.
5. Was it erroneous for the circuit court to determine that the Defendant-Appellant's 1984 conviction was not "similar to" the allegations in the present case?
    a. The Court of Appeals decided that the circuit court "erroneously exercised its discretion…by deciding that the 1984 conviction is not 'similar to' the allegations in the current case." *Id.*

The Supreme Court should grant review because the issues described above present novel questions of statutory interpretation, the resolution of which will have statewide impact, are likely to recur unless resolved, and a decision by the Supreme Court will help develop, clarify, and harmonize the law.

STATEMENT OF FACTS AND OF THE CASE

The State charged Kenneth W. Hill with two counts 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. § 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."

The circuit court denied the State's motion to admit the 1984 conviction in a written decision. The court first found that the 1984 conviction was "comparable" to Wis. Stat. § 948.02(1), as required by the prior-conviction statute, without significant consideration. It then found that factual dissimilarities between the incident involving the 1984 Minnesota criminal conviction and the criminal charges (now pending in the case at bar) were "clearly significant, compelling and strong." For these reasons, the circuit court found that "the State ha[d] not met its burden of establishing the admission of [Hill's] 1984 Minnesota conviction as character evidence that satisfies both the requirements of [§] 904.04(2)(b)2. and the first prong of the *Sullivan* analysis." The circuit court further held that the probative value of Hill's 1984 conviction was low given the significant and

compelling factual dissimilarities of the incidents, and that what little probative value existed was outweighed by the danger of unfair prejudice.

The State appealed, arguing that the circuit court's opinion does not comport with legal principles for admitting evidence in child sexual assault cases. The Court of Appeals reversed the circuit court's order and remanded with directions, concluding that "in order to determine whether an offense in another jurisdiction is "comparable" to first-degree sexual assault of an adult or a child in Wisconsin, the circuit court conducts a comparison of the criminal statutes at issue, including the titles of the statutes and elements of the offenses, subject to the greater latitude rule", that "to determine whether the prior conviction is "similar to the alleged violation," the court reviews the underlying circumstances of the current charge(s) and those of the prior conviction to determine whether they are similar, also subject to the greater latitude rule", and that "to determine whether the prior conviction is 'similar to the alleged violation,' the court reviews the underlying circumstances of the current charge(s) and those of the prior conviction to determine whether they are similar, also subject to the greater latitude rule."

The Defendant-Respondent moved the Court of Appeals for reconsideration, on the bases that the court's decision that the 1984 conviction is a "comparable offense" to first-degree sexual assault of an adult or child in Wisconsin did not conform with its holding that in order to determine whether an offense in another jurisdiction is "comparable" to first-degree sexual assault of an adult or a child in Wisconsin, the circuit court conducts a comparison of the

criminal statutes at issue, including the titles of the statutes and elements of the offenses, subject to the greater latitude rule. Further, the Defendant-Respondent argued that the Court's decision that the circuit court erroneously exercised its discretion by determining that the circumstances of the 1984 conviction are not "similar to" the allegations in the current case also did not conform with the Court's holding that "a reasonable reading of 'similar to the alleged violation' is that the circuit court must conduct a fact-based analysis to determine whether the conduct underlying the prior conviction is similar to the conduct underlying the current charge", since the circuit court performed such an analysis and determined that the dissimilarities were "clearly significant, compelling, and strong". The Defendant-Respondent also argued that the Court's holding does not comport with established principles of due process and casts doubt upon the court's ultimate holding in *State v. Gee* that the greater latitude extended to evidence of sexual assault of a child is constitutional under Wis. Stat. § 904.04(2)(b)(2). The Court of Appeals denied the motion for reconsideration without further hearing or briefing.

ARGUMENT

The Supreme Court should grant review of the decision of the Court of Appeals because several aspects of the court's decision and the case at bar as a whole present novel questions of statutory interpretation, the resolution of which will have statewide impact, are likely to recur unless resolved, and a decision by the Supreme Court will help develop, clarify, and harmonize the law.

Wis. Stat. § 904.04(2)(b)(2) provides an exception to the general prohibition of admission of evidence of a person's character for the purpose of proving that the person acted in conformity therewith on a particular occasion. Wis. Stat. § 904.04(2)(b)(2) provides that in a criminal proceeding alleging a violation of first-degree sexual assault of an adult or child, the general prohibition does not bar evidence that a person was previously convicted of Wisconsin's statute criminalizing first-degree sexual assault of an adult or child, or a comparable offense in another jurisdiction, when that previous conviction was similar to the presently-alleged violation.

I. What is required for an offense in another jurisdiction to be "comparable" to first-degree sexual assault of an adult or child in Wisconsin?

The case at bar raises several questions about the proper interpretation of Wis. Stat. § 904.04(2)(b)(2). The first, a question that was not meaningfully addressed at the trial level but was decided at the Court of Appeals, is essentially what the term "comparable offense" means, as used in Wis. Stat. § 904.04(2)(b)(2). In order to determine whether an offense in another jurisdiction is "comparable" to first-degree sexual assault of an adult or child in Wisconsin, what information does a circuit court consider? This is a novel question of statutory interpretation that has yet to be decided by any published Court of Appeals decision aside from the case at bar. This question must be considered and answered, deliberately or not, by any

circuit court judge who is presented in a prosecution for first-degree sexual assault with evidence that a person was previously convicted of a sex crime in another jurisdiction as evidence of the person's character to show that the person acted in conformity therewith. The judge will have to consider, as Judge Glonek did in the case at bar, whether that conviction in another jurisdiction is a "comparable offense" to Wisconsin's first-degree sexual assault statute. Likely because Judge Glonek did not have any published opinion of the Court of Appeals or the Supreme Court to guide him in determining what qualifies as a "comparable offense", he did not have goalposts as to what criteria needed to be present in the previous offense for it to be "comparable", he did not meaningfully analyze whether the 1984 version of Minn. Stat. § 609.342 was comparable to Wisconsin's first-degree sexual assault statute, and, in the Defendant-Respondent's opinion, made the wrong decision as a result. Unguided mistakes like this are likely to recur across the state unless this question is resolved, and a decision by the Supreme Court will help to develop, clarify, and harmonize the law and guide judges and practitioners in determining what sorts of evidence of a person's character are admissible in a presented in a prosecution for first-degree sexual assault.

The Defendant-Respondent has, despite a diligent search, found no meaningful discussion or analysis of what "a comparable offense in another jurisdiction" is defined as in the Wisconsin Statutes, in any Wisconsin court, nor in any court in the Seventh Circuit. Through diligent searching, only three states, two

in the Ninth Circuit and one in the Tenth Circuit, have discussed what qualifies as a "comparable offense".

The state of Kansas, the geographically closest state that has analyzed whether an offense in another state is "comparable" to a Kansas offense, performs such an analysis in an effort to give due consideration to offenses committed in other states when determining sentences using "presumptive sentencing guidelines". In *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984, 2018 Kan. LEXIS 32, the Supreme Court of Kansas construed the meaning of "comparable offense" in K.S.A. 2017 Supp. 21-6811(e)(3) to require that the out-of-state crime have *identical or narrower elements than the Kansas offense to which it is being compared.*

Washington State considers comparable offenses in other jurisdictions for a similar purpose—similarly to in Kansas, Washington courts use a grid and a defendant's prior convictions, including those in other jurisdictions, to calculate the offender's "score" for the court to consider for sentencing. Less strictly than Kansas, however, the Supreme Court of Washington has interpreted the phrase "comparable offense" to require "substantial similarity" between the elements of the foreign offense and the Washington offense, and if the elements of the foreign offense are comparable to those of a Washington offense, then "the inquiry ends" and the foreign crime counts toward the offender score as if it were the comparable Washington crime. *State v. Jordan*, 180 Wash. 2d 456, 325 P.3d 181 (2014), citing *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) and *State v. Sublett,* 176 Wn.2d 58, 87, 292 P.3d 715 (2012).

Oregon State statutes contain a provision that create a presumptive sentence of life imprisonment for any sex crime "if the defendant has been sentenced for sex crimes that are felonies at least two times prior to the current sentence", and that "a prior sentence includes…[s]entences imposed by any other state or federal court for comparable offenses." Or. Rev. Stat. Ann. § 137.719. The Supreme Court of Oregon determined that, in lieu of definitions or legislative history suggesting otherwise, "comparable offenses" in that statute refers to offenses *with elements that are the same as or nearly the same* as the elements of an Oregon felony sex crime, not to offenses that merely share a core similarity with such an offense. *State v. Carlton*, 361 Or. 29, 388 P.3d 1093 (2017) (emphasis added). Ultimately, in *Carlton*, the Court found that California Penal Code section 288, criminalizing "[l]ewd or lascivious acts involving children", was not a comparable offense to that prohibited by Or. Rev. Stat. Ann. § 163.427 titled "sexual abuse in the first degree". From *Carlton*:

"The Oregon offense has three conduct elements: first, an offender must touch a child; second, the touch must be of a part of the body that is sexual or that is regarded as intimate by the child and that the offender knew or should have known was regarded as intimate; and third, the touch must be made with a sexual intent. In contrast, the California offense has only two conduct elements and may be proved by any touching of a child, even outwardly innocent touching, if the touch is sexually motivated. That means that the California offense could be committed simply by placing an arm around a child's shoulder, patting the top of a child's head, or helping a child put on a pair of shoes, if the physical contact—though experienced by the child as innocent—is made with a sexual purpose. In short, although Cal. Penal Code § 288(a) proscribes sexually motivated conduct, it prohibits conduct simply by proscribing the intent with which the conduct is undertaken. ORS 163.427(1)(a)(A) is significantly narrower. It also prohibits sexually motivated conduct, but it proscribes only a limited category of sexually motivated conduct. Thus, the elements of Cal. Penal Code § 288(a) do not *closely match the elements*

of ORS 163.427(1)(a)(A). Accordingly, the offenses are not comparable for purposes of ORS 137.719(3)(b)(B)."

Id. at 23 (emphasis added).

In sum, while no Wisconsin court appears to have discussed § 904.04(2)(b)2.'s "comparable offense in another jurisdiction" language, courts in other states have generally agreed that the term "comparable offense", when used to compare an offense under that state's laws to an offense criminalized by another state, means an offense that is substantially similar, identical or narrower, or with elements that are the same or nearly the same as those of the in-state offense.

When considering other jurisdictions' discussion of the "comparable offense" language, both parties and Judge Glonek may have been remiss to conclude without analysis that the Defendant-Respondent's conviction in 1984 of a violation of Minn. Stat. § 609.342(c) was a comparable offense in another jurisdiction to Wis Stats. § 940.225(1) or § 948.02(1). When using the rather strict definitions of "comparable" used by Kansas, Washington and Oregon, a conviction of a violation of § Minn. Stat. 609.342(c) as it existed in 1984 is not a comparable offense in another jurisdiction to either Wis. Stats. § 940.225(1) or § 948.02(1).

The 1984 version of § 609.342(c) of the Minnesota Statutes defines Criminal Sexual Conduct in the First Degree as follows:

"A person is guilty of criminal sexual conduct in the first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000, or both, if he engages in sexual penetration with another person and if… [c]ircumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another."

Wis. Stat. § 940.225(1) defines First Degree Sexual Assault as follows:

"Whoever does any of the following is guilty of a Class B felony:
(a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.
(b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.
(c) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.
(d) Commits a violation under sub. (2) against an individual who is 60 years of age or older. This paragraph applies irrespective of whether the defendant had actual knowledge of the victim's age. A mistake regarding the victim's age is not a defense to a prosecution under this paragraph."

Finally, Wis. Stat. § 948.02(1) defines First Degree Sexual Assault of a Child as:

"(am) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years and causes great bodily harm to the person is guilty of a Class A felony.
(b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.
(c) Whoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony.
(d) Whoever has sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years of age when the sexual contact occurs.
(e) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony."

Minn. Stat. § 609.342(c) appears to have two required elements. The first is that the defendant "engages in sexual penetration with another person"; and the second is that "[c]ircumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another."

Wis. Stat. § 940.225(1), on the other hand, essentially contains five separate offenses, four of which each of which share one required element, one "either/or" element, and one or two element(s) that is unique to each paren; and one, sub (d), that is essentially an enhancer to § 940.225(2). All of the first four require that the defendant "has sexual contact or sexual intercourse with another person", that the contact or intercourse is "without [the] consent of that person", and then each require a separate specific element. Sub (a) contains two separate crimes: the first half of sub (a) criminalizes "sexual contact or sexual intercourse with another person", "without [the] consent of that person", that "causes pregnancy…to that person"; the second half of sub (a) criminalizes "sexual contact or sexual intercourse with another person", "without [the] consent of that person", that "causes great bodily harm…to that person". Sub (b) criminalizes "sexual contact or sexual intercourse with another person", "without [the] consent of that person", "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon." Sub (c) criminalizes "sexual contact or sexual intercourse with another person", "without [the] consent of that person", when that contact or intercourse "[i]s aided or abetted by one or more other persons" and is committed "by use or threat of force or violence". Lastly, sub (d) states that an offense is First Degree Sexual Assault when an individual commits what would otherwise be Second Degree Sexual Assault when the conduct is committed against an individual who is 60 years of age or older.

None of the individual offenses under Wis. Stat. § 940.225(1) "closely match the elements" of Minn. Stat. § 609.342(c).

Sub (d) is patently dissimilar, as it requires both that the offense be committed against an individual who is 60 years of age or older, which is completely absent from Minn. Stat. 609.342(c), and also that the individual committed what would otherwise be Second Degree Sexual Assault.

In regard to the first four individual offenses, the Defendant-Respondent admits that the first element of Minn. Stat. § 609.342(c), that that the defendant "engages in sexual penetration with another person", has identical or narrower elements than the "either/or" element of the first four Wis. Stat. § 940.225(1) crimes, that the defendant "has sexual contact or sexual intercourse with another person".

However, each of the first four remaining individual offenses under Wis. Stat. § 940.225(1) has at least two additional elements, none of which are identical or narrower than the second element of Minn. Stat. § 609.342(c). All four require that the contact or intercourse with another person be "without [the] consent of that person", which is not an element of Minn. Stat. § 609.342(c). This additional element, in and of itself, makes Minn. Stat. § 609.342(c) an offense that is not a "comparable offense in another jurisdiction" to Wis. Stat. § 940.225(1).

Additionally, each of the four remaining individual offenses contain at least one additional element.

Sexual Contact or Intercourse Without Consent Causing Great Bodily Harm under Wis. Stat. § 940.225(1)(a) requires that the contact or intercourse *caused great bodily harm*, which is not an element of Minn. Stat. § 609.342(c).

Sexual Contact or Intercourse Without Consent Causing Pregnancy under Wis. Stat. § 940.225(1)(a) requires that the contact or intercourse *led to a pregnancy*, which, again, is not an element of Minn. Stat. 609.342(c).

Sexual Contact or Intercourse by Use or Threat of Use of a Dangerous Weapon under Wis. Stat. § 940.225(1)(b) requires use or threat of *use of a dangerous weapon* or *any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon*. While the third element of Minn. Stat. 609.342(c) requires that "[c]ircumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another", the element is patently not "identical or narrower" than the Wisconsin element, not "the same or nearly the same", nor do the elements bear "substantial similarity". The Wisconsin element requires either the use or the threat of use of either a dangerous weapon or an "article" that could cause the victim to believe it is a dangerous weapon. The Minnesota element only requires "circumstances" to exist to cause the victim to fear imminent great bodily harm. One can imagine several theoretical "circumstances" that could cause a victim to fear imminent great bodily harm without the presence of a dangerous weapon or an article that appears to be a dangerous weapon. In the alternative, there could be

potential circumstances in which a dangerous weapon was used or threatened to be used where the victim did not necessarily fear imminent great bodily harm.

Lastly, Sexual Contact or Intercourse Without Consent by Use or Threat of Force or Violence While Aided and Abetted requires a finding both that the offending contact or intercourse is *aided or abetted* by one or more other persons and is committed by *use or threat of force or violence*. Minn. Stat. § 609.342(c) certainly does not require that the offending conduct was aided or abetted by one or more persons, and, similarly to as discussed above, the Minnesota element is not identical or narrower than "use or threat of force or violence".

A conviction for violating Minn. Stat. § 609.342(c) does not have identical or narrower elements than any of the individual offenses under Wis. Stat. § 940.225(1), the elements of the two crimes do not bear substantial similarity, and the elements are not the same, closely the same, or nearly match. The Defendant-Respondent takes the position that a conviction of a violation of Minn. Stat. § 609.342(c) as it existed in 1984 is not a comparable offense in another jurisdiction to either Wis. Stats. § 940.225(1) or § 948.02(1), and the parties and Judge Glonek were incorrect to concede as much at the trial level.

Wis. Stat. § 948.02(1) is similar to Wis. Stat. § 940.225(1) in that it essentially contains five separate offenses. Sub (am) states that "[w]hoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years and causes great bodily harm to the person is guilty of a Class A felony." Sub (b) reads that "[w]hoever has sexual intercourse with a person who has not

attained the age of 12 years is guilty of a Class B felony." Sub (c) states that "[w]hoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony. Sub (d) reads that "[w]hoever has sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years of age when the sexual contact occurs." Finally, sub (e) states that "[w]hoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony."

Of importance, each and every offense contained within § Wis. Stat. 948.02(1) contains an element requiring that the offender had sexual intercourse or sexual contact "with a person who has not attained the age of X years". While the requisite age is different for each offense, all five offenses contain an element requiring a showing that the victim has not yet reached a certain age. § Minn. Stat. 609.342(c) has no such requirement in either of its elements, and as such, a conviction for violating Minn. Stat. 609.342(c) does not have identical or narrower elements than any of the individual offenses under Wis. Stat. § 948.02(1), the elements of the two crimes do not bear substantial similarity, and the elements are not the same, closely the same, or nearly match.

Thus, the Defendant-Respondent's 1984 conviction for Criminal Sexual Conduct in the First Degree is not "a comparable offense in another jurisdiction" to Wis. Stat. § 940.225(1) or Wis. Stat. § 948.02(1), and § 904.04(2)(b)2. is therefore inapplicable to the defendant's 1984 conviction. Though this does not appear to be

the reason Judge Glonek found that the 1984 Minnesota criminal conviction was inadmissible at trial, had he analyzed whether the Defendant's conviction in 1984 of a violation of Minn. Stat. § 609.342(c) was a comparable offense in another jurisdiction to Wis Stats. § 940.225(1) or § 948.02(1), he would have found yet another basis for determining the 1984 Minnesota criminal conviction was inadmissible.

II. What is required for a previous conviction to be "similar to the alleged violation"?

A similar query that the case at bar raises is what the term "similar" means, as used in Wis. Stat. § 904.04(2)(b)(2). Similarly to the previous issue, this is a novel question of statutory interpretation that must be answered by any circuit court judge who is presented in a prosecution for first-degree sexual assault with evidence that the defendant was previously convicted of a sex crime. This question, however, has an even more broad impact, as every judge who is presented in a prosecution for first-degree sexual assault with evidence that a person was previously convicted of a sex crime must weigh the similarities between the previous conviction and the present prosecution, including those where both prosecutions revolve around Wisconsin's first-degree sexual assault statute (whereas the previous issue only pertains to those judges who must weigh a conviction in another jurisdiction for a sex crime against charges for a violation of Wisconsin's first-degree sexual assault

statute, which is likely meaningfully less common). Also similarly to the previous issue, this question has yet to be decided by any published Court of Appeals decision aside from the case at bar. Each and every judge who is presented with evidence in a prosecution for first-degree sexual assault that the defendant was previously convicted of a sex crime as evidence of the defendant's character to show conformity must weigh the similarities between the past conviction and the present prosecution. Without guidance from the Supreme Court, different judges are likely to use different standards as to how "similar" the prior conviction must be to the previous prosecution to fulfill the requirements of § 904.04(2)(b)(2). In the present case, Judge Glonek 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."

This question does not appear to have been addressed to any meaningful extent by other Court of Appeals decisions or by the Supreme Court of Wisconsin. The Defendant-Respondent propounds that the Court should adopt a fact-intensive analysis similar to that the Court adopted in *State v. Hurley*, 2015 WI 35, 361 Wis. 2d 529, 861 N.W.2d 174. While the *Hurley* court's analysis sought to determine whether "other-acts evidence was admissible to establish method of operation", the depth of analysis used in *Hurley* would serve well to determine whether a conviction is "similar to the alleged violation" under Wis. Stat. § 904(2)(b)2.

In *Hurley*, this Court weighed the similarity between two "acts" of sexual abuse toward children to determine whether the circuit court had erroneously

exercised its discretion in admitting other-acts evidence of the first "act" to establish method of operation. The Court cited a case that held that "[t]he threshold measure for similarity with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged. Whether there is a concurrence of common features is generally left to the sound discretion of the trial courts." *Id*., citing *State v. Kuntz*, 160 Wis. 2d 722, 746-47, 467 N.W.2d 531 (1991). The *Hurley* court held that the circuit court acted within its discretion in admitting the other-acts evidence because 1) the allegations of the victims in the two sets of assaults were very similar; 2) the victims were similar and age; 3) both sets of assaults involved digital penetration that were repeated over a number of years; and 4) Hurley preceded the assaults with games.

In the case at bar, Judge Glonek used a similar means of determination as the *Hurley* court in determining the level of similarity of the prior conviction and the alleged violation. Though he improperly used *State v. Mitchell*, 2022 WI App 49, 404 Wis. 2d 510, 979 N.W.2d 811 as his justification for such a determination, using the analysis set forth by this Court in *State v. Hurley* would come to the same conclusion. In his analysis, Judge Glonek weighed the similarity in "time, place and circumstance", as well as whether there was "a concurrence of common features", an analysis that the court should "generally le[ave] to the sound discretion of the trial court[]." *Hurley*, citing *State v. Kuntz*, 160 Wis. 2d 722, 746-47, 467 N.W.2d 531 (1991). In his analysis, he agreed with the State that there were some similarities, but that there were collective factual dissimilarities that were "clearly

significant, compelling, and strong", including the differences in the defendant's age between the two acts, the difference in relationship between the two victims, the difference in location of the acts, and several significant factual dissimilarities between the two acts. Judge Glonek held that the significant, compelling, and strong factual dissimilarities were such that even a more liberal interpretation of the rules in light of the greater latitude rule would not permit evidence of the defendant's 1984 conviction to be entered into evidence.

In sum, while the question has not been addressed to any meaningful extent by previous courts, the Defendant-Respondent proposes that that the Court should adopt a fact-intensive analysis similar to that adopted in *State v. Hurley* to determine whether a previous conviction is "similar to the alleged violation" under Wis. Stat. § 904(2)(b)2. In doing so, appellate courts should defer to trial courts' weighing of similarity in time, place and circumstance and concurrence of common features of the prior conviction and the charged offense, and give great deference to the sound discretion of the trial court in doing so, absent the court's application of an improper legal standard or if its decision is not reasonably supported by the facts on the record.

III. Is the other-acts evidence analysis developed under *Sullivan* and its progeny for § 904.04(2)(a) evidence the appropriate test for the admissibility of evidence of a prior conviction offered under § 904.04(2)(b)(2)?

Finally, and likely of the most statewide importance, the case at bar raises the issue of whether the other-acts evidence analysis developed under *Sullivan* and its progeny for § 904.04(2)(a) evidence the appropriate test for the admissibility of evidence of a prior conviction offered under § 904.04(2)(b)(2). This is a novel question of interpretation that, similarly to the last, must be answered by any circuit court judge who is presented in a prosecution for first-degree sexual assault with evidence that the defendant was previously convicted of a sex crime. This question has yet to be decided by any published Court of Appeals decision aside from the case at bar, and notably, there appears to be conflicting unpublished decisions of the Court of Appeals on this specific issue. Without guidance and clarification from the Supreme Court, differing stances on this issue will continue to occur across the state unless this question is resolved, and a decision by the Supreme Court will help to develop, clarify, and harmonize the law and guide judges and attorneys alike as to the appropriate test for admissibility of evidence of a prior conviction offered under § 904.04(2)(b)(2).

There is no precedential opinion that decides the question, and there are *per curium* opinions that support both positions. In the case at bar, Judge Glonek took notice of one of the per curium decisions, *State v. Mitchell*, 2022 WI App 49, 404

Wis. 2d 510, 979 N.W.2d 811, and, acknowledging that the *Mitchell* court was not binding on him nor could he rely on it for precedential purposes, "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." Judge Glonek would have needed to decide either one way or the other, and with the lack of precedential opinion to bind or guide him, he appropriately exercised his discretion and determined that "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." Regarding this specific issue, the Defendant-Respondent urges the Court to essentially ratify and certify Judge Glonek's decision and reverse the decision of the Court of Appeals and, in doing so, create a precedent circuit court judges will be able to rely upon in the future.

CONCLUSION

This Court should grant review of the decision of the Court of Appeals in this matter dated August 6th, 2024, and, after review, reverse the decision of the Court of Appeals, 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 27th day of September, 2024.

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. § 809.62(4) for a brief produced with a proportional font. The length of this brief is 6,146 words.

Dated this 27th day of September, 2024.

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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 27th day of September, 2024.

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