STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2013AP558-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

JOEL M. HURLEY,

Defendant-Respondent-Cross-Appellant.

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

COMBINED BRIEF OF APPELLANT AND CROSS-RESPONDENT

J.B. VAN HOLLEN
Attorney General

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Appellant-Cross-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 266-9594 (Fax)
wittwerjj@doj.state.wi.us

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

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REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF WISCONSIN

ARGUMENT

"In closing argument, 'counsel is allowed considerable latitude,'" *State v. Henning*, 2013 WI App 15, ¶ 24, 346 Wis. 2d 246, 828 N.W.2d 235 (quoted source omitted), and reversal is warranted only when the prosecutor's remarks "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due

process.'" *State v. Jorgensen*, 2008 WI 60, ¶ 24 n.8, 310 Wis. 2d 138, 754 N.W.2d 77 (quoted source omitted).

The circuit court's decision reversing the judgment of conviction was contrary to these well-established principles, and involved a clear misapplication of *State v. Weiss*, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 372, to the prosecutor's remarks. As developed below, and in the State's brief-in-chief, the prosecutor did not say anything to the jury that he knew to be false or ask the jury to draw an inference he knew to be false, and, regardless, any alleged error did not merit reversal.

THE PROSECUTOR'S UNOBJECTED-TO REMARK IN CLOSING ARGUMENT DID NOT WARRANT REVERSAL, AND THE TRIAL COURT ERRED IN OVERTURNING THE CONVICTION ON THIS BASIS.

A. Because the circuit court reversed for plain error *and* misapplied *Weiss* in overturning Hurley's conviction, the correct standard of review is *de novo*.

In its brief-in-chief, the State noted that the circuit court declined to review counsel's failure to object to the prosecutor's remarks for ineffective assistance, and asserted that the court thus reversed the judgment under a plain error review, consistent with the approach the supreme court took in reviewing unobjected-to closing argument remarks in *Jorgensen*, 310 Wis. 2d 138, ¶¶ 40-44, and *Neely v. State*, 97 Wis. 2d 38, 55, 292 N.W.2d 859 (1980). The State argued a trial court's determination of plain error is reviewed *de novo* (State's br. at 9-10).

In his brief, Hurley argues that the circuit court did not reverse for plain error. Rather, he asserts its decision was "clearly under the rubric of the interests of justice," and, accordingly, should be reviewed for an erroneous

exercise of discretion, citing *State v. Williams*, 2006 WI App 212, ¶ 13, 296 Wis. 2d 834, 723 N.W.2d 719 (Hurley's response br. at 9-10).

While Hurley's postconviction motion requested reversal in the interests of justice if the court rejected Hurley's claim that counsel was ineffective for failing to object to the remarks (39:11-12), nowhere in the court's oral ruling or its written order (drafted by postconviction counsel) does the court reference "the interests of justice" (47; 66:68-73; A-Ap. 103, 111-16). Whether the court reversed for plain error or in the interests of justice is therefore unclear from the record.

Nonetheless, it should not matter which standard this court concludes the circuit court applied (plain error or in the interests of justice) because this court's review should effectively be *de novo* in either instance. This is because the circuit court's error in reversing—whether for plain error or in the interests of justice—was caused by its misapplication of the *Weiss* case to the prosecutor's remarks. This was an error of law, and is subject to independent review. *State v. Sharp*, 180 Wis. 2d 640, 649-50, 511 N.W.2d 316 (Ct. App. 1993) (Where a trial court's discretionary decision is premised on a misapplication of the law to the facts, there is a misuse of discretion and review is *de novo*).

B. The prosecutor did not tell the jury something the prosecutor knew to be false, or invite the jury to draw an inference that he knew to be false.

Hurley elected to take the stand in his own defense, and had the opportunity to deny the other-acts allegations of his sister, Janell. Instead, defense counsel asked Hurley twice whether he "recalled" assaulting his sister. Hurley

responded he did not recall having done so, and did not volunteer an outright denial of Janell's allegations:

> Q: Now, [Janell] testified that she was assaulted when she believed she was around eight years old. Do you recall having an encounter with [Janell] when she was around eight?
>
> A: No.
>
> ….
>
> Q: Do you recall any of the allegations [Janell] brought up here today?
>
> A: No, I do not.

(63:265, 267; A-Ap. 118, 120).

Hurley's failure to outright deny at trial his sister's allegations was noteworthy. At the time, the prosecutor knew based on a police report that Hurley's sister had told police that Hurley had denied the allegations to her on the phone (39:15; A-Ap. 124). But Hurley himself had never previously addressed the truth or falsity of Janell's allegations to authorities, and now his position at trial was that he did not recall having assaulted Janell. The prosecutor in his closing argument therefore remarked upon Hurley's failure to make an outright denial of his sister's allegations *at trial*:

> 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.

(64:25-26; A-Ap. 122-23).

As developed below, these remarks were entirely appropriate based on Hurley's testimony, and did not ask the jury to draw an inference that the prosecutor knew to be false based on what he knew about Hurley's sister's

report to police. Accordingly, the circuit court erred in concluding that the prosecutor's remarks were like those of the prosecutor in *Weiss*.

Analysis of the prosecutor's remarks should begin with what the prosecutor actually said. The prosecutor said that Hurley was not asked at trial whether he assaulted his sister, but whether he recalled assaulting her, and that Hurley had responded that he did not recall (64:25-26; A-Ap. 122-23). These assertions are true. The prosecutor then noted that Hurley's testimony that he did not recall was "different than it didn't happen" (*id.*). This assertion is also true.

Critically, the prosecutor limited his comments to Hurley's trial testimony, and appropriately held Hurley to that testimony. In his remarks, the prosecutor *did not*:

- assert or in any way suggest that Hurley had *never* previously denied his sister's allegations in another setting; or

- otherwise allude to material outside of the trial record.

As further developed in the next section, and in the State's brief-in-chief at 14-15, these facts are what distinguish this case from *Weiss*. Had the prosecutor suggested to the jury that Hurley had *never* denied his sister's allegations, or had he otherwise alluded to material outside of the trial record, this might be a *Weiss* case. But the prosecutor's remarks were plainly confined to Hurley's testimony at trial, and in no way suggested that Hurley had *never* previously denied his sister's allegations in some other setting.

In sum, the prosecutor did not ask the jury to draw a false inference about prior out-of-court denials because his remarks did not ask the court to draw *any* inference about *anything* outside of Hurley's trial testimony. For this reason, the State seeks to withdraw the statement in its

brief-in-chief that "the prosecutor's invited inference was arguably inconsistent with a witness's statement in an investigator's report" (State's br. at 2). The prosecutor's remarks invited *no* inferences with regard to *any* prior statements.

There is a second reason why the prosecutor was on solid ground in remarking on Hurley's failure to provide a strong denial of his sister's allegations at trial: The prosecutor could not have known how Hurley would have testified had he been directly asked at trial whether he assaulted his sister (State's br. at 12-13).

While Hurley had denied the allegations to his sister on the telephone, he had not previously denied these allegations to police or in court under threat of prosecution for obstruction or perjury. The trial was the first time Hurley had faced questions about his sister's allegations in his criminal proceeding. Simply put, there is a difference between testifying under oath, and talking to your sister and accuser on the phone. Hurley had powerful incentives to make a strong denial to his sister, even if such a denial was not true (to challenge her recollection, to dissuade her from coming forward with her claims). And he had an equally powerful incentive to tell the truth at trial (to avoid prosecution for perjury).

Under these circumstances, the prosecutor was not required to assume that Hurley's true position was not what he actually said at trial—that he did not recall assaulting his sister—but what he had told his accuser on the phone. No one, except Hurley and perhaps his attorney, can say for certain how Hurley would have testified at trial had he been asked directly whether he assaulted his sister.[1] The circuit court failed to consider the very real possibility that Hurley had actually told the

[1] And, contrary to Hurley's novel suggestion, the prosecutor had no obligation to rehabilitate Hurley on cross-examination by attempting to elicit the strong denial of his sister's allegations that Hurley did not provide on direct examination (Hurley's response br. at 12).

truth at trial in saying that he did not recall, and had not told the truth in denying the allegations to his sister on the phone. And regardless, the prosecutor's actual remarks were confined to Hurley's testimony at trial; he did not suggest to the jury that Hurley had *never* previously denied the allegations in another setting.

On a separate point, Hurley challenges the State's assertion in its brief-and-chief that the prosecutor's remarks "invited the jury to . . . conclude that Hurley was not asked by defense counsel whether he assaulted Janell . . . because Hurley may have believed it was *possible* he had assaulted her, but could not *recall* having done so" (State's br. at 12; Hurley's response br. at 10-11). Upon further consideration, the State withdraws its affirmative assertion of what exactly the prosecutor invited the jury to infer. This assertion was unnecessary to the State's case, and may have confused the issue. It is more accurate simply to say that the prosecutor noted that Hurley had testified at trial that he did not recall assaulting his sister, and pointed out that Hurley's testimony was "different than it didn't happen" (64:25-26; A-Ap. 122-23). As Hurley observes, the prosecutor told the court at the postconviction hearing that he "was not thinking of having the jury draw an inference," but was rather "commenting on what the defendant's actual testimony was" (66:59; RCA-App. 259; Hurley's response br. at 10-11).

However, the State disputes Hurley's apparent suggestion that this case largely turns on the circuit court's factual findings (Hurley's response br. at 10). Rather, this case turns on its legal conclusion that the prosecutor's remarks were improper, and on its misapplication of the *Weiss* case. Alternatively, as the court's ruling demonstrates, *see* 66:70-73, A-Ap. 113-16, the court's factual findings, such as they are, are so intertwined with its legal conclusions that application of a clearly erroneous standard of review would be inappropriate. *Cf. Wassenaar v. Panos*, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983) (giving only some "weight" to the circuit

court's decision where its factual findings are intertwined with its legal conclusions).

Moreover, to the extent the circuit court's findings can be clearly discerned and separated from its legal conclusions, these findings are not reasonably supported by the prosecutor's remarks, and therefore would not survive even clearly erroneous review. Again, the prosecutor's actual remarks were confined to Hurley's testimony, and did not invite the jury to conclude that Hurley had *never* previously denied the remarks. The prosecutor said nothing improper, but rather simply held Hurley to his trial testimony. Additionally, because Hurley had not previously answered his sister's allegations to authorities, and had only denied them to his sister on the phone, the prosecutor could not have known how Hurley would have testified at trial had he been directly asked whether he assaulted her.

C. The circuit court misapplied *Weiss* to the prosecutor's remarks.

As argued in the State's brief-in-chief at 14, careful review of *Weiss* reveals that this is not a *Weiss* case, and that the circuit court misapplied *Weiss* to the prosecutor's remarks.

Weiss was tried on two counts of second-degree sexual assault of a minor. *Weiss*, 312 Wis. 2d 382, ¶ 2. Weiss testified in his own defense, and denied the allegations against him. *Id.* ¶ 4. The case boiled down to a credibility determination between Weiss and his child victim, whose credibility was seriously challenged at trial. *Id.* ¶¶ 3, 17.

Weiss had previously denied the allegations in two separate interviews with police. *Id.* ¶ 9. Nonetheless, in her closing argument, the prosecutor asserted, "[The] *[f]irst time that we have heard a denial was when the defendant took the stand*." *Id.* ¶ 5 (emphasis in original). "*He never said he didn't do it. Never said he didn't do it.*"

Id. ¶ 5 (emphasis in original). In her rebuttal closing argument, the prosecutor further stated, *"[A]t the time if one were falsely accused of a serious crime, seems to me the first thing out of such a person's mouth would be: I did not do this. I'm not guilty. I never touched the girl. Had nothing to do with it*. . . . He didn't deny it. *Except today*. *Id.* ¶ 7 (emphasis in original).

The *Weiss* court concluded that the prosecutor's remarks were improper because they asked the jury to reach a conclusion that the prosecutor knew to be false. *Id.* ¶ 15. The prosecutor had told the jury that Weiss had never previously denied the allegations to authorities, when, in fact he had done so twice in police interviews. The *Weiss* court further concluded that this misrepresentation prevented the controversy from being fully tried, and reversed under the court of appeals' power of discretionary reversal, Wis. Stat. § 752.35. *Id.* ¶¶ 16-17.

The circuit court erred in concluding that *Weiss* was "almost right on point" with the prosecutor's remarks in this case (66:71; A-Ap. 114). *Weiss* is plainly distinguishable.

Unlike the prosecutor in *Weiss*, this prosecutor confined his remarks to Hurley's testimony at trial, and appropriately held him to that testimony. This prosecutor did not assert or suggest that Hurley had *never* denied the allegations in some other setting, or otherwise refer to facts outside of the record, as the *Weiss* prosecutor did.

Moreover, unlike the *Weiss* prosecutor, this prosecutor did not ask the jury to draw an inference that he knew to be untrue. He did not do so because: (1) he did not ask the jury to draw *any* inference about whether Hurley had made prior denials in other settings; and (2) the prosecutor could not have known how Hurley would have testified had he been directly asked at trial if he had assaulted his sister because he had never before addressed the allegations to authorities.

Additionally, as argued in the State's brief-in-chief, the only other case to apply *Weiss* in reversing a conviction for a prosecutor's improper remarks, *State v. Bvocik*, 2010 WI App 49, 324 Wis. 2d 352, 781 N.W.2d 719, demonstrates that this prosecutor's remarks did not warrant reversal. In *Bvocik*, the prosecutor knew that the actual birth date of the agent posing as a minor online was Valentine's Day. *Bvocik*, 324 Wis. 2d 352, ¶ 6. Nonetheless, the prosecutor argued in closing that the fact that her chat profile showed a birth date of February 14 gave Bvocik reason to suspect that the birth date was made up, and that he was actually chatting with an underage person. *Id*. Unlike the prosecutor in *Bvocik*, this prosecutor did not ask the jury to reason from factual premise that he knew to be false.

D. Even if the prosecutor's remark was improper, it did not merit reversal.

Even if this court were to conclude that the circuit court did not err in determining that the prosecutor's remarks were somehow improper, it must also review the circuit court's implicit determination that the remarks were so serious as to require a new trial. Whether this determination is reviewed for harmless error as a necessary part of the circuit court's reversal for plain error, *see Jorgensen*, 310 Wis. 2d 318, ¶ 23 & n.4, or as a necessary part of the circuit court's reversal in the interests of justice, the State submits that, under either test, the alleged error was not so serious as to require reversal.

As argued in the State's brief-in-chief at 15-16, the prosecutor's remarks noting Hurley's failure to make a strong denial were understandably a small part of his closing argument. While Hurley did not make a strong denial, he did twice state that he did not recall assaulting her many years earlier. The lack of a strong denial would have been more remarkable had the assaults been more

recent, instead of occurring over 20 years ago starting when Hurley was twelve.

Moreover, unlike in *Weiss*, where the victim's credibility was brought into question on cross-examination, *Weiss*, 312 Wis. 2d 382, ¶¶ 3, 17, Hurley's sister's credibility was never seriously challenged. The defense labeled the sister's allegations "incredible" in closing argument, but failed to present evidence challenging her truthfulness, and failed to offer a plausible theory as to why she would fabricate these allegations. The difference between "I don't recall" and "it didn't happen" under these circumstances would not have been decisive in the jury's assessment of the truthfulness of the sister's allegations.

CONCLUSION

For the reasons set forth above, and in the State's brief-in-chief, the circuit court's order vacating the conviction for the prosecutor's closing argument remarks must be reversed, and Hurley's judgment of conviction for repeated sexual assault of a child reinstated.

Dated this 16th day of December, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Appellant-
Cross-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 266-9594 (Fax)
wittwerjj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,944 words.

Dated this 16th day of December, 2013.

_____

Jacob J. Wittwer
Assistant Attorney General

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BRIEF AND SUPPLEMENTAL APPENDIX OF
CROSS-RESPONDENT STATE OF WISCONSIN

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested on the issues raised in Hurley's cross-appeal, which should be adequately addressed in the briefs. Hurley's cross-claims may be resolved by applying well-established legal principles to the facts, and therefore the portion of this court's decision addressing the cross-claims is unlikely to meet publication criteria. *See* Wis. Stat. § 809.23(1).

STATEMENT OF THE CASE

The Statements of the Case provided by the State and Hurley in the briefs on the State's appeal are adequate to frame the issues raised in Hurley's cross-appeal. Relevant facts are provided as necessary in the Argument below.

ARGUMENT

I. THE AMENDED COMPLAINT PROVIDED ADEQUATE NOTICE TO SATISFY DUE PROCESS REQUIREMENTS.

A. Introduction.

Hurley argues that the circuit court erred in rejecting his claims of ineffective assistance for failing to seek dismissal of the amended complaint on notice grounds, and of plain error for the complaint's deficiencies (Hurley's br. at 17-22). Hurley maintains that

the charging documents[2] violated his due process rights to notice and to prepare a defense by alleging an unconstitutionally broad five-year charging period in which, he asserts, the complaint alleged only five incidents of assault.

The court properly rejected Hurley's ineffective assistance and plain error claims because the five-year charging period meets the constitutional test for notice in child sexual assault cases established in *State v. Fawcett*, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988). The State submits that the amended complaint, in fact, alleged a total of at least 26 incidents of assault during the five-year period, and provided sufficient notice under *Fawcett*. Counsel was not ineffective for failing to bring a notice claim that would have been rejected by the circuit court, *State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441, and there is no plain error in a complaint that meets *Fawcett*'s test for notice.

B. Notice challenges to a complaint alleging sexual assault of a child.

The sufficiency of a pleading is a question of law that an appellate court reviews independently on appeal. *Fawcett*, 145 Wis. 2d at 250. Whether a deprivation of a constitutional right has occurred is a question of constitutional fact that also is independently reviewed. *Id.* Whether a period of time alleged in a complaint and information is too expansive to allow the defendant to prepare an adequate defense is an issue of constitutional fact which is reviewed independently of the trial court's determination. *Id.* at 249.

To determine whether a complaint is sufficient, a court considers "whether the accusation is such that the

[2] This brief discusses the amended complaint. The information filed in this case stated only the charged offense, and did not include the facts of the alleged crime provided in the amended complaint.

defendant [can] determine whether it states an offense to which he [is able to] plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense." *Holesome v. State*, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968) (footnote omitted). In *Fawcett*, the court identified seven factors that are helpful in evaluating the complaint and determining whether the *Holesome* test is satisfied:

> 1) the age and intelligence of the victim and other witnesses;
>
> 2) the surrounding circumstances;
>
> 3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately;
>
> 4) the length of the alleged period of time in relation to the number of individual criminal acts alleged;
>
> 5) the passage of time between the alleged period for the crime and the defendant's arrest;
>
> 6) the duration between the date of the indictment and the alleged offense; and
>
> 7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Fawcett, 145 Wis. 2d at 253.

When the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged. *Id.* at 250. Time is not of the essence in sexual assault cases. *Id.*

The charge in Hurley's case was one of repeated acts of sexual assault of the same child (4:1; CR-Ap. 101). The court in *Fawcett* explained the inherent difficulties of prosecuting sexual assaults of children.

> Sexual abuse and sexual assaults of children are difficult crimes to detect and prosecute. Often there are no witnesses except the victim. The child may have been assaulted by a trusted relative or friend and not know who to turn to for assistance and consolation. The child may have been threatened and told not to tell anyone. Even absent a threat, the child might harbor a natural reluctance to reveal information regarding the assault. These circumstances many times serve to deter a child from coming forth immediately. As a result, exactness as to the events fades in memory.

Fawcett, 145 Wis. 2d at 249 (citation omitted).

The court observed that "[c]hild molestation often encompasses a period of time and a pattern of conduct," and that "[a]s a result, a singular event or date is not likely to stand out in the child's mind." *Id.* at 254. Moreover, the court observed, "child molestation is not an offense which lends itself to immediate discovery. Revelation usually depends upon the ultimate willingness of the child to come forward." *Id.*

The court held in *Fawcett* that in cases involving a child victim, "a more flexible application of notice requirements is required and permitted." *Id.* "The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony," the court held, "rather than to the legality of the prosecution in the first instance." *Id.* at 254. "Such circumstances ought not prevent the prosecution of one alleged to have committed the act." *Id.*

After *Fawcett*, the legislature created the offense of repeated sexual assault of the same child, Wis. Stat. § 948.025. *See* 1993 Wis. Act 227, § 30. "Wisconsin Stat. § 948.025 was enacted to address the problem that often arises in cases where a child is the victim of a pattern of sexual abuse and assault but is unable to provide the specifics of an individual event of sexual assault." *State v. Nommensen*, 2007 WI App 224, ¶ 15, 305 Wis. 2d 695, 741 N.W.2d 481.

C. The amended complaint provided sufficient notice.

Hurley's notice argument rests on his assertion that the complaint alleges only five criminal acts during the five-year period alleged in the complaint, and on the fact that Hurley was not charged until five to six years after the end of the alleged period (Hurley's br. at 19). In doing so, Hurley relies exclusively on *State v. R.A.R.*, 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988). Application of the *Fawcett* factors shows that the complaint provided Hurley with adequate notice to satisfy due process requirements, and *R.A.R.* is distinguishable on its facts.

1. The allegations in the amended complaint.

The amended complaint alleged that, between 2000 and 2005, Hurley had engaged in repeated acts of sexual assault of the same child, contrary to Wis. Stat. § 948.025, by committing three or more violations of first-degree or second-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(1) and (2) (4:1; CR-Ap. 101).

The probable cause section of the amended complaint alleges that a Marinette County Sheriff's Department detective met with Julie Hurley, M.C.N.'s mother (4:1; CR-Ap. 101). Julie told the detective that M.C.N. had disclosed to her that M.C.N had been abused by her ex-stepfather, Joel Hurley (4:1-2; CR-Ap. 101-02). Julie reported that M.C.N. had said that Hurley "would take her clothing off on a regular basis to weigh her," and "did on various occasions get into M.C.N.'s bed at night and inserted his fingers into her vagina" (4:2; CR-Ap. 102).

The detective met with M.C.N., who stated that, shortly after Hurley married her mother when M.C.N. was 6, Hurley "played a type of game with her" in which he "would chase her around the house when her mother was gone and took her clothing off after he caught her" (4:2; CR-Ap. 102). Thereafter, Hurley started coming into her

bedroom at night, and "would get into bed with her and place his hand into her pajama bottoms and put his fingers inside her vagina" (*id.*). "On these occasions, [Hurley] would also try to get her to touch him, which M.C.N. stated she did during one of these encounters" (*id.*).

M.C.N. also said that "after getting home from school, [Hurley] would have her take her clothing off and would put her on his shoulders to take her into the bathroom" to be weighed on the scale (*id.*). "These incidents occurred on a very frequent basis, M.C.N. thought a couple of times per week" (*id.*).

M.C.N. "estimated that between the ages of approximately 6 to 11, [Hurley] had weighed her naked in excess of 20 times, and placed his fingers inside of her vagina approximately 5 times" (*id.*).

2. Application of the *Fawcett* factors.

Hurley acknowledges that the State could not have ascertained a more definite period for the offense with diligent efforts (Hurley's br. at 19). Hurley then asserts that *Fawcett* factors one through three do not apply to the analysis of his claim, citing *R.A.R.*, 148 Wis. 2d at 411 ("As we noted in *Fawcett*, the first three factors apply [only] when the defendant claims that the state could have obtained a more definite date through diligent efforts. [*Fawcett*, 145 Wis. 2d] at 251 n.2."). For purposes of this review, the State does not dispute this assertion, and turns to the remaining factors.[3]

[3] However, the State questions whether footnote 2 in *Fawcett* actually holds that factors one through three should be skipped in this circumstance. Footnote 2 identifies different types of notice challenges, then details the approach taken in *People v. Morris*, 461 N.E.2d 1256, 1259-60 (N.Y. 1984), when the defendant asserts that the State could have ascertained a more definite charging period. It also notes that a New Jersey court *In re K.A.W.*, 515 A.2d 1217 (N.J. 1986), adopted a modified version of *Morris*. *Fawcett*, 145 Wis. 2d at 251 n.2. The footnote appears to be essentially descriptive. *Id.* It does not expressly endorse skipping factors one

3. *Factor four*: Length of the charging period in relation to the number of criminal acts alleged—the amended complaint alleged at least 26 criminal acts, not five.

Hurley asserts that the amended complaint alleged only five separate criminal acts over the five-year period alleged, and that this factor weighs heavily in favor of the conclusion that the complaint failed to give him adequate notice (Hurley's br. at 19). The five acts Hurley recognizes in the complaint stem from allegations that Hurley "would get into bed with [M.C.N.] and place his hand into her pajama bottoms and put his fingers inside her vagina" (4:2; CR-Ap. 102). The State disputes Hurley's assertion that the complaint alleges only five criminal acts.

First, the State counts *six* criminal acts, not five, stemming from Hurley's contact with M.C.N. in her bed. In addition to committing five violations of Wis. Stat. § 948.02(1)(b) by the alleged acts of digital penetration, the complaint alleges Hurley also committed a separate violation of Wis. Stat. § 948.02(1)(e) by getting M.C.N. to touch him on one occasion (4:2; CR-Ap. 102).

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through three when the defendant does not allege that the State could have discovered a more definite date. *Id.* In fact, the defendant's claim in *Fawcett* did not include a more-definite-date allegation, and yet the *Fawcett* court in its analysis did not expressly limit its analysis to factors four through seven. *Id.* at 253-54. (listing all seven factors, then introducing its analysis by stating, "[l]ooking to the factors under the reasonableness test. . . ."). Moreover, in at least one case since *R.A.R.*, this court *has* addressed the first three factors when the defendant did not assert that the State could have come up with a more definite period for the offense. *See State v. Miller*, 2002 WI App 197, ¶¶ 27-31, 257 Wis. 2d 124, 650 N.W.2d 850. Nonetheless, in light of *R.A.R.*, the State elects not to challenge in this court Hurley's assertion that the first three factors do not apply in this case. *See Cook v. Cook*, 208 Wis. 2d 166, 185-87, 560 N.W.2d 246 (1997).

Moreover, as developed below, the State submits that the complaint also alleged that Hurley committed at least 20 additional criminal acts during the period by putting M.C.N. naked on his shoulders as a part of a "weighing" game, for a total of at least 26 alleged assaults. Accordingly, the length of the alleged period of time was not unreasonable in relation to the number of criminal acts alleged.

Hurley was charged in the complaint with one count of Class B felony repeated sexual assault of a child contrary to Wis. Stat. § 948.025. This statute provides: "Whoever commits 3 or more violations under s. 948.02(1) or (2) within a specified period of time involving the same child is guilty of . . . . (d) A Class B felony if at least three of the violations were violations of s. 948.02(1)." Wis. Stat. § 948.025(1)(d). Wisconsin Stat. § 948.02(1), first degree sexual assault of a child, provides, as relevant:

> (b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.
>
> . . . .
>
> (e) Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony.

"Sexual contact," as defined in Chapter 948, includes "[i]ntentional touching by the defendant . . . by the use of *any* body part or object, of the complainant's intimate parts," Wis. Stat. § 948.01(5)(a)1. (emphasis added), "if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." Wis. Stat. § 948.01(5)(a). "Intimate parts," as used in Chapter 948, includes "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." Wis. Stat. § 939.22(19).

As noted, the probable cause section of the complaint alleges that Hurley would "'weigh' [M.C.N.] naked after she would arrive home from school" (4:2; CR-Ap. 102). "After getting home from school, [Hurley] would have [M.C.N.] take her clothing off and would put her on his shoulders and take her to the bathroom" and put her on the scale (*id.*). "M.C.N. estimated that between the ages of approximately 6 to 11, [Hurley] had weighed her naked in excess of 20 times" (*id.*).

This part of the complaint sufficiently alleges an additional 20 criminal acts of sexual contact with M.C.N. within the meaning of the relevant statutes. Hurley was alleged to have placed M.C.N. naked on his shoulders after having her take off her clothes, thereby putting "any" part of his body in contact with one or more of M.C.N.'s naked "intimate parts," *i.e.*, her "buttock[s], anus, groin . . . vagina" and/or her "public mound" Wis. Stat. §§ 939.22(19), 948.01(5)(a)1. These allegations were sufficient to put Hurley on notice to defend against these incidents of sexual contact with person under the age of 13, in addition to those alleged incidents of sexual intercourse (finger-to-vagina) with a person under the age of twelve.

While the amended complaint did not explicitly allege that Hurley had contact with M.C.N.'s intimate parts, it would have been a near physical impossibility for him *not* to have touched one or more of the child's intimate parts with his shoulders and neck while M.C.N. was riding on his shoulders. And while Hurley may object that this contact was not for the purpose of either Hurley's sexual arousal or gratification or the degradation or humiliation of the child, the complaint plainly alleges circumstances sufficient to infer sexual intent, which, of course, is how intent is nearly always determined. The allegations in the complaint that Hurley's regularly carried M.C.N. naked on his shoulders as a part of a "weighing" game would lead a reasonable person in Hurley's position to conclude that these incidents were among those that could be used to prove repeated sexual assault of the same

child under Wis. Stat. § 948.025. *See State v. Blalock*, 150 Wis. 2d 688, 694, 442 N.W.2d 514 (Ct. App. 1989) ("Criminal complaints must be evaluated with a common sense, non-hypertechnical, reading.").

The State acknowledges that, at trial, the prosecutor focused primarily on the multiple alleged acts of digital penetration, and the State ultimately chose to have the jury instructed that the three or more sexual assaults under Wis. Stat. § 948.025 were acts of sexual intercourse contrary to Wis. Stat. § 948.02(1)(b) (63:75; 64:22, 42-43). However, the prosecutor also noted the allegations of sexual contact arising from the "weigh[ing]" incidents in his opening and closing arguments, and elicited testimony from M.C.N. about these incidents (63:77, 98-99; 64:24).

Regardless, Hurley's claim is that the *charging documents* failed to provide him with notice sufficient to meet the requirements of due process. The amended complaint itself does not specify whether the three or more incidents of assault were for sexual intercourse, sexual contact or both (4:1; CR-Ap. 101).[4] It merely alleges that Hurley "did commit three or more violations of sec. 948.02(1) or (2)" (*id.*). Ultimately, how the prosecutor elected to try the case—focusing on the allegations of sexual intercourse and not the allegations of sexual contact that were in the complaint (and testified to at trial)—should not be relevant in assessing whether the charging documents provided Hurley notice adequate to prepare a defense. *See R.A.R.*, 148 Wis. 2d at 410 n.1 ("We restrict our analysis to the charging documents. The validity of a complaint must stand or fall on its contents . . .").

Thus, the amended complaint alleges at least 26 separate criminal acts that would count for purposes of the repeated sexual assault of the same child statute, Wis. Stat. § 948.025(1)(d). Given the large number of alleged assaults, the length of the alleged period of time was not

[4] Neither does the information.

unreasonable in relation to the number of criminal acts alleged.

Even if this court were to determine that the allegations described above were in some way insufficient to allege 20 additional criminal acts under Wis. Stat. §§ 948.02(1)(e) and 948.025(1)(d), and that the amended complaint instead alleged six criminal acts, this determination would not compel the conclusion that the complaint failed to provide adequate notice. The remaining six alleged criminal acts committed in M.C.N.'s bed themselves represent a *pattern* of sexual abuse, three more than the discrete assaults alleged in *R.A.R.*, requiring "a more flexible application of notice requirements." *Fawcett*, 145 Wis. 2d at 254. Additionally, Hurley was charged with the crime of repeated child sexual assault, which was created by the legislature to address problems inherent in prosecuting cases of pattern child sexual abuse, and criminalized the course of conduct itself. *Nommensen*, 305 Wis. 2d 695, ¶ 15; *State v. Johnson*, 2001 WI 52, ¶¶ 15-16, 243 Wis. 2d 365, 627 N.W.2d 455. These considerations, as well as application of the *Fawcett* factors in their totality, must lead to the conclusion that the amended complaint satisfied due process requirements.

4. *Factors five and six*: Duration of time between arrest/indictment and the alleged criminal acts.

The fifth and sixth factors address the passage of time between the alleged period for the crime and the defendant's arrest, and the duration between the date of the indictment and the alleged arrest. *Fawcett*, 145 Wis. 2d at 253. This court has essentially treated these factors as a single factor intended to address "the possibility that the defendant may not be able to

sufficiently recall" the allegations. *State v. Miller*, 2002 WI App 197, ¶ 35, 257 Wis. 2d 124, 650 N.W.2d 850.

In this case, five or six years passed between the alleged period for the crime and the filing of the first criminal complaint (1:1; 4:1; CR-Ap. 101). A delay of this length would appear to weigh in favor of Hurley's claim. *See R.A.R.*, 148 Wis. 2d at 412.

However, like many child victims, M.C.N. was assaulted by a family member, there were no other witnesses, and M.C.N. was afraid[5]—all "circumstances . . . [that] serve to deter a child from coming forth immediately." *Fawcett*, 145 Wis. 2d at 249. As the court held in *R.A.R.*, a time interval of this duration is not, by itself, enough to render the complaint insufficiently definite. *See R.A.R.*, 148 Wis. 2d at 412 ("While the four-to-five-year intervals between the alleged offenses and R.A.R.'s arrest and when the complaint was filed do not alone render the charges insufficiently definite, those intervals in combination with other factors present weigh heavily in favor of that conclusion.").

> 5. *Factor seven*: The ability of the victim to particularize the date and time of the alleged transaction or offense.

Hurley notes that M.C.N. was unable to particularize the dates or time periods of the alleged offenses, and appears to argue that this factor also weighs in favor of his claim (Hurley's br. at 19). It plainly should not, for the reasons set forth below.

As this court observed in *Fawcett*, "[c]hild molestation often encompasses a period of time and a pattern of conduct. As a result, a singular event or date is

[5] M.C.N. testified she did not feel safe to come forward until after Hurley left Marinette to live in Indiana, which happened in the spring of 2010 (63:100-01, 256).

not likely to stand out in the child's mind." *Fawcett*, 145 Wis. 2d at 254. Likewise, the offenses here demonstrate a pattern of conduct, which began when M.C.N. was six years old. The amended complaint alleged that Hurley came into M.C.N.'s bed at night and digitally penetrated her on at least five occasions, and Hurley had made her touch him on one occasion (4:2; CR-Ap. 102). The complaint further alleged that Hurley had M.C.N. take off all her clothes when she got home from school and carried her naked on his shoulders at least 20 times (4:2; CR-Ap. 102). It is understandable under these circumstances that M.C.N. would have difficulty identifying the particular times and dates of the offenses. *See Fawcett*, 145 Wis. 2d at 249 ("Young children cannot be held to an adult's ability to comprehend and recall dates and other specifics.").

Hurley relies entirely on *R.A.R.* in arguing that the amended complaint did not meet notice requirements (Hurley's br. at 19). *R.A.R.* is distinguishable on multiple grounds. First, the two victims in *R.A.R.* were between the ages of 11 and 14 when the alleged assaults occurred. *R.A.R.*, 148 Wis. 2d at 409-10. M.C.N. was only six when the assaults began, and 11 when they ended (4:2; CR-Ap. 102). As an elementary school aged child, she would have had much greater difficulty identifying particular dates and times than the two victims in *R.A.R.*

Second, and most importantly, *R.A.R.* was decided before the enactment of Wis. Stat. § 948.025 in 1994, see 1993 Wis. Act 227, § 30, and alleged three discrete criminal acts. *R.A.R.*, 148 Wis. 2d at 409. The amended complaint against Hurley alleges a pattern of conduct involving at least 26 separate criminal acts, six acts of sexual intercourse and sexual contact in M.C.N.'s bed and 20 acts of sexual contact in which Hurley had M.C.N. take off all of her clothes and carried her naked on his shoulders (4:2; CR-Ap. 102). While the *R.A.R.* court may have concluded it was reasonable to hold the victims to a higher standard because they were older and had fewer individual assaults to recall, it would be unreasonable to

require that M.C.N., a much younger victim, identify the specific dates and times on which the many assaults in this case happened.

A case involving a charge of repeated acts of sexual assault of the same child under Wis. Stat. § 948.025 is different in nature than a case such as *R.A.R.* that involves discrete charges of child sexual assault. "Wisconsin Stat. § 948.025 was enacted to address the problem that often arises in cases where a child is the victim of a pattern of sexual abuse and assault but is unable to provide the specifics of an individual event of sexual assault." *Nommensen*, 305 Wis. 2d 695, ¶ 15. "The purpose of the legislation was to facilitate prosecution of offenders under such conditions." *Id.*

To that end, the statute does not require that the jury unanimously agree on the underlying acts as long as it unanimously agrees that the defendant committed at least three. *See Johnson*, 243 Wis. 2d 365, ¶ 15. "In other words, it is the *course* of sexually assaultive conduct that constitutes the primary element of this offense." *Id.* ¶ 16.

The frequency of the assaults and M.C.N.'s age[6] when they occurred are precisely why M.C.N. cannot recall particular dates and times of the assaults. Hurley should not benefit from the fact that his victim was young enough, and he assaulted her with enough frequency over an extended period of time, that she cannot remember when they occurred. The legislature created Wis. Stat. § 948.025 for exactly this situation. As alleged in the criminal complaint, M.C.N. was able to identify that the acts of digital penetration and forced touching always occurred in her bed at night, and that the acts of sexual contact that happened when Hurley had her take off her clothes and put her naked on his shoulders always occurred when she came home from school. Those allegations provided adequate notice to Hurley of the

[6] While the victim's age is a part of factor one of the *Fawcett* test, it is also certainly relevant to the victim's ability to identify the particular time and date of the alleged offense.

charge that he engaged in a course of conduct that violated Wis. Stat. § 948.025(1)(d).

Based on the analysis above, the State submits that the *Fawcett* factors, on balance, weigh strongly against Hurley's notice claim. Moreover, the recognition of a more flexible notice standard for child sexual assaults, particularly in cases in which a course of sexually abusive conduct is alleged under Wis. Stat. § 948.025, further supports a conclusion that the amended complaint provided adequate notice to satisfy due process requirements. Accordingly, this court should reject Hurley's request to vacate the judgment of conviction on this ground and to remand for dismissal.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING OTHER ACTS EVIDENCE.

A. Introduction.

Hurley argues that the circuit court erroneously exercised its discretion in admitting other acts evidence that Hurley had sexually assaulted his sister, Janell, when she was approximately the same age as M.C.N., and that this error was not harmless (Hurley's br. at 33-34). As developed below, the record demonstrates that the court did not misuse its discretion in admitting the evidence, particularly in light of the rule allowing greater latitude in the admission of like occurrences in child sexual assault cases.

B. Appellate review of admission of other acts evidence in child sexual abuse cases.

Under Wis. Stat. § 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." However, such evidence

> may be offered for other purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Section § 904.04(2). The list of allowable purposes in § 904.04(2) is merely illustrative, not exclusive. *See State v. Payano*, 2009 WI 86, ¶ 63 n.12, 320 Wis. 2d 348, 768 N.W.2d 832.

In *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), the supreme court adopted a three-part test for courts to apply in determining whether to admit other-acts evidence. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399. Under this test, other-acts evidence is properly admissible: (1) if it is offered for a permissible purpose, such as one listed under Wis. Stat. § 904.04(2); (2) if it is relevant, *i.e.* (a) relates to a fact of consequence in the case, and (b) makes that fact more or less probable than it would otherwise be without the evidence; (3) if its probative value is not substantially outweighed by the risk or danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. *See Sullivan*, 216 Wis. 2d at 772-73. The party offering the other acts evidence bears the burden of establishing the first two prongs by a preponderance of the evidence. *Marinez*, 331 Wis. 2d 568, ¶ 19. Once the party offering the evidence establishes that the first two prongs have been met, the burden shifts to the party opposing admission of the evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice. *Id.*

"[A]longside this general framework, there also exists in Wisconsin law the longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" *State v. Davidson*, 2000 WI 91, ¶ 36, 236 Wis. 2d 537, 613 N.W.2d 606 (quoted source omitted, listing cases).

"[T]he greater latitude rule facilitates the admissibility of the other acts evidence under the exceptions set forth in § (Rule) 904.04(2)," *State v. Hammer*, 2000 WI 92, 236 Wis. 2d 686, 703, 613 N.W.2d 629, and applies to each prong of the *Sullivan* analysis. *Davidson*, 236 Wis. 2d 537, ¶¶ 46-48. "[O]ne of the reasons behind the rule is the need to corroborate the victim's testimony against credibility challenges." *Davidson*, 236 Wis. 2d 537, ¶ 40 (*citing State v. Fishnick*, 127 Wis. 2d 247, 257, 378 N.W.2d 272 (1985)).

The decision whether to admit or exclude other-acts evidence is addressed to the sound discretion of the trial court. If there is a reasonable basis for the trial court's ruling, an appellate court will not find an erroneous exercise of discretion. *State v. Hunt*, 2003 WI 81, ¶¶ 34, 42, 263 Wis. 2d 1, 666 N.W.2d 771; *State v. Veach*, 2002 WI 110, ¶ 55, 255 Wis. 2d 390, 648 N.W.2d 447.

The independent review rule applies to decisions to admit other acts evidence. *See Hunt*, 263 Wis. 2d 1, ¶ 52. Accordingly, "an appellate court may consider acceptable purposes for the admission of evidence other than those contemplated by the circuit court, and may affirm the circuit court's decision for reasons not stated by the circuit court." *Id.*

A court's erroneous exercise of discretion in admitting other-acts evidence is normally subject to harmless error review. *Hunt*, 263 Wis. 2d 1, ¶¶ 76-82. The State does not assert harmless error as to this issue.

C. The motion hearing and the circuit court's decision.

Prior to trial, the State filed a motion to introduce evidence in its case-in-chief that Hurley had sexually assaulted his sister, Janell (d/o/b 11/27/1976), on a regular basis when she was approximately 8 to 10 years old (14:2). Joel Hurley (d/o/b 1/3/1973) is nearly four years

older than Janell (4:1; CR-Ap. 101). The motion asserted that the evidence would be offered to show Hurley's plan, opportunity, intent and absence of mistake or accident under Wis. Stat. § 904.04(2) (14:1).

At the motion hearing, the State presented testimony from Janell in support of its motion (61:6; RCA-App. 306). Janell testified she was between the ages of 8 and 10 at the time of the assaults (61:7; RCA-App. 307). Janell testified that she believed the assaults occurred when her parents were gone and always in her parents' bedroom (61:7-8; RCA-App. 307-08). Janell testified that she was the youngest child, and had three older brothers (61:7; RCA-App. 317).

Janell testified that Hurley would have her take off all her clothes, and then put on her long coat and perform a strip tease for him in their parents' bedroom (61:8-9; RCA-App. 308-09). Janell testified Hurley "would have me . . . perform oral sex on him and vice versa" (61:10; RCA-App. 310). Janell testified Hurley would "finger me," "[l]ike he would insert his fingers in my vagina" (*id.*). Janell testified Hurley would also have her "fondle him" (*id.*). Janell could not recall if Hurley had ever penetrated her with his penis (*id.*). Janell testified that Hurley "would always say . . . you are not going to tell mom and dad, are you? It's just between you and me" (61:11; RCA-App. 311).

Janell estimated the assaults occurred about "once a week" for "probably a good couple years" (61:12, 18; RCA-App. 312, 318). Janell testified that the assaults were "something that's been in my life since it happened," but she had not come forward until now because "my family means the world to me and I don't want to be the reason to break . . . us up" (61:12-13; RCA-App. 312-13). Janell testified that, when she heard about the alleged abuse of M.C.N., and realized that she "just d[id]n't want that to happen to anyone else[,] . . . that's when I had enough strength . . . to come out with it" (61:13; RCA-App. 313).

Following Janell's testimony, the State argued that the alleged assaults of Janell were similar in key ways to the alleged assaults of M.C.N. The State noted that the victims were the same age, the victims were family members, the assaults occurred in the home, and involved acts of digital penetration of the vagina (61:23-24; RCA-App. 323-24).

The State suggested that one of the purposes for which the evidence could be offered was "intent" or "motive," to show that Hurley had acted with a "sexual purpose" (61:24-26; RCA-App. 324-26). The State appeared to acknowledge that intent is not an element of sexual intercourse, but noted that M.C.N. had also alleged acts of sexual contact as well as acts of sexual intercourse, and asserted that Janell's allegations could also be used to show that Hurley had acted with sexual intent in touching M.C.N. (61:25; RCA-App. 325). The State urged the court to give a limiting instruction both at the time of Janell's testimony and when reading the jury instructions to limit the prejudicial effect of Janell's testimony (61:26; RCA-App. 326).

The defense challenged the credibility of Janell's allegations, and noted that Janell's allegations involved sex acts between two children, and not an adult and a young child (61:28-29; RCA-App. 328-29). He also argued that Janell's allegations involved incest, a term "so horrifying to a jury that they may find him guilty based on that fact alone" (although the alleged assaults of M.C.N. were also acts of incest) (61:29; RCA-App. 329). The defense argued that Janell's testimony was like the other acts evidence found to be improperly admitted in *State v. McGowan*, 2006 WI App 80, 291 Wis. 2d 212, 715 N.W.2d 631 (61:31; RCA-App. 331).

The court granted the State's motion, concluding that the evidence was admissible to show opportunity and method of operation (61:34; RCA-App. 334). The court concluded that the evidence was relevant, stating that

there was "great similarity" between Janell's and M.C.N.'s allegations, noting, among other things, the similar age of the victims, the fact that both cases involved acts of digital penetration and that Hurley had both victims play "games" with him (61:35-37; RCA-App. 335-37). The court further found the evidence "bolsters the credibility of [M.C.N.]" (*id.*).

The court appeared to conclude that the evidence could also be used to prove that Hurley acted with sexual intent, if the State presented evidence at trial showing that some of the repeated acts of abuse involved sexual contact and pursued that theory as well as a theory of sexual intercourse (61:36; RCA-App. 336).

The court agreed to give a limiting instruction both before Janell's testimony and again at the close of the case, and did so at trial (61:38; 63:170-71; 64:47-48; RCA-App. 338).

Janell's trial testimony was consistent with her hearing testimony, and further developed matters raised at the hearing. Parts of Janell's trial testimony are provided as necessary in the next section.

D. As to each prong of the *Sullivan* test, the record supports the court's discretionary decision to admit other acts evidence, particularly in light of the greater latitude rule.

In challenging the court's admission of Janell's testimony about the prior assaults, Hurley relies exclusively on *McGowan*, 291 Wis. 2d 212, arguing that his facts and the facts in that case are so similar that *McGowan* must be viewed as "controlling precedent" (Hurley's br. at 27-31). *McGowan* is plainly distinguishable, and the record supports the court's discretionary determination to admit Janell's testimony.

The decision to admit the evidence "was *not* a decision that no reasonable judge could make." *Payano*, 320 Wis. 2d 348, ¶ 52 (emphasis in original).

1. Proper purposes.

As noted, the circuit court allowed Janell's testimony for the purposes of mode of operation and opportunity (61:34; RCA-App. 334). Hurley complains that Janell's testimony was not probative of these purposes (Hurley's br. at 31-32). Hurley also argues that opportunity was not a proper purpose in this case (Hurley's br. at 32-33). The record demonstrates that Janell's testimony was properly allowed for the purposes of mode of operation, as the court concluded, as well as motive.

At trial, M.C.N. testified that her stepfather, Hurley, came into her room at night and lay in bed with her and put his fingers in her vagina (63:94). M.C.N. testified that this became a "regular thing" (63:95). M.C.N. testified she did not remember how many times it happened, but agreed it was at least three times (*id.*). M.C.N. testified that this happened when she was in elementary school, and stopped by the time she reached middle school (63:96). M.C.N. also testified about other acts short of sexual intercourse. M.C.N. testified that Hurley: would put her naked on his shoulders to carry her to the bathroom scale, something which happened "a lot" (63:99); chased her around the house once and took off all her clothes; and came into the shower once when she was in Middle School, but left immediately after asking if Janell would tell her mother (Janell said she would) (63:96-99).

Janell testified at trial that Hurley was her brother, and was close to four years older than her (63:173). Janell testified she had two other older brothers, including one that was only about one year older, but she was "not ever [as] close to [them] as what Joel [Hurley] and I were"

(63:187-88). Janell said "I was always tagging up with Joel or like following Joel around" (63:188).

Janell testified that, when she was between about 8 and 10 years old and their parents weren't home, Hurley would tell her to "go put on the jacket and meet me in mom and dad's room" (63:173-74). Janell would take off her clothes and put on the jacket and go to their parents' room, where Hurley would be waiting on the bed (*id.*). Hurley had her perform a strip tease, and would kiss her and stroke himself (63:174-75). Janell testified the two would perform oral sex on each other, and that Hurley would insert his fingers into her vagina (63:175-77). Janell testified she did not remember Hurley inserting his penis in her vagina (63:176-77). Janell agreed that these incidents happened quite frequently over the course of about two years (63:177).

Janell testified that she remembered telling Hurley at the time, "I don't want to do this. And he would always say, you know, I love you. And you know, I know he would say, too, you are not going say anything to Mom and Dad" (63:178). Janell further testified, "Joel [Hurley] was always the one I always leaned towards and I always—he was always the one I was just the closest to" (*id.*).

In view of the above testimony, and Janell's hearing testimony, the circuit court properly exercised its discretion in admitting Janell's testimony to show Hurley's *modus operandi*. In assaulting his step-daughter, M.C.N., Hurley targeted a vulnerable elementary-school-age girl within his immediate family with whom he had a relationship of implied trust, subjecting her to repeated sexual abuse over an extended period. Hurley's acts of sexual intercourse with M.C.N. occurred over a period of years, consisting of multiple acts of finger-to-vagina intercourse.

Hurley did much the same thing to his younger sister, Janell, with, of course, some differences. As an

adolescent, Hurley targeted another vulnerable elementary-school-age girl in his immediate family, his sister. As with M.C.N., Hurley subjected Janell to a pattern of sexual abuse over multiple years. While not Janell's parent, Hurley is her big brother and nearly four years Janell's senior. As Janell's testimony makes clear, she was closest to Hurley of all her siblings and was "always lean[ing] towards [him]," "tagging up with [him]" and "following [him] around" (63:178, 188). Janell looked up to Hurley, and Hurley took advantage of this relationship of implied trust for his own sexual ends, as he did with M.C.N. While Hurley engaged in additional sex acts with Janell, he engaged in finger-to-vagina intercourse with Janell, but not, as far as Janell could recall, penis-to-vagina intercourse, similar to Hurley's acts with M.C.N.

Janell's testimony thus demonstrates Hurley's mode of operation—preying upon girls of a particular age in his immediate family over whom he had some control, and using them for his own sexual ends over a period of years—and was therefore allowed for a proper purpose.

The State submits that the record also demonstrates that Janell's testimony was also properly offered to show motive, although it was not explicitly admitted by the court for this particular purpose. *McGowan*, 291 Wis. 2d 212, ¶ 16 (noting the "obligation imposed upon this court to independently review the record to ascertain whether there is a reasonable basis for the trial court to have admitted other acts evidence").[7] Janell's testimony showed that Hurley was motivated by sexual desire, and could assist the jury in understanding why Hurley might act out sexually with a preadolescent member of his immediate family. Of course, Hurley's actions as an adolescent do not fully explain why, as an adult male, he sexually assaulted a young family member in his home. But, for the average juror who cannot comprehend why an

[7] The State submits that the doctrine of independent review should defeat any suggestion that the State waived this potential purpose by failing to raise it in the circuit court.

adult person would do such a thing—*and thus might be apt to dismiss the child victim's testimony as incredible*—evidence of Hurley's adolescent sexual experiences over a two-year period with his preadolescent sister might begin to explain how *this* person could commit these acts.

The State acknowledges that "sexual intent"—*i.e.*, the purpose to gratify or arouse one's self or to degrade or humiliate another—is not an element of sexual intercourse, the acts which the State chose to argue as the three or more assaults in this case, and thus Janell's testimony could not be offered to show sexual intent. *See* Wis. Stat. §§ 948.01(6), 948.02(1)(b). And *McGowan* "question[ed]" whether evidence of other assaults "could properly be admitted as evidence of *motive and intent* in a case where intent is not at issue." 291 Wis. 2d 212, ¶ 17 (emphasis added). However, the *McGowan* court did not decide this issue, and rather assumed that a proper purpose *had* been shown. *Id.*

The State respectfully submits that motive in the broad sense—why did he do it?—is distinct from the narrow issue of sexual intent. A person (unless they are unconscious or insane) has a motive when he commits an act of sexual intercourse, whether or not the statute requires proof of sexual intent. Here, Hurley's motive was an attraction to preadolescent girls that was first manifested in two years of sexual assaults involving his sister. Motive was thus a permissible purpose in this case.

2. Relevance.

Hurley argues that the circuit court misused its discretion in concluding that the evidence was relevant, relying on *McGowan* (Hurley's br. at 27-31). The court properly determined that the evidence was relevant, and *McGowan* is distinguishable.

Janell's testimony was relevant to show Hurley's *modus operandi*, and his sexual motive in committing the alleged assaults of M.C.N. Additionally, Janell's

testimony was also plainly relevant to corroborate M.C.N.'s testimony against credibility challenges by the defense, such as claims that she was unreliable, or had fabricated the allegations for some reason. *See State v. Mink*, 146 Wis. 2d 1, 14, 429 N.W.2d 99 (Ct. App. 1988).

"The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." *Hunt*, 263 Wis. 2d 1, ¶ 64. The probative value of the other acts evidence in this case was increased by the substantial similarity between the charged offense and the other acts involving Janell. The two sets of acts share obvious similarities: First, in both incidents, Hurley was sexually attracted to a child, and acted on that sexual attraction by digitally penetrating each girl's vagina. *Cf. Davidson*, 236 Wis. 2d 537, ¶ 68 ("we note the obvious similarity that in both incidents, the defendant was sexually attracted to a child and acted on that sexual attraction by touching the child between her legs"). Second, each girl was elementary-school-age when Hurley sexually assaulted them; M.C.N. was ages 6 to 11, and Janell was ages 8 to 10. Third, each girl was a member of his immediate family and lived with Hurley. M.C.N. was his step-daughter, and Janell was his little sister who looked up to him, and, in both instances, Hurley took advantage of the girls in a relationship of implied trust. Fourth, Hurley subjected both girls to a pattern of sexual abuse over a period of years. The similarities between the other acts evidence and the charged offense are significant.

Hurley argues that this case is "strikingly similar" (Hurley's br. at 27) to *McGowan*, a case in which the court of appeals reversed based on the circuit court's admission of other acts evidence. *McGowan*, 291 Wis. 2d 212. Hurley is mistaken.

In *McGowan*, the victim, Sasha, testified that she had been abused by her cousin, McGowan, over a two and one-half year period starting when she was 10 and McGowan was 18. *McGowan*, 291 Wis. 2d 212, ¶ 2. The

assaults included oral sex as well as vaginal and anal intercourse, and occurred when McGowan would visit from Chicago and stay with her family in Milwaukee. *Id.* ¶¶ 3-8.

Upon the State's motion, the court allowed for the purposes of intent and motive other acts evidence that McGowan had sexually assaulted a different cousin, Janis, when she was 5 and McGowan was 10 and she was living with McGowan's family. *Id.* ¶ 9. The evidence involved a single act of assault in which McGowan forced Janis to perform oral sex on him and urinated in her mouth. *Id.*

The *McGowan* court concluded that Janis's allegations were not sufficiently similar to Sasha's to justify admission. *Id.* ¶ 20. The court noted multiple differences between the two sets of allegations. *Id.* One involved "a single assault," the other a series of more "frequent and more complex assaults." *Id.* There were "significant differences in the nature and quality of the assaults" and "significant differences in the details involving the earlier event" (oral sex and urinating in the victim's mouth) "and the later events" (oral, vaginal and anal sex). *Id.* The court also noted that McGowan was 10 when he committed the earlier assault, which did not "provide evidence of the motive or intent of[] an adult some eight or more years later" *Id.*

Unlike the other acts evidence in *McGowan*, Janell's allegations were sufficiently similar to M.C.N.'s allegations to be probative and warrant admission. The other acts evidence in *McGowan* concerned a single prior assault, which was also *singular* in its nature—it does not appear that Sasha ever alleged that McGowan had urinated in her mouth even once during the repeated assaults over two and one-half years. Here, Janell, like M.C.N., alleged a series of assaults occurring over a period of years that involved, in part, digital penetration of the vagina. Moreover, Janell and M.C.N. were both immediate family members, and both lived under the same roof as Hurley, and Hurley was in a relationship of

implied trust with both girls. McGowan's victims were not direct family members, and he did not live with but visited one (Sasha) while the other lived with McGowan's family at the time of her assault (Janis). Additionally, although the assaults of Janell, like the single assault of Janis, occurred when the defendants were both minors, Hurley's age at the time (12-14) was much closer to that of an adult than McGowan's age (10).

Hurley argues that the other acts evidence was too remote to be relevant, because it occurred 14-16 years prior to the charged offense, just as the other act in *McGowan* occurred 19 years before the offense. The length of time between the prior acts and the charged acts is a factor to be considered in evaluating the relevancy of the prior acts evidence, but remoteness does not necessarily render the prior acts evidence inadmissible. The Wisconsin Supreme Court has explained:

> The defendant also argues that the other acts evidence is inadmissible because it was too remote in time, place and circumstances. It is within a circuit court's discretion to determine whether other acts evidence is too remote. *See Hough v. State*, 70 Wis. 2d 807, 814, 235 N.W.2d 534 (1975). There is no precise point at which a prior act is considered too remote, and remoteness must be considered on a case-by-case basis. *Friedrich*, 135 Wis. 2d at 25 [ ]. Even when evidence may be considered too remote, the evidence is not necessarily rendered irrelevant if the remoteness is balanced by the similarity in the two incidents. *See State v. Mink*, 146 Wis. 2d 1, 16, 429 N.W.2d 99 (Ct. App. 1988) (citing *Sanford v. State*, 76 Wis. 2d 72, 81, 250 N.W.2d 348 (1977)). This court has in other cases upheld the admission of other acts evidence that was more remote in time than the five to seven year time span in this case. *Plymessser*, 172 Wis. 2d at 596 [ ] (upholding the admissibility of thirteen-year-old evidence); *State v. Kuntz*, 160 Wis. 2d 722, 749, 467 N.W.2d 531 (1991) (upholding the admissibility of sixteen-year-old evidence).

Hammer, 236 Wis. 2d 686, ¶ 33.

In this case, while the length of time and difference in Hurley's age between the other acts and charged offense was significant, it was not so great as to attenuate a rational or logical connection between them given their substantial similarities. *See Mink*, 146 Wis. 2d at 16; *see also Davidson*, 236 Wis. 2d 537, ¶ 72 (noting that a defendant's prior offense does not need to be identical to the charged offense to be probative).

In *State v. Friedrich*, 135 Wis. 2d 1, 24, 398 N.W.2d 763 (1987), the court found prior offenses involving two other girls admissible to prove plan and sexual motive because the other acts evidence and charged incident

> share[d] certain characteristics: All of these incidents involve young girls of like age; the girls were either part of the Defendant's family or had a quasi-familial relationship with Defendant's family; the nature of the sexual contact was virtually identical; Defendant was seen taking advantage of the girls in the context of relationship which involved an implied trust; and the Defendant was seen gratifying his sexual desires through the physical contact.

Friedrich, 135 Wis. 2d at 24.

Similarly, here, the common shared characteristics between the two assaults give the other acts evidence sufficient probative value, notwithstanding some differences between the other acts and the charged offense.

For all of these reasons, the trial court did not erroneously exercise its discretion in concluding that the other acts evidence was relevant in spite of the length of time and difference in Hurley's age between the other acts and the charged acts. The record independently supports that conclusion.

3. Prejudice

Hurley also appears to argue that, even if the evidence had some limited probative value, that value was substantially outweighed by the risk of unfair prejudice, again relying on *McGowan* (Hurley's br. at 27-31). The circuit court did not misuse its discretion in concluding that Hurley failed to meet his burden to show prejudice, and *McGowan* is again distinguishable.

Once the proponent of the other acts evidence establishes a permissible purpose and relevance, the evidence is admissible unless the opponent establishes that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Marinez*, 331 Wis. 2d 568, ¶ 41. The test is not whether the evidence will harm the opposing party's case because nearly all evidence operates to the harm of the party against whom it is offered. Rather, the test is whether the prejudice is unfair. *State v. Johnson*, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994).

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Sullivan, 216 Wis. 2d at 789-90. Specifically, in other acts evidence cases, unfair prejudice refers to the danger that the jury will conclude that because the defendant committed one bad act, he necessarily committed the crime for which he is now on trial. *Fishnick*, 127 Wis. 2d at 261-62. The party opposing the other acts evidence must demonstrate that the probative value of the evidence is substantially outweighed by this danger of unfair prejudice. The term "substantially" is critical. "[I]f the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted."

State v. Speer, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993).

In order to limit the possibility that the jury will convict based on this improper basis, the trial court may provide a limiting/cautionary instruction. The reviewing court presumes that juries comply with properly given limiting/cautionary instructions and therefore such instructions are an effective means of reducing the risk of unfair prejudice. *Marinez*, 331 Wis. 2d 568, ¶ 41. "Cautionary instructions eliminate or minimize the potential for unfair prejudice." *Hammer*, 236 Wis. 2d 686, ¶ 36.

The trial court in this case gave a cautionary instruction both before Janell's testimony and at the close of the case. The court's cautionary instructions specifically told the jury that the evidence was not to be used to conclude that Hurley was a "bad person," the type of instruction that was affirmed in prior cases. *See Hammer*, 236 Wis. 2d 686, ¶ 36 (citing *Fishnick*, 127 Wis. 2d at 262, and *State v. Gray*, 225 Wis. 2d 39, 65, 590 N.W.2d 918 (1999)). The court's full instruction before Janell's testimony reads as follows:

> Members of the Jury, evidence will now be presented regarding other conduct of the defendant for which the defendant is not on trial, specifically evidence will be presented that the defendant engaged in sexual intercourse with Janell Goldsmith. Sexual intercourse means any intrusion however slight by any part of a person's body or of any object into the genital or anal opening of another. Emission of semen is not required.
>
> If you find this conduct did occur, you should consider it only on the issues of opportunity and method of operation. You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.

> The evidence is received on the issue of, first, opportunity, that is whether the defendant had the opportunity to commit the offense charged; and second, method of operation.
>
> You may consider this evidence only for the purposes I have described giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

(63:170-71).

Contrary to Hurley's suggestion, the risk of prejudice in this case does not substantially outweigh the probative value of the other acts evidence, unlike in *McGowan*. The *McGowan* court explained that Janis's allegation that then 10-year old McGowan had forced oral sex and then urinated in the victim's mouth was certain to provoke "a sense of horror" and "[r]evulsion" in jurors:

> Here, the offered evidence (testimony of forced fellatio, performed by a five-year-old child victim, followed by urination in the victim's mouth) undoubtedly aroused the jury's "sense of horror" and "provoke[d] its instinct to punish." *See Sullivan*, 216 Wis. 2d at 789-90, 576 N.W.2d 30. Revulsion as to this conduct is not significantly mitigated by the fact that McGowan was only ten years old at the time and the event was an isolated incident. Given the obvious probable prejudice to the defendant, the probative value of the evidence to prove a legitimate fact of consequence—which is not proof of the defendant's character—should be strong indeed. The slim reeds of probative value identified above crumble here under the weight of prejudice to the defendant.

McGowan, 291 Wis. 2d 212, ¶ 23.

By contrast, the nature of Janell's allegations would not have "arouse[d] its sense of horror" or "provoke[d] its instinct to punish." *Sullivan*, 216 Wis. 2d at 789-90. Unlike the acts in *McGowan*, the sex acts alleged by Janell were not, of themselves, horrific and

repulsive. While Janell's allegations involved incest, the charged offense was already one of incest involving Hurley's stepdaughter. The charged offense in Hurley's case—repeated finger-to-vagina intercourse to a 6-11 year old child by an adult—would have been more likely to arouse the jury's horror than testimony that Hurley had committed similar assaults on Janell.

The probative value of Janell's testimony discussed in the preceding section was not substantially outweighed by its risk of unfair prejudice, which was minimized by the court giving an appropriate and well-crafted cautionary instruction before Janell's testimony and at the close of the case. The circuit court therefore properly exercised its discretion in concluding that Hurley failed to meet his burden of showing that the probative value of Janell's testimony was not substantially outweighed by its risk of unfair prejudice.

For the reasons set forth above, the circuit court did not erroneously exercise its discretion in admitting the other acts evidence. Accordingly, this court must reject Hurley's claim that he is entitled to a new trial based on the admission of the other acts evidence.

III. THE PROSECUTOR'S UNOBJECTED-TO REMARK IN CLOSING ARGUMENT THAT HURLEY WAS "OPPORTUNISTIC" DOES NOT WARRANT REVERSAL.

Hurley maintains that a statement by the prosecutor in closing argument that Hurley was "opportunistic" was improper, and necessitates that Hurley receive a new trial (Hurley's br. at 34-35). Although Hurley does not provide the authority under which he seeks a new trial, the State presumes that he is asking this court either to conclude that the unobjected-to remark constitutes plain error that is not harmless, or to conclude that the remark merits

discretionary reversal under Wis. Stat. § 752.35.[8] Hurley fails to show that the prosecutor's remark, if improper, meets either standard to warrant a new trial.

In its opening statement, the defense offered an analogy involving a cat and a mouse in a box to illustrate the meaning of reasonable doubt (63:86). If, counsel argued, one put a cat and mouse in a box, came back ten minutes later, and noticed that the mouse is gone, one could conclude beyond a reasonable doubt that the cat ate the mouse (*id.*). But if instead, one noticed that the box had a mouse-sized hole, one could not conclude beyond a reasonable doubt that the cat ate the mouse (63:86-87).

In his closing argument, the prosecutor referenced this analogy, and suggested that the cat, in this case, was Hurley, and that the mice were M.C.N. and Janell:

> In [defense counsel's] opening statement he told you about this cat and mouse in a box. Remember that? Well, one of the things you can use here for—one of the purposes you can use Janell's testimony for is the defendant's opportunity, his opportunity to commit the crime. The defendant's opportunistic, took advantage of two elementary girls, just like the prowling cat taking advantage of that mouse in the box.
>
> Opportunity, Ladies and Gentlemen. A preying cat, a vulnerable mouse.
>
> Now, the defense also built in an escape route for that mouse. They said well, what if there is a hole in the box? But for [M.C.N.] that box was the four walls of her bedroom. The doors closed. Unlike the mouse, there is no escape route for this young, vulnerable elementary age child.

(64:30-31).

[8] Hurley plainly does not argue that the circuit court erred in rejecting his ineffective assistance claim based on counsel's failure to object to this remark. Defense counsel testified at the hearing that he made the strategic decision not to object to the statement to avoid drawing additional attention to the remark (66:28).

Ruling on Hurley's postconviction claim based on this remark, the circuit court concluded that "what was being said [by the prosecutor] that [Hurley's] opportunistic, that's simply another form of mentioning his method of operation . . . " (66:65). "That's the method that he operates and that was one of the allowable criteria or factors, if you will, under which the Court allowed that to come in. And I think that the argument was appropriate. I find nothing wrong with that and I will deny based on that" (*id.*).

The State acknowledges that the prosecutor's word choice in calling Hurley "opportunistic" immediately after discussing "opportunity" as a permissible purpose for the other acts evidence was inartful. *See State v. Wolff*, 171 Wis. 2d 161, 169, 491 N.W.2d 498 (Ct. App. 1992) ("[C]riminal trials 'do not unfold like a play with actors following a script.'"(quoted source omitted)). However, the State believes that the circuit court was correct in stating that the prosecutor's argument, if inartfully phrased, was proper. The full context of the prosecutor's remarks demonstrate that his point went to Hurley's mode of operation, a purpose for which the court allowed Janell's testimony. Like the cat with a mouse in his box, Hurley preys upon young girls living under his own roof who cannot escape—girls who are trapped by their familial relationship to him as well as their age.

To the extent that the prosecutor's remark was improper, the State submits that Hurley has utterly failed to show that the error was of such magnitude as to warrant a new trial under the plain error rule or Wis. Stat. § 752.35. *See State v. Vinson*, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994) (plain error rule requires that error be "substantial or grave" and resulted in denial of basic constitutional right); *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719 (power of discretionary reversal "should be exercised sparingly and with great caution"). Moreover, the remark would not have "vaporized the meager protections afforded Hurley"

by the clear limits set by the court on the evidence's use (Hurley's br. at 35). While "opportunistic" may not have been the best word choice here, the effect of the prosecutor's remark was to invite the jury to consider the other acts testimony for a permissible purpose, mode of operation.

For these reasons, Hurley has failed to show that the prosecutor's remark, if at all improper, warrants a new trial under the plain error rule or Wis. Stat. § 752.35.

CONCLUSION

For the foregoing reasons, the circuit court properly denied the claims raised in Hurley's cross-appeal, none of which entitle Hurley to postconviction relief. Hurley's conviction should be reinstated for the reasons set forth in the State's brief and reply brief as Appellant.

Dated this 16th day of December, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Appellant-
Cross-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 266-9594 (Fax)
wittwerjj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,660 words.

Dated this 16th day of December, 2013.

_____
Jacob J. Wittwer
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, 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.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of December, 2013.

_____
Jacob J. Wittwer
Assistant Attorney General