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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2022AP1718-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH W. HILL,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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CRITERIA FOR REVIEW

Petitioner Kenneth W. Hill seeks review of a published court of appeals decision that interpreted Wisconsin's narrow prior-conviction-as-propensity-evidence statute, Wis. Stat. § 904.04(2)(b)2. The State had sought to admit at Hill's trial his 1984 conviction for first-degree sexual assault of a child under section (2)(b)2., and the circuit court denied the motion. The court of appeals concluded that the circuit court applied the wrong legal standard: "[T]he circuit court failed to correctly analyze the evidentiary requirements of the prior-conviction statute, which then led the court to apply an incorrect legal standard to the question of whether the evidence was admissible." (Pet-App. 32.) After setting forth the standard for each part of the analysis, it reversed the circuit court's order and remanded "with directions for the court to consider the 1984 conviction under the proper standard of admissibility." (Pet-App. 5.)

Hill argues that the petition satisfies the criteria for review under Wis. Stat. § (Rule) 809.62(1r)(c)3. because the questions of law raised in this case are "likely to recur unless resolved," and state courts need a decision from this Court to "help develop, clarify and harmonize the law." (Pet. 8, 11.)

But the Court of Appeals published its decision; the questions of law have therefore been resolved. *State v. Hayes*, 2004 WI 80, ¶ 14 n.9, 273 Wis. 2d 1, 681 N.W.2d 203 ("Published opinions of the court of appeals are precedential for lawyers, trial courts, the court of appeals, and this court.").

Hill is thus incorrect that "[t]here is no precedential opinion that decides the question" and that "[w]ithout guidance and clarification from the Supreme Court, differing stances on this issue will continue to occur across the state." (Pet. 27.) He is also incorrect that review is necessary because the questions presented here have "yet to be decided by any published Court of Appeals decision aside from the case at

bar” and have not “been addressed . . . by other Court of Appeals decisions.” (Pet. 12, 24, 27.) The decision states the law in Wisconsin.

In his petition for review, Hill is thus not asking this Court to “develop, clarify or harmonize” any law; he instead is simply asking this Court to take this case, affirm the circuit court’s evidentiary ruling in his favor, and remand the case for trial. (Pet. 26.) It is worth noting that the ruling he seeks to have affirmed was based on such “dissimilarities” between the 1984 offense and the present charges as the fact that Hill kissed the 1984 victim when he penetrated her vaginally but did not kiss the two alleged victims in this case when he did so. (Pet-App. 8–9.) The ruling also relied on the court’s conclusion that a prior conviction for sexual assault of a young girl was not even *relevant* to this case. (Pet-App. 8–9.)

The court of appeals conducted a straightforward, plain language interpretation of section 904.04(2)(b)2.¹ and set forth its holdings as follows:

¹ The statute creates a limited exception to the rule in Wis. Stat. § 904.04(1) prohibiting the use of “[e]vidence of a person’s character or a trait of the person’s character . . . for the purpose of proving that the person acted in conformity therewith on a particular occasion.” Wisconsin is one of 17 states with statutes inspired by Rule 414 of the Federal Rules of Evidence. In a case where a defendant is charged with child molestation, Rule 414 allows “evidence the defendant committed any other child molestations” to be used as propensity evidence.

Wisconsin’s statute imposes three significant limits that are not present in Rule 414 or any other state’s propensity evidence statute: first, only a *prior conviction* for first-degree sexual assault or first-degree sexual assault of a child can be used as propensity evidence; second, propensity evidence can be used only in a prosecution for first-degree sexual assault or first-degree sexual assault of a child; and third, propensity evidence is limited to criminal matters.

First, 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.

. . . Second, prior conviction evidence permitted under [section] 904.04(2)(b)2. encompasses only the fact of the conviction, not the underlying details of the prior case. . . .

. . . Third, 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.

. . . Fourth, and finally, the other-acts evidence analysis, as developed under *Sullivan* and its progeny for § 904.04(2)(a) evidence, is inapplicable to the prior-conviction statute. Instead, the admission of prior conviction evidence is subject to Wis. Stat. § 904.01 and Wis. Stat. § 904.03.

(Pet-App. 4–5.)

The court, having set forth its analysis, correctly remanded for the circuit court to apply the proper standard for admissibility to the motion to admit Hill’s prior conviction under section 904.04(2)(b)2. (Pet-App. 5.)

Hill seeks review entirely on the incorrect premise that the law is unsettled in Wisconsin. (Pet. 8, 11, 12, 13, 24, 27.) It is not. His petition contains no developed argument that the court of appeals erred—on any point. It does not engage with the reasoning of the court of appeals, much less show any flaw in it. The petition thus fails to meet the statutory criteria for review or otherwise demonstrate a need for it.

CONCLUSION

This Court should deny the Petition.

Dated this 7th day of October 2024.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this petition or response is 953 words.

Dated this 7th day of October 2024.

Electronically signed by:

Sonya K. Bice

SONYA K. BICE

Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the Clerk of the Wisconsin Supreme Court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 7th day of October 2024.

Electronically signed by:

Sonya K. Bice

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Assistant Attorney General