STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2013 AP 558-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent

v.

JOEL HURLEY,

Defendant-Respondent-Cross-Appellant

APPEAL FROM AN ORDER VACATING A JUDGMENT OF CONVICTION AND GRANTING A NEW TRIAL, AND ON CROSS-APPEAL FROM AN ORDER DENYING CERTAIN CLAIMS FOR POST-CONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MARINETTE COUNTY, THE HONORABLE DAVID G. MIRON, PRESIDING

COMBINED BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-CROSS-APPELLANT

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BRIEF OF RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Hurley welcomes oral argument in this case. Hurley also believes publication of the opinion in this mater will be warranted as the case presents an opportunity to affirm the law relative to the necessity for charging documents to allege an offense with sufficient particularity to allow a defendant to prepare a defense even in child sexual assault cases.

STATEMENT OF THE CASE

In a criminal complaint filed on June 10, 2011, Hurley was charged with one count of first degree sexual assault of a child under age 12 in violation of Wis. Stats. § 948.02(1)(b). A summons on the complaint was filed on June 14, 2011. Prior to Hurley making his initial appearance, the State filed an Amended Complaint charging one count of repeated sexual assault of a child in violation of Wis. Stats. § 948.025(1). The Amended Complaint's charging section alleged that: "The above-named defendant on and between 2000 and 2005, in the Town of Peshtigo…did commit three or more violations of sec. 948.02(1) or (2) Wis. Stats. Involving the same child who had not yet attained the age of 16." The probable cause section of the Amended Complaint alleged that Hurley had placed his fingers inside the vagina of M.C.N., approximately 5 times between the ages of 6 and 11. The complaint does not allege with any specificity when the alleged assaults occurred, other than to say they occurred during the time that M.C.N. lived with the Defendant.

An initial appearance was held on August 1, 2011. There was no objection made to the complaint and a preliminary hearing was set for August 11, 2011. The complaining witness, M.C.N., was the sole witness called by the State at the preliminary hearing. M.C.N.,

then 16 years of age, identified Hurley as her former stepfather. (R.59. at 4). M.C.N. testified that Hurley inserted his fingers into her vagina "a few" times when she "was in elementary school." (Id. at 5-6). M.C.N. testified that did not know how many times but she knew it was more than once. (Id. at 6). She agreed that she remembered telling police that it happened approximately 5 times and that that sounded right. (Id. at 7). She could not say in what month this happened, in what year it happened, or in what season it happened. She could not say how much time passed between occurrences. She could only say: "I don't know when it happened. I just know it happened." (R.59. at 11). At the close of evidence, trial counsel noted that M.C.N. did not remember much about the incidents other than that they happened, and that she wasn't sure how many times it happened. Counsel argued that he was "not sure if there is enough information here, your Honor, to move forward," and said that the defense would "leave it up to the Court." (Id. at 21-22). The State argued that even one instance would be a felony sufficient for bindover, and the Court subsequently found probable cause and ordered Hurley bound over for trial. (Id. at 22-23).

Hurley was arraigned in a separate proceeding on September 12, 2011. The State filed an Information charging the same count as the Amended Complaint. Counsel for Hurley entered not guilty pleas on Hurley's behalf, and asked that the Court set the matter for jury trial "raising all jurisdictional objections and the sufficiency of the information." (R.60 at 2). Trial counsel's apparent objection to the sufficiency of the information was not acknowledged by the Court, nor was there any further argument or discussion about it by either party. The prosecutor asked for a motion hearing date, informing Hurley and the Court that he expected to file motions for the admission of other acts and expert testimony. (Id. at 3). The Court scheduled a motion hearing for December 20, 2011 and the jury trial for January 18, 2012.

On November 23, 2011, the State filed a Motion to Introduce Expert Testimony at Trial and a Motion to Introduce "Other Acts" of the Defendant In Its Case-In-Chief. (R.14). The State's other acts motion sought the admission of testimony by Janell Goldsmith, Hurley's sister, concerning sexual contact between the two of them when they were children. (R.14). The defense filed a response objecting to the other acts motion on December 13, 2011. (R.20). At the motion hearing on December 20, 2011, the State introduced the testimony of Janell Goldsmith as an offer of proof. After argument from the parties, the Court determined that Goldsmith's testimony was relevant to show opportunity and method of operation.

Trial began on January 18, 2012. The State called four witnesses: M.C.N., Julie Hurley (M.C.N.'s mother), Goldsmith, and Susan Lockwood. M.C.N. was called first. She testified that Hurley would come into her room at night, lay in bed with her, and put his fingers in her vagina. (R.63: 94). She told the jury she did not know how many times that it happened, but it happened more than once and at least three times. (Id. at 95). M.C.N. said she knew that it happened when she was in elementary school, and that it did not happen when she was in middle school. (Id. at 95-96). She could not say whether these assaults occurred within the same month, within the same year or over a course of years, and could not say how much time, if any, passed between each of the alleged assaults. (Id. at 122-23). M.C.N. testified that Hurley traveled a lot and was out of the house "quite a bit." (Id. at 123).

M.C.N. also testified that on one occasion, Hurley chased her around the house and, when he caught her, he took her clothes off. (Id. at 96-97, 111). She could not remember how old she was when this occurred. (Id. at 111). He did not touch her inappropriately, she just put her clothes back on. (Id. at 97). She did not remember when this happened or the context for this, and testified that it was possible that Hurley was trying to get her into the bath or shower or to get her ready for

bed. (Id. at 112). M.C.N. also testified that Hurley would put her on his shoulders when she was naked and get on the scale to weigh her. (Id. at 98). She said this happened "a lot." (Id.) She testified that, at the time, her mom was concerned about her weight and the weighing could have been related to that. (Id. at 114). She could not remember if she or Hurley took her clothes off during these episodes. She also could not remember exactly when this was occurring, only that it was when she was in middle school. (Id. at 114-15). testified that she came forward with these allegations after she had been grounded for lying to her mother. (Id. at 104).

Julie Hurley ("Julie") testified next. Julie testified that M.C.N. made these allegations to her in August of 2010. (Id. at 139). M.C.N. only told her that some of the times when Hurley would tuck her in at night he would do things to her. (Id.). She did not say exactly what. (Id.) Julie testified that she called her brother, who was a police officer, and he gave Julie the number to the Sexual Assault Center. (Id. at 140). Julie testified that M.C.N. told her about these assaults during a period when M.C.N. had been grounded for two weeks. (Id. at 156). M.C.N. had lied to Julie about where she was going, and Julie had subsequently found out that M.C.N. had been "jet-skiing with a boy." (Id.) During this period when M.C.N. was grounded, she made the allegations about Hurley to Julie. Julie reduced M.C.N.'s grounding from two weeks to one week after M.C.N. made the allegations. (Id. at 167-68).

Janell Goldsmith testified next. Prior to her testimony, in accord with its pretrial ruling, the court read the jury a cautionary instruction, advising the jury that it could only use Goldsmith's testimony on the issue of whether Hurley had the opportunity to commit the assaults on M.C.N., and on the issue of Hurley's method of operation. (Id. at 171). Goldsmith testified that she was Hurley's sister, and was about four years younger than him. (Id. at 173). She told the jury that when she was between 8 and 10 years old (making Hurley 12-14) she

and Hurley had frequent sexual contact. She described the contact in detail. (Id. at 174-77). She told the jury that she did not remember when these interactions began, when they ended, or whether they had ever been caught. She said these interactions occurred about every week for two years, but that her "biggest burden" is not being able to remember everything. (Id. at 192). She told the jury that she first came forward with this information after Julie told her about M.C.N.'s allegations. (Id. at 181). Goldsmith told the jury that she called Hurley to confront him, and that he did not admit doing anything wrong. (Id. at 195).

The State's last witness was Susan Lockwood. Lockwood is a licensed clinical social worker and was director of the Sexual Assault Center of Family Services and director of the Child Advocacy Center. (Id. at 200). Lockwood testified that she is not an investigator, and that she never interviewed M.C.N. and would not know who she was if M.C.N. was in the same room. (Id. at 221). Lockwood provided a laundry list of reasons why a child might delay reporting of a sexual assault. (Id. at 211-16). Lockwood told the potential reasons she cited were "common knowledge" in her field. (Id. at 217). Her testimony about the reasons for delayed reporting came from her experience and what patients have told her their reasons were. Lockwood testified that as a therapist she believes whatever is told to her by a patient because she is not an investigator. (Id. at 221). She told the jury that she had received false claims of sexual assault previously, and that she has only testified for the prosecution in criminal cases. (Id. at 224). The State then rested.

The defense began its case by calling Matt Hurley ("Matt"), the defendant's son. Matt testified that he split time between Hurley's house and his mother's. He stayed with Hurley, Julie, and M.C.N. every Wednesday and Thursday night and every other weekend. (Id. at 230). Matt testified that he never observed his dad act inappropriately towards M.C.N.. He told the jury that M.C.N. continued to come over two to three times per

week after Julie and Hurley got divorced, but that one day she just stopped. (Id. at 238).

Hurley took the stand next. Hurley testified that he married Julie in May of 2000 and that they divorced in May of 2006. Hurley was asked by his counsel: "Do you recall any of the allegations Miss Goldsmith brought up here today?" Hurley answered: "No, I do not." (Id. at 267). He said he was "shocked" by Goldsmith's allegations, and that she had told Hurley on the phone that she was not sure if she was dreaming or if her memories were accurate. (Id. at 269). Hurley testified that he never participated in any chasing games with M.C.N., that he never requested her to strip down nude, and that he only weighed her one time. (Id. at 274-76). Hurley told the jury that he never touched M.C.N. inappropriately. (Id. at 280). Hurley testified that M.C.N. continued to come over to his house, 12-16 times per year, after he divorced her mother. (Id. at 286). M.C.N. stopped coming, Hurley said, after he sent her a letter in 2008 saying he was concerned that he was spoiling her because he always gave her things when she came over. (Id. at 287). Hurley said he wrote the letter at the suggestion of his new wife, Angela. (Id.). They next time he talked to M.C.N. was in 2010, when she called him on the phone and made these allegations. Hurley said he was shocked and in disbelief at her accusations. (Id. at 288).

The defense case continued the next day with the testimony of Hurley's current wife, Angela. Angela said she got to know M.C.N. while she was dating Hurley. During that time, M.C.N. would come over to Hurley's house, by Angela's estimation, every other week. (R.64: 8). Angela said there were times when Hurley would invite M.C.N. over and times when M.C.N. would just come over. (Id. at 9). Angela said that M.C.N. acted normal on these occasions, did not appear uncomfortable or scared. (Id.). Angela told the jury that M.C.N. stopped coming after Hurley sent her a letter that Angela suggested he write. Angela said that she felt that M.C.N. was too materialistic, and only

came around when she knew she was going to be getting something. (Id. at 9-10). Angela said she helped draft the letter, and did so because she felt Hurley was being taken advantage of. (Id.) Angela testified that she learned of M.C.N.'s allegations through Hurley and Goldsmith and that she was upset. She said she does not believe the allegations by M.C.N. or Goldsmith whatsoever, and noted that she and Hurley had watched Goldsmith's children and that Hurley was the godfather to Goldsmith's firstborn son. (Id. at 16). The defense rested.

In closing, the State argued that M.C.N. had no motive to falsely accuse Hurley. The State reminded the jury that M.C.N. had been grounded for two weeks, then incorrectly told the jury that her punishment had been reduced to one week *before* M.C.N. disclosed the assaults to Julie. (Id. at 29). The State noted that M.C.N. knew it happened at least three times, even though she could not recall specifics, and argued that Lockwood's testimony explained to the jury that most children delay in reporting and have problems of perception. The State then told the jury about Goldsmith's testimony, reminding them they could only use it to show opportunity and method of operation, but then argued that it showed that Hurley was "opportunistic." (Id. at 31). The State also told the jury to focus on Hurley's counsel's specific question about Goldsmith. The prosecutor told the jury that Hurley was only asked by his lawyer if he remembered any of the incidents that Goldsmith had described, not whether he denied doing those things. The State told the jury: "That's different than it didn't happen." (Id. at 25-26). There were no defense objections during the State's closing argument.

The defense began its closing argument by trying to discredit Goldsmith's testimony, arguing her story was incredible given her description of how often her sexual interactions with Hurley occurred and the fact that they were never caught. Counsel also highlighted Goldsmith's failure to come forward for 25 years, doing

so only after hearing M.C.N.'s story, and the fact that Goldsmith had made Hurley the godfather to one of her kids as reasons to disbelieve her testimony. Turning to M.C.N.'s allegations, the defense argued that her inability to remember any details rendered her testimony suspect. The defense argued that the State had provided no corroborating evidence of M.C.N.'s allegations, giving the jury only her word, which was not enough.

The jury found Hurley guilty of the charged count. The Court revoked his bond and remanded him pending sentencing. The Court ordered a PSI. The sentencing hearing took place on March 16, 2012. The PSI writer recommended a total term of incarceration of 20 years: 16 years of initial confinement and 4 years of extended supervision. The prosecutor asked for 30 years: 20 years of initial confinement and 10 years of extended supervision. The defense asked only for "something less" than the 30 years sought by the State, and made no specific recommendation. The Court stated that "I felt all along that a 25-year sentence is appropriate and that is what the sentence is going to be." (Tr. March 16, 2012, at 32). The Court sentenced Hurley to 18 years of initial confinement and 7 years of extended supervision. (Id. at 33).

Hurley filed a motion for post-conviction relief on October 15, 2012. (R.39). Hurley argued that the charges violated his due process rights to notice of the charges and denied him the ability to prepare a defense. Hurley further argued that the prosecutor had made improper remarks during closing, necessitating a new trial, and that the trial court had pre-determined Hurley's sentence. (Id., generally).

A post-conviction motion hearing was held on January 4, 2013. Trial counsel testified. At the conclusion of the hearing, the circuit court, the Honorable David G. Miron presiding, granted Hurley a new trial based on the prosecutor's improper comments in closing argument. (R.66; RCA-App. 201-84; R. 47; RCA-App. 101). Judge Miron rejected the remainder of Hurley's claims.

The judgment of conviction was vacated and Hurley was immediately released on a signature bond. (R.66: 78; RCA-App. 278).

The State filed a notice of appeal on March 7, 2013 (R.48), and Hurley filed a notice of cross-appeal on March 29, 2013. (R. 52).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING HURLEY A NEW TRIAL

A. Standard of Review

The State sets out the standard for plain error in its brief, seeking a *de novo* review of the trial court's decision to grant Hurley a new trial. (App. Br. at 9-10). Hurley, however, did not seek reversal on this subject under plain error; rather, Hurley claimed that the prosecutor's improper closing argument required reversal in the interests of justice. (See, R.39:12-14; 43:3-4). More importantly, the trial court's decision granting a new trial was clearly under the rubric of the interests of justice.

A trial court's ruling on a postconviction motion for a new trial in the interest of justice is within its discretion. *State v. Williams*, 2006 WI App 212, ¶13, 296 Wis. 2d 834, 845, 723 N.W.2d 719, 725. (citation omitted). Thus, such a ruling is reviewed for an erroneous exercise of discretion. *Id.* A trial court properly exercises its discretion if it applies accepted legal standards to the facts in the record. *Id.*

The circuit court ruled that a new trial was required in this case because the prosecutor asked the jury in closing arguments to draw an inference that he knew was false. (R.66:70-73; RCA-App. 270-73). The circuit court reviewed *State v. Weiss*, analyzed the facts of this case under *Weiss*, and determined that Hurley deserved a new

trial. The circuit court's analysis was correct, was a proper exercise of its discretion, and the order granting a new trial must be affirmed.

B. The Trial Court Correctly Found That The Prosecutor Sought An Inference That He Knew Or Should Have Known Was False

The circuit court found that the prosecutor's comments were designed to have the jury draw the inference that Hurley was not denying that the sexual contact described by Goldsmith occurred, and that Hurley only could not recall whether he engaged in the sexual contact with his young sister. (R.66:59; 70; RCA-App. 259, 270). The circuit court further found that this inference was inaccurate and that the prosecutor knew that Hurley had previously denied Goldsmith's allegations when confronted. (Id.). These factual findings are not clearly erroneous.

The statement of the prosecutor that is it issue was as follows:

> When the defendant testified, he was asked by his--by the attorney regarding Janell he said well, do you recall any of these incidents with Janell ever happening? And his answer was no. The question wasn't did you do this or not, it was do you recall? That's different than it didn't happen.

(R.64:25-26).

The State initially argues that the prosecutor's comment invited the jury to draw the inference that "Hurley was not asked by defense counsel whether he assaulted Janell (and Hurley did not volunteer a denial of Janell's allegations) because Hurley may have believed it was *possible* he had assaulted her, but could not *recall* doing so." (App. Br. at 12) (emphasis in original). This is not the inference that the trial court found the prosecutor sought; it is not the inference that Hurley argued was sought by the prosecutor; and, most importantly, the prosecutor himself did not claim to be seeking for the

jury to draw this inference[1]. Rather, the court was clearly convinced that the inference the prosecutor wanted drawn was that Hurley did not deny Goldsmith's allegations. (R.66:59; RCA-App. 259). That inference is, indeed, the only reasonable inference to have been intended considering the last phrase in the prosecutor's comment: "That's different than it didn't happen."

The court was also clearly, and correctly, convinced that the prosecutor knew that Hurley had denied Goldsmith's allegations previously, and therefore that the inference he was arguing was false. (R.66:59, 70; RCA-App. 259).

The State argues that it was improper for the trial court to conclude that the prosecutor knew that the inference was false. The State posits that that the Sheriff's report memorializing the fact that Hurley denied Goldsmith's allegations when she confronted him "did not tell the prosecutor how Hurley would have answered the question of whether he assaulted Janell had it been asked at trial." (App. Br. at 13). This is a frivolous argument.

First, the report stated in no uncertain terms that Hurley had denied Goldsmith's allegations when confronted: "Joel denied having any kind of inappropriate sexual contact with her." (R.39:15).

Second, the State argues that Hurley's denial to Goldsmith is merely a "second-hand account," apparently making it possible that Goldsmith somehow misconstrued Hurley's statement as a denial. (Id). This argument is wholly speculative and clearly unsupported by the clarity of the denials in the police report. Further, the prosecutor himself, under questioning from the circuit court at the post-conviction motion hearing, agreed that he knew that Hurley had denied the allegations and that these denials were in the discovery materials. (R.66:59; RCA-App. 259). The prosecutor did

[1] In fact, when questioned by the trial court during the hearing on Hurley's post-conviction motion, the prosecutor claimed that he was not asking the jury to draw any inference at all; rather, he was simply trying to highlight the weakness of Hurley's testimony. (R.66: 58-59; RCA-App. 258-59).

not say that he questioned the accuracy of Goldsmith's report about Hurley's denials.

The State also claims that Hurley's denials to Goldsmith do not mean that he would have denied it to investigators or at trial. (App. Br. at 13). The State reasons that because Hurley would have faced the threat of prosecution for providing untruthful answers in these scenarios, "Hurley may have responded differently to the question of whether he assaulted Janell *if the truth of the matter was simply that he could not recall having assaulted her* many years earlier." (Id.) (emphasis in original). Again, this is pure speculation by the State, since Hurley was never asked at trial whether he assaulted Janell. As the prosecutor pointed out in his improper remarks, the question by Hurley's lawyer was "do you recall?" not "did you do it?"

Interestingly, and damningly to the State's position here, the prosecutor did not ask Hurley whether he assaulted Janell either. The prosecutor had his opportunity to clarify Hurley's testimony about Goldsmith's allegations in his cross-examination by asking Hurley if he was denying them or whether he just couldn't remember if they happened or not. The prosecutor did not ask these questions, presumably because he knew through his own discovery materials that Hurley had denied it previously and would likely issue a flat denial on the stand again. By leaving Hurley's testimony alone, however, the prosecutor left himself the opportunity to argue the false inference during his summation.

The State also argues that Hurley would have other reasons to make a strong denial to Goldsmith, "such as to challenge Janell's own recollections and dissuade her from coming forward." (App. Br. at 13). Of course, Hurley would have even more compelling reasons to issue a strong denial to investigators or a jury—to avoid being convicted—rendering the State's argument in this regard unworthy of consideration.

The State further claims that the information in the prosecutor's possession—that Hurley denied the allegations to Goldsmith—was "essentially provided to the jury." (App. Br. at 14). The information was not, in fact, provided to the jury. Goldsmith was asked by Hurley's lawyer whether Hurley "admit[ted]" to "d[oing] anything wrong," and she answered "No." (R.63:195). Goldsmith was not asked whether Hurley denied her claims. Even if one was to agree that this exchange put Hurley's denials before the jury, it is difficult to see how that would further the State's position now. The State is still left with the unmistakable fact the prosecutor asked the jury to infer that Hurley did not and/or could not deny Goldsmith's allegations, an inference that was false.

C. The Trial Court's Reliance on *State v. Weiss* Was Proper

The State claims this case is unlike *State v. Weiss*, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 372, which the trial court relied upon in granting Hurley relief.

In *Weiss*, the defendant was charged with multiple counts of sexual assault of a child. The defendant testified at the trial and denied ever having sexual contact with the girl. In both closing and rebuttal closing, the prosecutor argued to the jury that it should not believe the defendant's denials because he made them for the first time at trial, and had not made them when he gave statements to police during the investigation. *Weiss*, 2008 WI App. at ¶¶ 5-7. The prosecutor made this argument despite the existence of two separate police reports stating that Weiss had denied ever having sexual contact with the girl when first interviewed by police during the investigation. *Id.* at ¶ 8.

The court of appeals reversed in the interests of justice, noting that the prosecutor's argument was not objected to. The court ruled that reversal was necessary because the case was largely a credibility battle, and the

prosecutor's arguments were designed to undercut Weiss' credibility. "In working to discredit Weiss' testimony, the prosecutor struck a foul blow. The system of justice will be better off if Weiss is tried anew so that a new jury can assess credibility in a more candid light." *Id*. at 17. An important factor was that the prosecutor's comments came during closing argument, after the close of evidence, when Weiss could not present evidence to rebut the argument. The principles of *Weiss* are fully applicable here.

The State claims a factual distinction in that in this case, unlike in *Weiss*, the prosecutor did not comment on whether Hurley had previously denied the allegations to authorities or to anyone else. (App. Br. at 14). This is a distinction without a difference. The prosecutor here argued to the jury that Hurley did not deny Goldsmith's allegations, limiting his answer to only that he could not recall whether those events occurred. The prosecutor made this argument despite the existence of a police report in his possession stating that Hurley had denied ever having inappropriate sexual contact with Goldsmith. Contrary to the State's claim, and as recognized by the trial court, this case is exactly like *Weiss*.

The State also weakly attempts to distinguish *State v. Bvocik*, 2010 WI App 49, 324 Wis. 2d 352, 781 N.W.2d 719, by returning to its argument that that the prosecutor in this case could not have invited the jury to draw an inference that he knew to be false.

In *Bvocik*, the defendant was charged with use of a computer to facilitate a child sex crime. The defendant had been chatting with a woman whose profile indicated an age of 28, but during chats the woman at times stated that she was 14. The trial record did not indicate the actual age of the woman. During closing argument, the prosecutor suggested that the defendant had reason to believe the woman was 14 because she claimed she was 14 and the birthday on her profile indicating she was 28, Valentine's Day, would have given the defendant a

reason to believe it was fake. The prosecutor knew, however, that the profile accurate and that the woman was 28.

The State highlights the fact from *Bvocik* that the prosecutor there knew the correct age of the woman, and contrasts it to this case by claiming, essentially, that the prosecutor in this case could not "know" that the inference he sought was false because the contents of the police report did not tell the prosecutor that Hurley would have denied Goldsmith's allegations at trial had he been asked. (App. Br. at 15).

This distinction is meritless. The circuit court in this case found that the prosecutor knew that Hurley had denied the allegations when confronted previously. The State does not deny that the prosecutor knew this. In addition, while the prosecutor in *Bvocik* was commenting on the trial evidence, he was inviting the jury to believe that the woman was actually a 14-year-old girl, which he knew to be false. Here, like in *Bvocik*, the prosecutor was commenting on the trial evidence--Hurley's testimony--but inviting the jury to conclude that Hurley could not deny Goldsmith's allegations, which he knew to be false through police reports.

The prosecutor seized on inartful questioning by Hurley's lawyer to suggest that Hurley could not and did not deny Goldsmith's allegations, despite police reports that memorialized his denials. The prosecutor, whose obligation is to the system and to seek justice, could have asked Hurley to clarify whether he was denying the allegations or whether he only could not remember. Instead, the prosecutor saved a foul blow for closing argument, telling the jury to infer that Hurley did not deny Goldsmith's allegations at a time when Hurley could not rebut such an argument. The trial court here, and the court of appeals in *Weiss*, recognized the importance of the prosecutorial role and that a new trial is the appropriate remedy for such an impropriety.

D. The Trial Court's Order Was a Proper Exercise Of Discretion

The State lastly claims that even if the remark was improper, a new trial is not warranted in the interests of justice. In so doing, the State invites this Court to review the record and conduct essentially a de novo review of whether the interests of justice warrant a new trial. That is not this Court's role in such a situation. Rather, this Court must review a circuit court's grant of a new trial in the interests of justice for an abuse of discretion.

The circuit court here clearly did not abuse its discretion. The circuit court reviewed the law, particularly *State v. Weiss*, which is good law. The court heard testimony and argument on the motion, then took a break to re-read *Weiss*. The court returned to the bench and concluded that application of the facts of this case to *Weiss* resulted in Hurley deserving a new trial. The court explained itself in detail, highlighting the fact that this case was a "huge credibility case." The court identified several similarities to *Weiss*, and concluded that the same outcome was required. The circuit court properly exercised its discretion in granting Hurley a new trial in the interests of justice, and that decision must remain undisturbed by this Court.

CONCLUSION

For the reasons stated herein, the trial court's order granting Hurley a new trial in the interests of justice must be affirmed.

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CROSS-APPELLANT'S BRIEF

ISSUES PRESENTED

1. Did the charge against Hurley allege a sufficiently narrow and definite period of time to provide Hurley proper notice and permit him to prepare a defense?

The circuit court answered: Yes.

2. Did the circuit court err in admitting other acts evidence, where the other acts were significantly different in detail, and involved conduct from the defendant's childhood?

3. Is a new trial required where the prosecutor's closing argument asks the jury to use the other acts evidence to draw a propensity inference?

The circuit court concluded that the prosecutor's argument was not improper.

ARGUMENT

I. The Complaint and Information Violated Hurley's Constitutional Due Process Rights to Notice and to Prepare a Defense

A. The Time Period Alleged in the Complaint and Information Was Unconstitutionally Broad

A criminal charge must be sufficiently stated to allow a defendant to plead and prepare a defense. *See Blenski v. State*, 73 Wis. 2d 685, 695, 245 N.W.2d 906 (1976). Whether the period alleged was too broad to allow the defendant to prepare a defense is a constitutional law question that is reviewed *de novo*. *State v. R.A.R.,* 148 Wis. 2d 408, 410-11, 435 N.W.2d 315, 316 (Ct. App. 1988)

The complaint and information in this matter were not constitutionally sufficient, as the time period during which the assaults were alleged to have occurred was too broad and indefinite to allow Hurley to present a defense. *See State v. R.A.R.*, 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988).

In *R.A.R.*, the defendant was charged with three counts of first degree sexual assault, alleging sexual contact or intercourse with a child under 12, and one count of second degree sexual assault, alleging sexual contact or intercourse with a child between the ages of 12 and 16. *Id.* at 409. The complaint was issued on August 18, 1987 and alleged that the first and second charges occurred "during the spring of 1982," the third charge occurred "during the summer of 1982," and the last charge occurred "during the summer of 1983." *Id.* The trial court ruled that the complaint did not allege the dates of the offenses with sufficient precision to satisfy the defendant's right to due process and the right to be informed of the nature and cause of the accusation. *Id.* at 410. The court of appeals affirmed the trial court, applying a 7-factor test.

The court of appeals noted that the first three factors from the test apply only when a defendant claims that the State could have obtained a more definite date through diligent efforts. Those factors are: (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the alleged offense, including whether it is likely to occur at a specific time or to have been discovered immediately. *Id.* at 411. Because *R.A.R.* did not present a claim that the State could have obtained a more definite time period, the first three factors were not considered. The remaining four factors of the test are: (4) the length of the time period relative to the number of offenses; (5) the time between that period and the defendant's arrest; (6) the time between the offense and the date of the complaint; and (7) the ability of the victim or complaining witness to particularize the date and time of the offense. *Id.* at 316. The court applied these factors,

relying heavily on the time elapsed between the alleged offenses and *R.A.R.*'s arrest and charging: over 5 years. *Id.* at 412.

The circumstances in the present case are even more severe than *R.A.R.*, and require that the judgment of conviction be vacated and the complaint and information dismissed. First, as in *R.A.R.*, there is no claim by Hurley that the State could have obtained a more specific time period through greater diligence; accordingly, the first three factors of the test do not apply. Considering the remaining factors requires relief for Hurley. The time periods alleged in *R.A.R.* cover 3 spans of 3 months, totaling 9 months. During this total 9 month period, *R.A.R.* was alleged to have committed four assaults.

In this case, the complaint and information covered a far longer period of 5 years: "between 2000 and 2005." During that 5-year period, M.C.N. alleged that Hurley assaulted her an estimated 5 times. Neither the complaint nor M.C.N.'s testimony (at either preliminary hearing or trial) provided any specific information sufficient to narrow the time frame of the assaults.

Similar to *R.A.R.*, the original complaint was not filed in this case until 5-6 years after the end of the time period alleged, and similar to *R.A.R.*, Hurley was not arrested until after the complaint was filed, 5-6 years after the end of the time period alleged. Lastly, M.C.N.'s testimony made it clear that she was totally unable to particularize the date or time of the offenses. The complaint and information in this case--alleging five assaults over five years, and filed over 5 years after the end of the time period in which the assaults allegedly occurred—fall woefully short of satisfying the minimum requirements of due process relative to providing sufficient notice to Hurley and the ability to prepare a defense.

B. The Deficiencies in the Complaint and Information Constitute Plain Error

Hurley asserts that the constitutional deficiencies of the complaint and information constitute a plain error, one that this Court can and must address even though trial counsel failed to raise this objection before trial. Plain error is "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *State v. Sonnenberg*, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984) (citation omitted). "Where a basic constitutional right has not been extended to the accused," the plain error doctrine should be utilized. *Id*. (internal citations omitted). Even if the Court disagrees with the assertion of plain error, trial counsel's failure to object to the complaint and information on this basis constituted ineffective assistance of counsel, requiring reversal.

C. Standards for Ineffective Assistance of Counsel

To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). To prove deficient performance, the defendant must identify the specific acts or omissions of counsel that formed the basis for his claim of ineffective assistance. *Id*. at 690. The court "must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*.

As for the "prejudice" prong, the defendant must prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Id*. at 693. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. at 694.

Trial counsel testified at the post-conviction motion hearing and did not provide a reasonable explanation for his failure to object to the vagueness of the Information. Counsel testified that he recognized the potential constitutional issue regarding the vagueness of the time period and researched the issue. (R. 66 at 9-10; RCA-App. 209-10). Counsel testified that he discussed the issue with Hurley and explained that it was his belief that if he was successful in winning the motion and getting a dismissal, the State would simply re-file the case "based on the nature of [it]." (Id. at 12; RCA-App. 212). Counsel could not recall whether he reviewed *State v. R.A.R.*. (Id. at 13; RCA-App. 213). Counsel testified that he reconsidered whether to file for a dismissal after the preliminary hearing when M.C.N. could not narrow down the timeframe of the assaults, but said that he decided not to "based on the fact that the Court found that there was probable cause to move forward," and that in his experience "motions after prelims—they usually don't go very far." (Id. at 18; 218). He further said that he believed that even if he was successful in arguing a motion to dismiss, the State would re-file the case due to the other acts evidence and evidence of Hurley offering M.C.N. money for a car. (Id. at 21-24). When asked to explain how those factors would cure a defect for vagueness when M.C.N. could not further narrow the time frame of the alleged assaults, counsel stated that the defect would not be cured; he then stated that he did not file the motion because it did not have merit due to the charge falling under the repeated acts statute. (Id. at 24; RCA-App. 224).

Counsel said he was familiar with *R.A.R.* but did not pursue a motion to dismiss for reasons that changed as his testimony progressed. His belief that the State would simply re-file the charges if he was successful was not a reasonable explanation, because success on the motion would necessarily entail a finding that the charge was unconstitutional as presented. With M.C.N. unable to

narrow the time frame down at all, the case could not be re-filed.

There would be absolutely no reasonable or rational reason not to pursue a dismissal based on the broad time period charged. There is no strategic down-side to such a motion, the motion had clear merit with on-point authority (*R.A.R.*), and success would result in the dismissal of incredibly serious charges which were incredibly difficult to defend given the vagaries of the charging document age of the case.

In addition, prejudice could not be clearer. As shown above, the time periods alleged in the complaint and information were clearly insufficient to satisfy Hurley's due process rights constitutional. M.C.N.'s testimony made it clear that she was unable to narrow the time frame of the alleged assaults beyond that which was laid out in the charging documents. Accordingly, had counsel filed the motion, the case would have been dismissed based on the State's inability to narrow the time period to bring it in line with constitutional requirements. By failing to move to dismiss the complaint and/or information, Hurley's trial counsel was constitutionally ineffective.

The charge in this matter was unconstitutionally vague, depriving Hurley of his due process rights to notice and the ability to prepare a defense. Whether via plain error or ineffective assistance of counsel, this court must vacate the judgment of conviction and remand the case for dismissal.

II. The Circuit Court Erroneously Admitted Other Acts Evidence

A. Facts

Prior to trial, the State moved in limine to admit other acts evidence via the testimony of Hurley's sister, Janell Goldsmith. (R.14). An evidentiary hearing on the State's motion was held on December 20, 2011, during which

the State proffered Goldsmith's testimony. (R.61). Goldsmith said that Hurley was "four to five years" older than her. (Id. at 7; RCA-App. at 307). Although after saying that "she wasn't very good with dates," she accepted that Hurley's birthday was in 1973, making him less than four years older. (Id. at 14, 19; RCA-App. at 314, 319). She described her memory of the sexual contact with Joel as "very faint." (Id. at 7; RCA-App. at 307). She said that "the things that [she] remember[s]," she thought occurred "between the ages of eight and ten." (Id.). She said she was the "youngest of three older brothers" and was "the only girl." (Id.). She testified that she remembered that whenever her parents were gone, "I don't know if this happened like once a week, but I don't know where my other two brothers were, if they were even in the house or not, but what I remember is this always happened in my parents' bedroom. And Joel would always ask me to meet him in the room or to come on in the bedroom." (Id. at 8; RCA-App. at 308). Their parents' bedroom was right off of the living room. (Id. at 20; RCA-App. at 320)

She said that, "usually," when she went in the bedroom Hurley would be naked on the bed or underneath the covers. (Id. at 8; RCA-App. at 308). She claimed that Hurley would tell her to put on a fur coat she had, wear nothing underneath the coat, and meet him in the bedroom. (Id. at 8-9; RCA-App. at 308-09). She claimed Hurley would tell her to slowly remove the jacket, "like a strip tease." (Id. at 9; RCA-App. at 309). She said there was "a lot of oral sex" that occurred, with each of them performing oral sex on the other. (Id. at 10). She also said she knew that Hurley had penetrated her vagina with his fingers, but she did not recall if there was ever penetration with his penis. (Id. at 10; RCA-App. at 310.). She further claimed that Hurley would have Goldsmith "fondle" him. (Id.).

She agreed that she never came forward with any of this information until she heard about M.C.N.'s allegations, even though she had been in counseling over the years. (Id. at 13, 16, 18; RCA-App. at 313, 316, 318). She

further agreed that she was not 100% positive about everything in her allegations. (Id. at 18; RCA-App. at 318).

The State argued that the acts Goldsmith described were similar and were relevant to show Hurley's opportunity and intent or motive to be sexually gratified in the assaults alleged by (Id. at 24-26; RCA-App. at 324-26). The State argued that the similarities were: (1) digital penetration; (2) that Goldsmith and M.C.N. were similarly aged at the time; (3) the occurrence in a "familial setting." (Id. at 26). The State further argued that a limiting instruction would be sufficient to alleviate any prejudice to Hurley. (Id.).

The defense argued that Goldsmith's testimony was not plausible, and that she described actions between two children (herself and Hurley) which is starkly different from the allegation that as an adult Hurley assaulted a child. (Id. at 28-29; RCA-App. at 328-29). The defense also argued that Goldsmith's testimony was unfairly prejudicial to Hurley because it involved incest between a brother and sister, which would evoke a strong reaction from the jury who would seek to punish Hurley for Goldsmith's testimony, and because it was virtually impossible for Hurley to defend himself against Goldsmith's allegations of decades-old behavior without any eyewitnesses or physical evidence. (Id. at 30). The defense directed the court to *State v. McGowan*, 2006 WI App 80, 291 Wis. 2d 212, 715 N.W.2d 631, highlighted the similarities, and argued that it controlled and required exclusion of the evidence. (Id. at 31-33; RCA-App. at 331-33).

The circuit court ruled that Goldsmith's testimony was admissible to show Hurley's opportunity and method of operation. (Id. at 34; RCA-App. at 334). The circuit court swiftly distinguished *McGowan*, saying that *McGowan* involved a single previous incident whereas Goldsmith's testimony alleged acts occurring "for quite a long time." (Id. at 33; RCA-App. at 333). The circuit

court concluded: "So this isn't the same as *McGowan* by any stretch of the imagination." (Id.).

The circuit court concluded that there was "great similarity" between Goldsmith's allegations and those of M.C.N. (Id. at 35). The court said the girls were in the same age range; that M.C.N. talks about Hurley "playing some kind of game with her, trying to get her to touch him," and that Hurley had Goldsmith "do this dress up game;" that M.C.N. alleged that Hurley inserted his fingers in her vagina, and Goldsmith talked about Hurley "fingering her, the oral sex, and then she talked about this humping." (Id. at 35; RCA-App. at 335). The court concluded that these similarities "[went] towards the alleged method of operation of Mr. Hurley and how he goes about this." (Id. at 36; RCA-App. at 336The court concluded that Goldsmith's evidence was relevant because it "bolster[ed] the credibility of [M.C.N.]" and "relate[d] to a fact of proposition of whether it occurred or not." (Id.)

The circuit court reiterated that it found that Goldsmith and M.C.N. were "very similar in age" and that the alleged conduct was "very similar when you talk about the digital penetration, you talk about the games that the defendant allegedly had each of the victims partake in." (Id. at 37; RCA-App. at 337). The circuit court lastly appeared to compare this case to *State v. Hammer*, noting that the remoteness in time of the other acts evidence was similar, and that the allegations shared some common characteristics in that they occurred over time and "nobody else [was] around." (Id. at 37-38; RCA-App. at 337-38). The circuit ordered that a jury instruction read both before Goldsmith's testimony and again at the close of the case. (Id. at 38; RCA-App. at 338).

Goldsmith's trial testimony was consistent with her testimony at the pre-trial evidentiary hearing. (R.63 at 173-198).

During trial, M.C.N. testified about the "game" referred to by the trial court as part of its pre-trial order on Goldsmith's testimony. described an incident where Hurley supposedly chased her around the house and took her clothes off once he caught her. (Id. at 96). She testified that Hurley did not touch her inappropriately and she simply put her clothes back on. She said this occurred only one time. (Id. at 111). also said she had no recollection of the context for this activity, and it was possible that Hurley was just trying to get her ready for a bath. (Id. at 112).

B. Standards

A trial court's decision to admit or exclude other acts evidence is reviewed for an erroneous exercise of discretion. This Court must review whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. *State v. McGowan*, 2006 WI App 80, ¶ 15, 291 Wis. 2d 212, 715 N.W.2d 631 (citation omitted). A trial court's ruling on the admissibility of other acts evidence will be affirmed if the trial court reviewed the relevant facts; applied a proper standard of law; and using a rational process, reached a reasonable conclusion. *Id.*

The admissibility of other acts evidence is governed by Wis. Stats. § 904.04(2), which provides as follows:

> 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.

In deciding the admissibility of other acts evidence under § 904.04(2), a court must engage in a three-step analysis. First, the must consider whether the evidence is being offered for an acceptable purpose under Wis. Stats. § 904.04(2). Second, the court must determine

whether the evidence is relevant under Wis. Stats. § 904.01. Lastly, the court must consider whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion, or delay under Wis. Stats. § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998).

The Wisconsin Supreme Court has recognized that in child sexual assault cases, courts permit greater latitude of proof as to other like occurrences. *McGowan* at ¶14 (citing *State v. Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606).

C. The Circuit Court's Ruling Was Contrary to Controlling Precedent, Requiring Reversal

The circuit court was presented with controlling authority on strikingly similar facts, but ruled against that authority.

In *State v. McGowan*, the defendant was accused of sexually assaulting his cousin, Sasha, when she was 8 years old and he was 18. The allegations against McGowan were made 10 years after the events occurred and were that he repeatedly assaulted his cousin by having oral sex with her (both giving and receiving) as well as vaginal and anal intercourse. The alleged assaults occurred over approximately two-and-a-half years in the basement of Sasha's home, where McGowan would stay when he visited. *Id.* at ¶¶ 2-7.

At trial, the court allowed the testimony of Janis, another cousin of McGowan's. Janis testified that when she was five-years-old and McGowan was 10, McGowan forced her to perform oral sex on him and urinated in her mouth. *Id.* at ¶ 9. This occurred in the bathroom of the house where Janis's family was living with McGowan's family. *Id.* Janis never told anyone about the alleged assault until she heard about Sasha's allegations against McGowan, 19 years later. *Id.*

The trial court admitted Janis's testimony over defense objection, concluding that it was admissible to show

intent and motive. *Id.* at ¶ 10. McGowan was convicted on all four counts of first degree sexual assault of a child for his alleged conduct with Sasha and sentenced to 20 years in prison. *Id.*

On appeal, the District 1 Court of Appeals reversed and ordered a new trial. The court concluded that, even acknowledging the greater latitude rule, Janis's testimony did not pass the *Sullivan* analysis because it was not relevant and its prejudicial effect was substantially outweighed by the danger of unfair prejudice. *See Id., generally.*

The court assumed without deciding that Janis's testimony was offered for a proper purpose. The court then turned to the second prong of the analysis, determining the relevance of the offered evidence. To be relevant under Wis. Stats. § 904.01, evidence must relate to some fact that is of consequence to the determination of the action, and it must have some tendency to make that fact more or less probable than it would be without the evidence. "However, if the other acts evidence is probative of nothing more than the defendant's propensity to act a certain way, the evidence is not admissible." *McGowan*, at ¶ 18, citing *State v. Barreau*, 2002 WI App 198, ¶ 40, 257 Wis. 2d 203, 651 N.W.2d 12.

The court of appeals rejected the trial court's ruling that because the acts involved cousins living in the same household and penis-to-mouth intercourse, Janis's allegations were probative of Sasha's allegations. *Id.* at ¶¶ 19-20. It reasoned:

> [W]e conclude that a single assault, by one young child on another young child, eight years before repeated assaults by an adult on a different child who was three years older than the first victim, together with significant differences in the nature and quality of the assaults, does not tend to make the latter frequent and more complex assaults of Sasha more probable. Nor does such testimony make Sasha's testimony about the later events more credible because of the significant

> differences in the details involving the earlier event and the later events. Nor does the conduct of a ten-year-old child give "context" • to, or provide evidence of the motive or intent of, an adult some eight or more years later. *See Barreau*, 257 Wis. 2d 203, ¶ 38, 651 N.W.2d 12 ("Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult.).

Id. at ¶ 20.

Despite concluding that the evidence was not relevant, the court went on to conclude that the evidence was also wrongly admitted due the substantial danger of unfair prejudice to McGowan given the limited probative value thereof. The court reasoned that the nature of Janis's testimony was sure to arouse a "sense of horror" in the jury and "provoked its instinct to punish" McGowan. *Id.* at ¶ 23. This "revulsion" at McGowan's alleged conduct with Janis, the court concluded, would not be significantly mitigated by McGowan's youth at the time (10 years old) or the fact that it was a single occurrence. *Id.* Given the enormous prejudice to McGowan, the probative value of the evidence to an issue of consequence had to be strong. It was not. *Id.*

Hurley's case is strikingly similar to *McGowan*. The charges in this case are based on allegations made by a family member (step-daughter) 5-10 years[2] after they supposedly occurred. In *McGowan*, a cousin made allegations 7.5 to 10 years after the events. The other-acts evidence in this case was from approximately 14-16 years prior, and in *McGowan* the other acts evidence was from about 19 years prior. Also like *McGowan*, the charges in this case alleged adult-on-child sexual assault,

[2] It is impossible to provide a narrower date given M.C.N.'s testimony. She alleged that the assaults occurred sometime between 2000 and 2005, though she had no idea exactly when within that range any assault occurred, and she did not make her allegations to her mother until 2010.

whereas the admitted other acts evidence alleged child-on-child sexual conduct.

And further like *McGowan*, there were significant differences in the nature and quality of the sexual assaults charged and the other acts evidence alleged. The allegations by M.C.N. against Hurley were that he would come into her room at night to tuck her in, lay down in bed with her, and put his fingers in her vagina. (63: 94-96). She testified that she did not know how many times it happened, but that she told the police that it happened maybe five times. (Id. at 120).

Goldsmith testified that she and Hurley were both children, with her being 8-10 years old and Hurley being less than 4 years older than her. Goldsmith claimed that Hurley would tell her to put on a fur coat with nothing underneath and meet him in their parents' bedroom. He would tell her to do a striptease and then they would perform oral sex on each other, he would "finger" her and have her fondle him, and there was "humping" but she could not recall whether there was penis-to-vagina intercourse. She also testified that this went on about once a week for a couple of years. (Id. at 177).

The charges against Hurley involved no allegations of oral sex, "humping," kissing, dress-up or strip-tease activities. The entirety of the allegations by M.C.N. was finger-to-vagina contact, whereas similar conduct was only one small part of the other acts evidence alleged by Goldsmith. In addition, the fact that both the charged conduct and other acts evidence occurred in a familial setting is not in and of itself a significant or sufficient similarity to warrant admissibility. *See McGowan* at ¶ 20.

The trial court admitted Goldsmith's testimony on the basis that it was relevant because it bolstered M.C.N.'s credibility. (R.61: 36; RCA-App. 336). The *McGowan* court rejected the same relevancy rationale due to the "significant differences in the details involving the earlier event and the later events." *McGowan* at ¶ 20.

An additional, and critical, similarity to *McGowan* is the fact that the other acts evidence in this case involved sexual contact between children, whereas the charged conduct was an adult-on-child assault. As the court of appeals point out in *State v. Barreau*, 2002 WI App 198, ¶ 38, 257 Wis. 2d 203, 226, 651 N.W.2d 12, 23, court pointed out:

> Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult. *See Roberts v. State*, 634 S.W.2d 767 (Tex.App.Ct.1982); Edward J. Imwinklried, UNCHARGED MISCONDUCT § 8.08 at 27 (1999).

The *McGowan* court recognized this very point, concluding that the difference in the defendant's age between the charged conduct and alleged other acts, the other acts evidence did not provide any evidence of motive or intent as to the defendant's conduct as an adult. *McGowan* at ¶ 20.

The striking similarities between the present case and *McGowan* render it directly on point and controlling. The trial court's attempt to distinguish *McGowan* and decision not to rely on it were unreasonable and constitute reversible error.

D. Goldsmith's Testimony Was Not Probative of the Purposes Identified by the Circuit Court

The trial court ruled that Goldsmith's testimony was admissible to show a method of operation by Hurley and to show that Hurley had the opportunity to commit the assaults against M.C.N :

> [W]hen I think you look through this, it really is offered for purposes of opportunity. Did Mr. Hurley have the opportunity to commit these

> crimes? And also, what is his method of operation? That's what I see as the permissive uses here.

(R.61: 34; RCA-App. 334).

The trial court's conclusion that Goldsmith's testimony was relevant to show Hurley's method of operation relied in substantial part on the circuit court's idea of "games" Hurley played. With Goldsmith, it was the "dress up game," where Hurley would have Goldsmith dress up in the fur coat, slowly removing it and then assaulting her. (Id. at 35; RCA-App. 335). The court described M.C.N. as "talk[ing] about [Hurley playing some kind of game with her, trying to get her to touch him." (Id.) The trial court did not specify in the pre-trial hearing from what source it concluded that there was a game where Hurley tried to get M.C.N. to touch him, but at trial, M.C.N. testified about Hurley chasing her and disrobing her when he caught her. She testified, however, that Hurley did not touch her inappropriately and that it was possible that Hurley was trying to get her ready for a bath. (R.63: 111-12). M.C.N. offered no testimony that there was any sort of "game" preceding any alleged sexual assaults by Hurley.

These "great similarities," in the trial court's mind, showed a method of operation by Hurley and therefore bolstered M.C.N.'s credibility. (R.61: 35-36; RCA-App. 335-36). Such a conclusion, however, is not reasonable given the evidence and conflicts with *McGowan*, which is directly on point.

The trial court also concluded that the similarities between the charged conduct and other acts evidence in that they occurred "when nobody else is around and its just the alleged victim" made the other acts relevant to show the "opportunistic nature of doing this." As an initial matter, this is a blatant, prohibited propensity inference—that Hurley is "opportunistic." Even if it was not, the trial court's statement is not based on the facts of record. There was no evidence that the assaults alleged by M.C.N. occurred when nobody else was

around. M.C.N. alleged that they would have been alone in her room, but there was testimony that both M.C.N.'s mom and Hurley's son could have both been at home at the time of any or all of these alleged assaults. Goldsmith testified that she and Hurley engaged in sexual contact when nobody was home, but no such testimony was elicited relative to M.C.N.'s allegations.

"Proof of opportunity may be relevant to place the person at the scene of the offense (time and proximity) or to prove whether one had the requisite skills, capacity, or ability to carry out an act." Wisconsin Evidence, 3rd Ed., Daniel D. Blinka. Goldsmith's other acts evidence was substantially different from the conduct alleged by and was not probative at all of Hurley's "opportunity" to commit assaults of some 15 years later.

E. The Admission of the Other Acts Evidence Was Not Harmless.

An error is harmless if the beneficiary of the error (here, the State) proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *McGowan*, at ¶25 (internal citations omitted).

In other words, the State must prove beyond a reasonable doubt that the error did not contribute to the verdict. In *McGowan*, the court of appeals concluded that the error was not harmless largely because the case was about whether to believe the accuser because there were not eyewitnesses and no physical evidence, and the other acts evidence was actually an attack on his character. *Id.* at ¶ 37.

McGowan, again, controls the outcome here. Hurley's defense was that he did not do the things M.C.N. alleged. There was a significant passage of time between the alleged assaults and the court proceedings (5-10 year). There were no eyewitnesses to the alleged assaults and there was no physical evidence; there was only the word of M.C.N. versus the word of Hurley. In

addition, the dissimilarity of the charged conduct and other acts evidence provide no probative value to any issue of consequence to the case, and served only to attack Hurley's character.

Such an attack was undoubtedly crucial to the outcome given the fact that Hurley testified and the jury certainly evaluated his testimony through a prism clouded by the Goldsmith's graphic and irrelevant testimony. As in *McGowan*, there can be no doubt that Goldsmith's testimony did contribute to the verdict, and Hurley must be awarded a new trial.

III. The Prosecutor's Closing Argument That Goldsmith's Testimony Showed That Hurley Was "Opportunistic" Was Improper

If there was any doubt that the Goldsmith evidence nothing more than propensity evidence, that doubt was erased when the prosecutor stood up in closing argument and said just that.

In his closing argument, the prosecutor reminded the jury that Goldsmith's testimony was only to be used in consideration of Hurley's opportunity and method of operation. (R.64: 31). However, immediately after this preface, he asked the jury to consider the testimony to show that Hurley was "opportunistic, took advantage of two elementary school girls, just like the prowling cat taking advantage of the mouse in the box." (Id.) This was a call to the jury to draw an inference about Hurley's character—that he was "opportunistic" when it came to elementary school girls.

The prosecutor blatantly asked the jury to conclude that Hurley had the character to commit this crime, which is precisely what other acts evidence is not supposed to be used for, and what the limiting instruction was intended to avoid. See Wis. Stats. § 904.04(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); *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998) (cautionary

instruction's effect was significantly diminished by prosecutor's repeated references to the other acts and urging the jury to consider what the other acts said about the defendant's character).

The State did not argue that the Goldsmith evidence showed that Hurley had the opportunity to assault M.C.N.; the State specifically argued that the Goldsmith evidence showed that Hurley was "opportunistic." Other acts evidence admitted for the purposes of opportunity to commit a crime is relevant to show that a person was present at the scene of an offense or possessed the required skill, capacity, or ability to carry out the offense. WISCONSIN EVIDENCE, 3rd Ed., Blinka, §404.7, p. 209. So while the State used the magic word "opportunity" in prefacing its improper comment to the jury, the State did not argue the application of the Goldsmith evidence for any of the appropriate opportunity purposes. Instead, the State argued only that Hurley was "opportunistic;" i.e., that is his character.

Such argument was highly improper and called upon the jury to use grossly prejudicial evidence in a forbidden way. It also served to directly undercut the cautionary instruction crafted to avoid unfair prejudice to Hurley. The prosecutor's argument vaporized the meager protections afforded Hurley from the improper use of the evidence. By doing so, the prosecutor necessitated that Hurley receive a new trial.

CONCLUSION

For all the reasons stated, this Court should affirm the Circuit Court's ruling granting Hurley a new trial in the interests of justice. In addition, this Court should reverse the circuit court's ruling admitting Goldsmith's other acts testimony and bar the admission of such evidence on retrial. Lastly, the Court should reach the issue of the constitutional adequacy of the charging documents and determine that the charges against Hurley do not satisfy

constitutional notice requirements, requiring dismissal of all charges.

Dated this 16th day of September, 2013.

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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(6)(b) and 809.19(8)(c)(1) for a brief produced with a proportional serif font. The length of the Respondent brief is 5159 words, and the length of the Cross-Appellant brief is 5721 words.

Dated this 16th day of September, 2013

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. (RULE) § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. (Rule) § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 16th day of September, 2013

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2013 AP 558-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent

v.

JOEL HURLEY,

Defendant-Respondent-Cross-Appellant

APPENDIX

App. Pages

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Transcript of Motion Hearing,
January 4, 2013……201-284

Excerpt of Motion Hearing Transcript,
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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. (RULE) § 809.19(13)(f)

I hereby certify that I have submitted an electronic copy of this appendix which identical in content and format to the printed form of the appendix filed as of this date.

Dated this 16th day of September, 2013

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