**Appeal No. 2021AP1399-CR** **Cir. Ct. No. 2020CF687**

**WISCONSIN COURT OF APPEALS**
**DISTRICT II**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**MORRIS V. SEATON,**

**DEFENDANT-RESPONDENT.**

**FILED**

**FEB 08, 2023**

Sheila T. Reiff
Clerk of Supreme Court

---

## CERTIFICATION BY WISCONSIN COURT OF APPEALS

---

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

### ISSUE

In light of the 2014 amendment of WIS. STAT. § 904.04(2)(b) (2019-20),[1] codifying and expanding the "greater latitude" rule[2] and the Wisconsin

---

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] In ***State v. Hunt***, 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771, our supreme court explained that "[t]he greater latitude rule was first stated in 1893 in ***Proper v. State***, 85 Wis. 615, 628-30, 55 N.W. 1035 (1893).... The rule helps other acts evidence come in under the exceptions stated in WIS. STAT. § (Rule) 904.04(2)." ***Hunt***, 263 Wis. 2d 1, ¶86 (quoting ***State v. Hammer***, 2000 WI 92, ¶23, 236 Wis. 2d 686, 613 N.W.2d 629). The court noted that in ***State v. Davidson***, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606,

(continued)

Supreme Court's decision in ***State v. Dorsey***, 2018 WI 10, ¶¶23-25, 379 Wis. 2d 386, 906 N.W.2d 158, interpreting and applying that amendment, are ***State v. Alsteen***, 108 Wis. 2d 723, 324 N.W.2d 426 (1982), and ***State v. Cofield***, 2000 WI App 196, 238 Wis. 2d 467, 618 N.W.2d 214, still controlling law as they relate to the admissibility of prior nonconsensual sexual wrongs in cases involving an adult victim of an alleged sexual assault where consent is the primary issue?

## ***Background***

The State charged Morris V. Seaton with third-degree sexual assault of "Anna."[3] According to the criminal complaint, in June 2019, seventeen-year-old Anna and her older sister invited nineteen-year-old Seaton and the sister's boyfriend[4] over to their apartment for an evening of drinking and camaraderie. Anna and Seaton had been friends for some time; Anna attended Brookfield East High School, where Seaton had previously attended. Inebriated, both women went into their shared bedroom to sleep, and the sister informed her boyfriend and

---

> [w]e held that other-acts evidence is relevant to sexual assault cases (particularly those of children), because a normal juror would presume that the defendant was incapable of such a depraved act. We also noted the "difficulty sexually abused children experience in testifying, and the difficulty prosecutors have in obtaining admissible evidence." In light of such difficulty, we held that the greater latitude rule "support[s] the more liberal standard of admissibility in child sexual assault cases."

***Hunt***, 263 Wis. 2d 1, ¶87 (second alteration in original) (quoting ***Davidson***, 236 Wis. 2d 537, ¶42).

[3] "Anna" is a pseudonym.

[4] The record does not specifically indicate that this other male was the sister's "boyfriend" but does indicate that they had previously had a relationship of an intimate nature. For simplicity, we will use the term "boyfriend."

Seaton via text that they could stay in the apartment as long as they wanted and just let themselves out.

Instead of leaving, the men went into the bedroom, with the sister's boyfriend joining the sister on her bed and Seaton going onto the bed Anna was on. The sister and her boyfriend left the room and went into the mother's bedroom. Seaton placed his hand on Anna's thigh, and she adjusted her body to move it away. He subsequently placed his fingers inside of Anna's vagina and took off her clothes. With Anna on her knees and pushed up against the wall, Seaton positioned himself behind her and put his penis inside her vagina; Anna believes he did so without a condom on. Due to the pain, Anna told Seaton to stop, but he continued. As Anna "began to sober up," she pushed Seaton off of her, put on some clothes, and went into the bathroom. When she entered the bedroom again, Seaton was lying on her bed. He "tr[ied] to get her in bed with him but she told him not to touch her." Seaton eventually left the apartment.

Prior to trial, the State filed a motion in limine seeking to introduce at trial evidence of an alleged prior sexual assault by Seaton of another seventeen-year-old Brookfield East High School student, "Jane."[5] The State represented that in that incident, which occurred in September 2017 or 2018, Jane had consumed some alcohol and was "hanging out," along with Seaton, in her sister's front yard in Whitewater, Wisconsin, around 10:00 p.m. after having helped her sister move in for college. Jane and Seaton knew each other from high school, although he was one grade ahead of her and had already graduated.

[5] Another pseudonym.

Jane eventually decided to leave to look for her cousin, and Seaton offered to help. When they were a couple houses away, Seaton "suggested they go behind a residence." The two sat on the lawn and talked for some time before Seaton "pushed [Jane] back into the grass and held her hands above her head with one hand while he pushed down her pants with his other hand" and began having intercourse with her. She told him to stop, but he responded "that it was fine and to be quiet" and put his arm over her mouth. Jane believed Seaton did not use a condom.

In its motion, the State indicated it was offering this other acts evidence pursuant to WIS. STAT. § 904.04(2)(a)[6] for the purpose of providing context, bolstering Anna's credibility, and proving "motive, identity, plan, opportunity, and modus operandi." At the hearing on the motion, the State added that it also was offering it to prove intent.

The circuit court considered the admissibility of the Whitewater incident using the three-step analysis of ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). As relevant here, that analysis provides that "other-acts evidence is admissible if (1) it is offered for a permissible purpose under [WIS. STAT.] § 904.04(2)(a), (2) it is relevant under [WIS. STAT.] § 904.01, [*see infra* note 7], and (3) its probative value is not substantially outweighed by the risk of

---

[6] WISCONSIN STAT. § 904.04(2)(a) provides:

> *General admissibility*. Except as provided in par. (b) 2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

unfair prejudice under [WIS. STAT.] § 904.03." *See* ***Dorsey***, 379 Wis. 2d 386, ¶8 (footnotes omitted). Beginning with the first—permissible purpose—prong, the circuit court noted similarities and differences between the Whitewater incident and the incident in this case and stated, "I honestly think you could analyze this both ways, depending on how a court would really want to look at that. I would note the law does not require them to be identical, just similar. And there are a fair amount of similarities here."

For similarities, the circuit court pointed out that (1) the females were both seventeen and Seaton was close in age, a "peer"; (2) Seaton knew each of the females from having attended the same high school as them; (3) both alleged victims had consumed alcohol and Seaton appeared to have been aware of this; (4) each incident involved an allegation of "intercourse"; (5) during which "the victims indicate they told Mr. Seaton to stop and he did not." As to differences, the court indicated that Seaton and Anna appeared to have been friends, while Seaton and Jane appeared to have been more like acquaintances, and that the incident in the case at bar "occurred in a bedroom" in a residence to which Seaton had been invited, while the Whitewater incident occurred "[o]utside, on the grass." The court also believed the incidents involved "a different type of force if you will." It further indicated that the incidents occurred "about a year apart."

The circuit court posited, "Is [the Whitewater incident] being offered for motive? No, I don't see that here. Is it being offered for opportunity? Not really…. I don't see this as a crime of opportunity." The court continued, "What about intent? Well, in this case it would be intent to have, right? Intentional sexual contact, I suppose, in theory. And I'm not sure that's what the State has." The court added, "And I don't see this as a modus operandi because of th[e] differences that I talked about earlier, one being inside, [and] another being

outside," and in this case Seaton having been "invited into the home" as opposed to the Whitewater incident where "he's really kind of coming upon that person." The court stated that it "do[es] not believe that the evidence of the [Whitewater incident] fits under … identity, plan or modus operandi," adding that

> [t]his would be a far different situation if the Whitewater incident was really an invitation to a party together, an invitation by the victim to hang out.
>
> It was different. This was him helping her out, at least as the allegation goes, to help find her [cousin], and then a forcible assault is alleged outside.

If the incident with Anna had been different "in terms of it being outside or being, you know, taken behind bushes or anything like that," the court expressed, "it would be so much more similar, and I could say would go to this modus … operandi. But that's not what we have here." While the court acknowledged that the Whitewater incident could bolster Anna's credibility, it concluded that bolstering credibility, by itself, was not a permissible purpose, stating: "[R]eally, [credibility is] only acceptable if there's another acceptable purpose" and "we know it can't just be offered for the purpose to bolster the credibility. There must be something else under the statute." The court determined that the Whitewater incident was "not similar enough to warrant admissibility" and was "not being offered for a permissible purpose."

Looking at the second ***Sullivan*** prong, the circuit court considered whether the evidence of the Whitewater incident was relevant. The court stated, "Sure, it could be relevant on credibility, no doubt. It could bolster. But without being able to say it's being offered for a permissible purpose under step one of the ***Sullivan*** analysis, I have difficulty finding that it would be relevant then to those purposes." The court concluded,

> [W]hile there is the greater latitude [rule], and no doubt, that gives a court authority under the facts and circumstances as I've described, they are not similar enough to warrant admissibility. They are not being offered for a permissible purpose, and therefore, I'm gonna deny the State's motion to admit the other act.

The State filed an interlocutory appeal, which we granted.

## ***Discussion***

Forty years ago, the Wisconsin Supreme Court decided ***State v. Alsteen***, 108 Wis. 2d 723, 324 N.W.2d 426 (1982), in which it held that "[t]he fact that one woman was raped … has no tendency to prove that another woman did not consent," and thus, where "the only issue in [a] case [i]s whether [the complainant] consented to having sexual intercourse with [the defendant, e]vidence of prior acts … has no probative value on the issue of the complainant's consent" and should be excluded under WIS. STAT. § 904.02 as irrelevant.[7] ***Alsteen***, 108 Wis. 2d at 730-31 & n.6 (first alteration in original; citation omitted). With the amendment of WIS. STAT. § 904.04(2)(b) in 2014 and the Wisconsin Supreme Court's 2018 decision in ***State v. Dorsey***, 2018 WI 10, 379 Wis. 2d 386, 906 N.W.2d 158, interpreting and applying that amendment, however, a significant question exists as to whether ***Alsteen*** remains controlling law.

[7] WISCONSIN STAT. § 904.01 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WISCONSIN STAT. § 904.02 provides: "All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." Sections 904.01 and 904.02 both read the same today as they did at the time of ***State v. Alsteen***, 108 Wis. 2d 723, 324 N.W.2d 426 (1982).

After spending time with a fifteen-year-old girl and her boyfriend, Alsteen had sexual intercourse with the girl en route to driving her home. She reported being raped, and Alsteen was charged with sexual assault. At trial, the girl testified to details of the assault. ***Alsteen***, 108 Wis. 2d at 725-26 & n.1. The circuit court permitted the State to present the testimony of two witnesses as to other sexual wrongs perpetrated by Alsteen. The first witness was a father who testified to having found Alsteen in bed and on top of the father's nude eleven-year-old daughter seven years earlier. ***Id.*** at 726. The second witness testified that three years before the incident for which Alsteen was on trial, she left a party she and Alsteen had been attending, Alsteen drove by and offered her a ride home, which she accepted, and Alsteen stopped the car en route and had sexual intercourse with her over her objections and resistance. ***Id.*** at 726-27. Testifying on his own behalf, Alsteen acknowledged he had sexual intercourse with the fifteen-year-old girl in the case on trial but claimed she had consented, and he provided details to show she was "a willing participant in the act." ***Id.*** at 725-26 & n.1. Alsteen was convicted.

On appeal, our supreme court concluded the circuit court erred in admitting the other acts evidence. ***Id.*** at 730. The ***Alsteen*** court did not even consider whether the evidence fell within one of the WIS. STAT. § 904.04(2) other acts evidence "permissible purpose" exceptions and specifically did not resolve the State's contention that the evidence was admissible to prove Alsteen had a general scheme or plan. ***Alsteen***, 108 Wis. 2d at 731 & n.6. The court sidestepped that question because it determined the evidence "should have been excluded on grounds of relevancy," ***id.*** at 731 n.6, adding that it "was not relevant to any issue in the case," ***id.*** at 730. The court continued:

> Because Alsteen admitted having sexual intercourse with [the fifteen-year-old girl], the only issue was whether [the girl] consented to the act. Evidence of Alsteen's prior acts has no probative value on the issue of [the girl's] consent. Consent is unique to the individual. "The fact that one woman was raped … has no tendency to prove that another woman did not consent."

***Id.*** (citation omitted). Distinguishing the case before it from a prior decision, the ***Alsteen*** court went on:

> Regardless of whether the evidence fits within an exception to [§] 904.04(2), it must be relevant to an issue in the case to be admissible. [***State v. Tarrell***, 74 Wis. 2d 647, 247 N.W.2d 696 (1976)] is distinguished by the fact that the other crimes evidence admitted therein had a tendency to prove a material issue. In ***Tarrell*** the issue was whether the defendant was the individual who sexually assaulted the complainant. By contrast, the only issue in the instant case was whether [the girl] consented to having sexual intercourse with Alsteen. Evidence of prior acts may be relevant to prove the identity of a sex offender. As already noted, however, such evidence has no probative value on the issue of the complainant's consent.

***Alsteen***, 108 Wis. 2d at 731 (footnote omitted). The court concluded that "the evidence of Alsteen's prior acts was improperly admitted," adding that "[s]uch evidence is often highly prejudicial" and its admission in that case was "prejudicial error warranting a new trial." ***Id.*** at 731-32.

In our ***Cofield*** decision in 2000, we relied on ***Alsteen*** when we "remind[ed]" the circuit court that "[c]onsent is unique to the individual. The fact that one woman was raped … has no tendency to prove that another woman did not consent." ***Cofield***, 238 Wis. 2d 467, ¶10 (second alteration in original) (quoting ***Alsteen***, 108 Wis. 2d at 730);. Three years later, however, our adherence to ***Alsteen*** began to wane.

In ***State v. Ziebart***, 2003 WI App 258, 268 Wis. 2d 468, 673 N.W.2d 369, we agreed with the State's contention that "***Alsteen*** does not stand for the proposition that other acts evidence can never be probative of the issue of consent or that the other acts evidence is not probative of the issue of the victim's credibility." ***Id.***, ¶19. We stated in the jury-instruction context of ***Ziebart*** that

> although … the prior non-consent of one person to sexual contact may not be introduced *solely* to prove the non-consent of another person to sexual contact, the preclusion of such other-acts evidence is not absolute. Where, as here, the other-acts evidence of non-consent relates not only to sexual contact but also to a defendant's *modus operandi* encompassing conduct inextricably connected to the strikingly similar alleged criminal conduct at issue, the evidence of non-consent may be admissible to establish motive, intent, preparation, plan, and absence of mistake or accident under WIS. STAT. § 904.04(2).

***Ziebart***, 268 Wis. 2d 468, ¶20. Seemingly at odds with ***Alsteen***, we approvingly noted language from an Iowa Supreme Court case in which that court stated that modus operandi evidence "may be introduced to rebut a defendant's claim of consent by showing that he 'has had a *nonconsenting* encounter with another person in this strikingly singular way.'" ***Ziebart***, 268 Wis. 2d 468, ¶23 (quoting ***State v. Plaster***, 424 N.W.2d 226, 231 (Iowa 1988)). We added,

> [w]here, as here, a defense of consent is inextricably connected to a defendant's conduct surrounding and including sexual contact, and where other-acts evidence is probative of a *modus operandi* rebutting that defense, ***Alsteen*** does not preclude an instruction advising the jury that it may consider the evidence *on the issue of whether the alleged victim consented* to the defendant's conduct.

***Ziebart***, 268 Wis. 2d 468, ¶24 (emphasis added).

We additionally stated that

> Ziebart could have no complaint if the trial court, instead of instructing the jury that … testimony [of one of the prior

> act victims] could be considered to evaluate consent and non-consent, had simply advised that it could be considered to evaluate credibility. And here, consent/non-consent and credibility were virtually interchangeable. The issue simply was whether [this victim's] account, in her trial testimony, or Ziebart's account, presented to police, was true. That determination reduced to whether [this victim] consented to Ziebart's actions. Therefore, assuming that the trial court had not uttered the challenged 'consent/non-consent' words, the jury, having been properly instructed to determine the credibility of witnesses still would have evaluated [that prior act victim's] testimony as it bore on [this victim's] credibility and, perforce, on her declaration of non-consent.

***Id.***, ¶27 (citations omitted).

Occurring prior to the 2014 amendment of WIS. STAT. § 904.04(2)(b) and not involving children as the victims, ***Alsteen***, ***Cofield***, and ***Ziebart*** did not consider the "greater latitude rule."

In 2014, the legislature amended WIS. STAT. § 904.04(2)(b) to add the following:

> *Greater latitude.*
>
> 1. In a criminal proceeding … alleging the commission of a serious sex offense, as defined in [WIS. STAT. §] 939.615(1)(b), or of domestic abuse, … evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

*See* 2013 Wis. Act 362, §§ 21, 38. The amendment expanded the application of the greater latitude rule to domestic assault cases and various sexual offense cases, like the third-degree sexual assault case now before us. Prior to this amendment, the greater latitude rule was primarily utilized in cases involving sexual assault of children. *See, e.g.*, ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606.

Then, in 2018, our state supreme court decided ***Dorsey***, in which the court considered "what standard for admission of other-acts evidence applies" under this new WIS. STAT. § 904.04(2)(b)1. language and whether evidence of prior acts of domestic violence by Dorsey was properly admitted under that provision. ***Dorsey***, 379 Wis. 2d 386, ¶25. Related to the first issue, the ***Dorsey*** court recognized that "the greater latitude rule allows for more liberal admission of other-acts evidence," ***id.***, ¶32, but also noted that "we cannot read subd. (2)(b)1. as an exception to para. (2)(a)'s general prohibition on propensity," ***id.***, ¶29. The court stated that "for the types of cases enumerated under WIS. STAT. § 904.04(2)(b)1., circuit courts should admit evidence of other acts with greater latitude under the ***Sullivan*** analysis to facilitate its use for a permissible purpose." ***Dorsey***, 379 Wis. 2d 386, ¶33. Even though the case before it was in the context of domestic abuse, the court added that "our interpretation here applies with equal force to the other circumstances listed in WIS. STAT. § 904.04(2)(b)1." ***Dorsey***, 379 Wis. 2d 386, ¶26 n.20. "In sum," the court concluded, "§ 904.04(2)(b)1. permits circuit courts to admit evidence of other, similar acts of domestic abuse with greater latitude, as that standard has been defined … under ***Sullivan***." ***Dorsey***, 379 Wis. 2d 386, ¶35. Considering whether the circuit court erred in admitting the evidence of prior instances of domestic abuse by Dorsey, the court recognized that a circuit court's evidentiary decisions "are entitled to great deference." ***Id.***, ¶37 (citation omitted).

Arguing for the admissibility of the prior acts of domestic violence, the State, in addressing the first—permissible purpose—prong of ***Sullivan***, offered the evidence "to establish the defendant's intent and motive to cause bodily harm to his victim and to control her within the context of a domestic relationship." ***Dorsey***, 379 Wis. 2d 386, ¶9. Related to the second prong—relevance—the State

contended "that the evidence was relevant because it established Dorsey's intent and motive, which were facts of consequence, and that the other acts were near enough in time, place, and circumstances to have a tendency to make the facts of intent and motive more probable." ***Id.***

In discussing the second ***Sullivan*** prong, the ***Dorsey*** court considered whether the evidence was related "to a fact or proposition of consequence" and had "probative value, that is, 'a tendency to make a consequential fact more or less probable than it would be without the evidence.'" ***Dorsey***, 379 Wis. 2d 386, ¶44 (citation omitted). Specifically addressing these two considerations in relation to the assertion that the evidence of prior violence against a different victim bolstered the credibility of the victim in the case before it, the ***Dorsey*** court stated,

> [T]o the extent that [the prior victim's] testimony [that she had been physically assaulted by Dorsey two years earlier] operated to bolster [the current victim's] credibility [as to her testimony that she was physically assaulted by Dorsey in the current case], we have held that "[a] witness's credibility is always 'consequential' within the meaning of WIS. STAT. § 904.01."

***Dorsey***, 379 Wis. 2d 386, ¶50 (sixth alteration in original; citation omitted). The court added,

> And we have held that credibility is particularly probative *in cases that come down to he-said-she-said*. Moreover, the difficult proof issues in these kinds of cases "provide the rationale behind the greater latitude rule.… [I]t follows that the greater latitude rule allows for the more liberal admission of other-acts evidence that has a tendency to assist the jury in assessing [credibility]."

***Id.*** (alterations in original; emphasis added; citations omitted).

Thus, broken down, ***Dorsey*** indicates that bolstering a current alleged victim's credibility is a relevant use of prior acts evidence in he-said, she-said type cases. The sexual assault case against Seaton, as in so many similar cases, boils down to he-said, she-said on the issue of whether the sexual intercourse with Anna was consensual. ***Alsteen***, however, pointedly states that such prior acts evidence is not relevant and thus not admissible. So, the question is most ripe as to whether the amendment of WIS. STAT. § 904.04(2)(b)1. and our supreme court's decision in ***Dorsey*** have effectively rendered ***Alsteen*** no longer controlling on the question of whether in a sexual assault case in which the core issue is consent in a he-said, she-said context—like the case now before us—evidence of a similar prior nonconsensual sexual wrong by the defendant is "relevant to an issue in the case," ***Alsteen***, 108 Wis. 2d at 731, and thus admissible.

More recently, we appeared to either ignore or overlook ***Alsteen*** in ***State v. Smogoleski***, No. 2019AP1780-CR, unpublished slip op. (WI App. Nov. 18, 2020), a case with facts not far afield from those in this case. Smogoleski was charged with sexually assaulting a seventeen-year-old female who had become intoxicated at a house party and gone to lie down in a bedroom. ***Id.***, ¶1. Smogoleski later entered the bedroom and was subsequently found by the party host to be "on top of" the female whose "shirt was off, and her pants and underwear were at her ankles," "Smogoleski's pants and underwear were also off," and his penis was in contact with her vagina. ***Id.***, ¶3. The host pulled Smogoleski off of the female, who remained asleep the entire time. ***Id.***

The State moved to admit evidence at trial of a prior similar allegation involving Smogoleski and a sixteen-year-old female. According to the female, she became intoxicated at a house party, passed out on the couch, and

woke up to her leggings removed and a pantless Smogoleski performing cunnilingus on her, producing a condom, and asking her if she "wanted to have sex," which she refused. ***Id.***, ¶17. The trial court denied the State's motion, appearing to conclude that the evidence passed the first two prongs of the ***Sullivan*** test—"permissible purpose" and "relevancy"—but failed on the third prong. ***Smogoleski***, No. 2019AP1780-CR, ¶19.

On appeal, we agreed, without analysis, that the first two ***Sullivan*** prongs had been satisfied. ***Smogoleski***, No. 2019AP1780-CR, ¶20. Related to the third prong—whether "the probative value of the other acts evidence [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"—we determined that the circuit court "reversed the language of the third prong" and thus applied the wrong standard and erroneously exercised its discretion. ***Id.***, ¶22 (alteration in original) (quoting ***Sullivan***, 216 Wis. 2d at 772-73). Expressing that "the greater latitude rule is clearly applicable under the circumstances," ***Smogoleski***, No. 2019AP1780-CR, ¶21, we further determined that the other acts evidence involving the sixteen-year-old female

> is *highly relevant* to this case, as it provides context, intent, and motive and *specifically addresses the questions of consent and witness credibility*. *Therefore*, the evidence is *highly probative* based on the similarities between the allegations: Smogoleski engaging in sexual acts with an unconscious teenager who had been drinking alcohol at a house party.

***Id.***, ¶23 (emphasis added). We concluded that the third prong of the ***Sullivan*** test had been satisfied, again indicating that the evidence was "highly relevant and probative" and also observing that the circuit court "may provide limiting

instructions to 'substantially mitigate any unfair prejudicial effect.'" ***Id.***, ¶24 (citation omitted). We made no mention of ***Alsteen*** or its holding that evidence of a prior nonconsensual sexual wrong is *not relevant* as to whether an alleged victim in a subsequent case consented, instead stating that such a prior encounter is "highly relevant" and "highly probative" and "specifically addresses the questions of consent and witness credibility." ***Id.***, ¶¶23-24.

As indicated, it is unclear if ***Alsteen*** remains controlling law on the issue of whether a prior nonconsensual sexual wrong is relevant, admissible evidence at a trial where the defendant admits certain sexual conduct occurred but maintains that it was consensual, while the alleged victim asserts it was not. ***Alsteen*** holds that regardless of the asserted "permissible purpose" under the first prong of ***Sullivan***, such evidence is not probative and thus not relevant and not admissible on the issue of consent.

Relatedly, we note that the first prong of the ***Sullivan*** analysis is "hardly demanding." ***State v. Payano***, 2009 WI 86, ¶63, 320 Wis. 2d 348, 768 N.W.2d 832 (emphasis and citation omitted). Thus, should the court accept this certification, it would also make sense for it to answer the question propounded by the State and pondered by the circuit court in this case as to whether the bolstering of an alleged victim's credibility or the undermining of the defendant's credibility for that matter, which are two sides of the same coin in a case such as this, is itself a "permissible purpose" for purposes of the first prong of the ***Sullivan*** analysis, especially in light of the greater latitude rule.

We respectfully request that the Wisconsin Supreme Court accept this certification and provide guidance on the issues raised herein.