STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP558-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent-Petitioner,

v.

JOEL M. HURLEY,

Defendant-Respondent-Cross-Appellant.

REVIEW OF A DECISION AND ORDER OF THE WISCONSIN COURT OF APPEALS, DISTRICT III, REVERSING IN PART AN ORDER OF THE MARINETTE COUNTY CIRCUIT COURT, THE HONORABLE DAVID G. MIRON, PRESIDING, THAT DENIED IN PART AND GRANTED IN PART A MOTION FOR POSTCONVICTION RELIEF, AND REMANDING TO THE CIRCUIT COURT WITH DIRECTIONS TO DISMISS THE CHARGE WITHOUT PREJUDICE

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT-PETITIONER

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ISSUES PRESENTED

1. Under *Fawcett*,[1] courts use a seven-factor test to evaluate notice challenges to charges of sexual assault of a child. Here, Hurley was charged with repeated sexual assault of a child for assaulting his step-daughter twenty-six times over a six-year period starting when she was six. Because the assaults were repeated and similar in nature, the victim could not recall the dates and times of individual acts. Because he lived with the victim, Hurley could not have asserted an alibi or identity defense. Did the charge provide notice to satisfy Hurley's right to prepare a defense, so that counsel's decision not to seek dismissal of the complaint was neither ineffective assistance nor plain error?

The circuit court concluded that the complaint provided adequate notice. The court of appeals disagreed, concluding that the complaint violated Hurley's right to due process, relying extensively on *State v. R.A.R.*, 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988).

2. Under *Sullivan*,[2] other acts evidence is admissible if it is offered for an acceptable purpose, is relevant, and is not unfairly prejudicial. Here, the circuit court admitted testimony that Hurley repeatedly assaulted another member of his immediate family, his sister, when she was the same age as the victim.

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[1] *State v. Fawcett*, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988).

[2] *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998).

Did the circuit court act within its discretion in admitting this evidence, particularly in view of the greater latitude shown other acts evidence in child sexual assault cases?

The circuit court admitted the other acts evidence to show method of operation, among other purposes, upon determining that there were important similarities between the two sets of allegations. The court of appeals disagreed, concluding that the evidence did not satisfy any of the three *Sullivan* factors.

3. In *Weiss*,[3] a new trial was ordered for a prosecutor's closing argument remark that the defendant "never" denied the charges previously, when he had actually done so twice in police interviews. Here, Hurley's trial testimony was that he did not "recall" assaulting his sister. In closing, the prosecutor held Hurley to this testimony, arguing that I don't "recall" is "different than it didn't happen," but did not assert that Hurley had *never* previously denied the allegation. Was the prosecutor's unobjected-to remark improper, and does it warrant a new trial?

The circuit court ordered a new trial because of this remark. The court of appeals decided it was unnecessary to address this issue, given its disposition of the notice issue.

[3] *State v. Weiss*, 2008 WI App 72, ¶¶ 1, 5, 312 Wis. 2d 382, 752 N.W.2d 372.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The court's order granting review stated that this case will be argued on the same calendar assignment as *State v. Kempainen*, No. 2013AP1531-CR. This court ordinarily publishes its decisions.

STATEMENT OF THE CASE

The criminal complaint.

In July 2011, an amended complaint ("the complaint") was filed charging Joel Hurley with repeated sexual assault of a child for assaulting his stepdaughter, M.C.N. (b. 1994), on three or more occasions "on and between" 2000 and 2005 (4:1; Pet-Ap. 129). At the time, Hurley was married to M.C.N.'s mother, Julie Hurley, and lived in the family residence (4:1; Pet-Ap. 129). The couple divorced in 2006. (4:1; Pet-Ap. 129).

According to the complaint, M.C.N. disclosed the alleged assaults to her mother in September 2010 after Hurley moved to Indiana (4:1-2; Pet-Ap. 129-30). Police interviewed M.C.N., who recalled the following:

- "the assaults began shortly after the marriage [in 2000] at the residence that [the family] lived in" (4:1-2; Pet-Ap. 129-30).

- After an incident in which Hurley chased a naked M.C.N. around the house, Hurley started coming into M.C.N.'s bedroom at night, and getting into bed with her (4:2; Pet-Ap. 130). Hurley would then place his

hand into M.C.N.'s pajama bottoms, and put his fingers inside her vagina (4:2; Pet-Ap. 130). M.C.N. said Hurley did this "approximately five times during the time she lived with him" (4:2; Pet-Ap. 130.). Hurley also forced M.C.N. to touch his penis on one occasion (4:2; Pet-Ap. 130).

- Also "[a]round this time," the defendant began to weigh M.C.N. naked when she got home from school (4:2; Pet-Ap. 130). Hurley would have M.C.N. take her clothing off, including her underwear, put her on his shoulders, take her into the bathroom, and put her on the scale (4:2; Pet-Ap. 130). M.C.N. said that Hurley did this "in excess of 20 times" "between the ages of approximately 6 to 11" (4:2; Pet-Ap. 130).

Admission of other acts evidence.

Before trial, the State filed a motion to introduce evidence in its case-in-chief that Hurley had repeatedly sexually assaulted his sister, J.G. (b. 1976), over two years when she was eight-to-ten years old and Hurley was twelve-to-fourteen years old (14:2). The circuit court granted the State's motion, concluding that the evidence was admissible to show opportunity and method of operation (61:34; Pet-Ap. 165). Additional facts relevant to this issue are provided later.

Trial.

The primary witnesses at trial were M.C.N., J.G. and Hurley.

M.C.N.'s trial testimony was largely consistent with her initial disclosures to police, although M.C.N. was less clear on the number of acts of digital penetration, testifying that this was a "regular thing," and confirming on direct examination that it happened "at least three times" (63:94). M.C.N. also testified about the weighing incidents in which Hurley would have her strip naked once she got home from school, and then carry her on his shoulders with her legs around his neck to the bathroom scale (63:98-99). J.G.'s testimony was also substantially consistent with her testimony at the pretrial hearing.

In his trial testimony, Hurley denied M.C.N.'s allegations (63:255, 274-81). Hurley said he and Julie would tuck M.C.N. in at night, and he would lay with M.C.N. in her bed when she asked him to for a "couple of minutes" with the bedroom door open (63:279-80). Hurley said his job at a saw mill supply company involved some travel, and that he could be gone from one day to one week at a time (63:277-78).

Regarding his sister J.G.'s allegations, Hurley on direct examination twice indicated he did not "recall" having committed the alleged acts:

> Q: Now, [J.G.] testified that she was assaulted when she believed she was around eight years old. Do you recall having an encounter with [J.G.] when she was around eight?
>
> A: No.

(63:265; Pet-Ap. 186). Moments later, defense counsel again asked:

> Q: Do you recall any of the allegations [J.G.] brought up here today?
>
> A: No, I do not.

(63:267; Pet-Ap. 188).

In his closing argument, Marinette County Assistant District Attorney Kent Hoffman highlighted the similarities between J.G.'s allegations and M.C.N.'s allegations (64:25-26; Pet-Ap. 190-91). The prosecutor remarked on the fact that Hurley did not make a strong denial of J.G.'s allegations at trial, testifying instead that he did not "recall" the alleged incidents:

> When the defendant testified, he was asked by his—by the attorney regarding [J.G.] he said well, do you recall any of these incidents with [J.G.] 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; Pet-Ap. 190-91).

Postconviction proceedings.

In his postconviction motion, Hurley alleged the complaint violated his right to due process by failing to provide adequate notice to prepare a defense, and that this constituted plain error (39:7-9). Hurley also argued that counsel was ineffective for failing to move to dismiss the complaint, and for failing to object to the

prosecutor's allegedly improper remarks during closing argument (39:9-12).

At an evidentiary hearing on the motion, trial counsel John D'Angelo testified that he decided not to file a motion to dismiss the charge for lack of notice after researching the issue and discussing the matter with Hurley (66:10-13; Pet-Ap. 203-06). Counsel said he concluded that a motion to dismiss was likely to fail based on his reading of the case law, and that, even if it had succeeded, the State would likely just re-file the charges with additional details (66:12-13; Pet-Ap. 205-06). Counsel said that once the State amended the complaint to allege repeated child sexual assault under Wis. Stat. § 948.025, the likelihood of success on a motion to dismiss was "lessened" (66:16; Pet-Ap. 209).

Counsel indicated that a shorter offense period would not have mattered to Hurley's defense: "[E]ven if they narrowed [the offense period] down to say a one- or two-year timeframe, it would still not necessarily pinpoint the times in which the acts occurred." (66:25; Pet-Ap. 218).

On the issue of the prosecutor's closing argument remarks, counsel testified he made a strategic decision not to object, explaining an objection would have drawn "more attention from the jury" to a statement that the prosecutor "said very quickly and didn't harp on" (66:29; Pet-Ap. 221).

At the conclusion of the hearing, the court rejected Hurley's notice claim (66:63-65; Pet-Ap. 256-58). However, the court ordered a new trial on the basis of the prosecutor's remark about

Hurley testifying that he did not recall having assaulted J.G., relying on *State v. Weiss,* 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 372 (66:68-73; Pet-Ap. 262-65).

The State appealed the circuit court's order for a new trial, and Hurley cross-appealed the court's denial of Hurley's notice claim, and its denial of claim regarding another remark by the prosecutor in closing argument. Hurley also challenged the court's pretrial order admitting other acts evidence.

Court of Appeals' decision.

In a *per curiam* opinion, the Wisconsin Court of Appeals, District III, reversed in part the circuit court's order, concluding that (1) the criminal complaint violated Hurley's right to due process, and (2) the trial court erred in admitting J.G.'s other acts testimony. *State v. Hurley*, No. 2013AP558-CR, (Wis. Ct. App. Mar. 18, 2014) opinion withdrawn and reissued May 6, 2014 (Pet-Ap. 101-24).[4] The court declined to address whether the court erred in ordering a new trial based on the prosecutor's closing argument remarks, and remanded for the circuit court to enter an order dismissing the complaint without prejudice. *Hurley*, slip op. ¶ 3 (Pet-Ap. 102).

In a footnote, the court concluded the State did not respond to Hurley's arguments that trial counsel was ineffective for failing to seek dismissal of the complaint before trial; that the plain error rule should apply; and therefore these arguments

[4] The May 6, 2014 decision is provided in the State's appendix. The changes made in the reissued decision were limited to three paragraphs, and are fully discussed herein.

were conceded. *Hurley*, slip op. ¶ 17 n.3 (Pet-Ap. 107). The court so concluded despite the State having argued that counsel was not ineffective for failing to bring a notice claim that the circuit court would have rejected, and that counsel's decision was not plain error. Combined Brief of Appellant and Cross-Respondent at 15.

The court evaluated Hurley's notice challenge to the complaint using the seven-factor test in *Fawcett*, 145 Wis. 2d at 253. *Hurley*, slip op. ¶¶ 20, 25-37 (Pet-Ap. 109, 111-17). In its original decision and order, the *Hurley* court concluded that, pursuant to *R.A.R.*, 148 Wis. 2d at 411, factors one through three did not apply because Hurley did not allege that the prosecutor could have obtained a more narrow charging period through diligent efforts. *Hurley*, slip op. ¶ 25 (Pet-Ap. 112). The court thus evaluated Hurley's claim under factors four through seven only, and concluded that all of these factors weighed in favor of the claim. *Hurley,* slip op. ¶¶ 26-31; (Pet-Ap. 112-15).

Four weeks later, the court of appeals, District II, issued *Kempainen*, which concluded that *R.A.R.*'s holding limiting the factors to be considered in notice claims when the defendant does not allege a lack of prosecutorial diligence was contrary to *Fawcett*. *State v. Kempainen*, 2014 WI App 53, ¶¶ 13-14, 354 Wis. 2d 177, 848 N.W.2d 320, *review granted*, No. 2013AP1531–CR (Sept. 18, 2014).

In response, the District III court withdrew its *Hurley* decision, and issued a new decision and order with the same mandate explaining that

factors one through three would not be addressed in this case because of how the parties had briefed the issue, and, even if these factors were considered, the outcome would be the same. *State v. Hurley*, No. 2013AP558-CR, slip op. ¶¶ 25-26 (Wis. Ct. App. May 6, 2014) (per curiam) (Pet-Ap. 111-12).

Regarding the other acts issue, the court of appeals concluded that the circuit court misused its discretion in admitting J.G.'s testimony under the three-part other acts test set forth in *Sullivan*, 216 Wis. 2d at 771-73. *Hurley*, slip op. ¶¶ 39-53 (Pet-Ap. 118-23).

ARGUMENT

I. THE CHARGE PROVIDED HURLEY SUFFICIENT NOTICE TO PREPARE A DEFENSE, AND THUS COUNSEL'S DECISION NOT TO SEEK DISMISSAL WAS NEITHER INEFFECTIVE ASSSITANCE NOR PLAIN ERROR.

A. Summary of Argument.

In *Fawcett*, the court of appeals recognized the difficulties inherent in prosecuting child sexual assaults, and created a seven-factor test to evaluate claims that a charge of child sexual assault was insufficient to allow the accused the opportunity to prepare a defense. After *Fawcett* was decided, the legislature created the offense of repeated sexual assault of the same child, Wis. Stat. § 948.025, to address the problem of a child being unable to recall dates and times of

individual assaults because the assaults occurred repeatedly.

The State submits that *Fawcett* provides a sound framework for evaluating notice challenges to charges of repeated sexual assault of a child—provided that courts address within that framework the following considerations unique to this charge:

- The impact of the repeated nature of the criminal acts on the child's ability to recall dates and times of the individual acts; and

- The defenses available to the accused under the circumstances.

In this case, these considerations were not properly addressed by the court of appeals. Further, the court failed to adequately consider factors one through three of the *Fawcett* test, and relied almost exclusively on *R.A.R.* in concluding that the charge violated Hurley's right to due process. As noted, *Kempainen* concluded that *R.A.R.* conflicted with *Fawcett*, and was therefore invalid.

Applying the *Fawcett* factors, the charge, which alleged that Hurley sexually assaulted M.C.N. twenty-six times when she was between ages six and eleven, satisfied Hurley's due process right to prepare a defense. M.C.N. was six when the assaults began, and the fact that the assaults were repeated and similar in nature impacted her ability to specify dates and times of individual acts. Hurley lived in the same household as M.C.N. for the entire offense period, and therefore an alibi or mistaken identity defense was not

available to him under the circumstances. As trial counsel acknowledged at the postconviction hearing, even an offense period as narrow as one or two years would not have changed or aided Hurley's defense. Thus, the charge did not violate Hurley's due process right to prepare a defense, and counsel's decision not to file a motion to dismiss was therefore reasonable, and did not constitute plain error.

Finally, because Hurley's notice claim was unpreserved, it should be addressed under the rubrics of ineffective assistance and plain error, and the court of appeals erred in concluding that the State forfeited these arguments. In the court of appeals, the State responded to Hurley's claim as follows: "Counsel was not ineffective for failing to bring a notice claim that would have been rejected by the circuit court, and there is no plain error in a complaint that meets *Fawcett*'s test for notice." (Combined Brief of Appellant and Cross-Respondent at 15) (case cite omitted). While Hurley's notice claim was not framed in the State's petition within an ineffective assistance and plain error context, the claim should be reviewed under these rubrics because it was not timely made.

B. Applicable Legal Principles.

1. Notice challenges to single-act charges of sexual abuse of a child.

The sufficiency of a pleading is a question of law that an appellate court decides independently. *Fawcett*, 145 Wis. 2d at 250. Whether a

deprivation of a constitutional right has occurred is a question of constitutional fact that is also independently reviewed. *Id.*

a. *Fawcett*.

In assessing the sufficiency of a complaint, a court considers "whether the accusation is such that the 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).

Here, Hurley was charged with the crime of repeated sexual abuse of the same child under Wis. Stat. § 948.025 (4:1; Pet-Ap. 129). In *Fawcett*, the court of appeals 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).

With these considerations in mind, the *Fawcett* court of appeals created a seven-factor test to apply in determining whether a charge of sexual abuse of a child satisfies *Holesome*:

> 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.

The *Fawcett* court observed that, 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 child sexual assault cases. *Id.*

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

b. *R.A.R.* and *Kempainen*.

In *R.A.R.*, 148 Wis. 2d at 411, the Wisconsin Court of Appeals suggested that factors one through three of the *Fawcett* test do not apply whenever the accused does not claim that the State could have narrowed the charging period by exercising reasonable diligence. Applying only factors four through seven, the *R.A.R.* court then invalidated four single-act counts of child sexual assault alleging offense periods of three months each. *Id.* at 409-12.

In *Kempainen*, 354 Wis. 2d 177, ¶¶ 13-14, the court of appeals concluded that, to the extent that *R.A.R.* limited the factors that may be considered in assessing the sufficiency of a charge, *R.A.R.* conflicted with *Fawcett*.

2. Repeated sexual assault of the same child, Wis. Stat. § 948.025.

In *Fawcett*, the court of appeals recognized that some of the most egregious cases of child sexual assault—those involving repeated assaults over months or years—can be among the most difficult for prosecutors to charge with specificity because "a singular event or date is not likely to stand out in the child's mind." 145 Wis. 2d at 254.

"[T]o address [this] problem . . . 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," the legislature established the offense of repeated sexual assault of the same child, Wis. Stat. § 948.025. *State v. Nommensen*, 2007 WI App 224, ¶ 15, 305 Wis. 2d 695, 741 N.W.2d 481 (footnote omitted). Section 948.025 requires proof of three or more acts of assault.

In *State v. Johnson*, 2001 WI 52, ¶¶ 11-28, 243 Wis. 2d 365, 627 N.W.2d 455, this court upheld Wis. Stat. § 948.025 on a constitutional challenge, concluding the statute required jury unanimity only as to the fact that three assaults occurred, but not which three acts occurred.

Addressing § 948.025, this court explained that "it is the *course* of sexually assaultive conduct that constitutes the primary element of this offense . . . ." *Johnson*, 243 Wis. 2d 365, ¶ 16 (emphasis in original).

3. Ineffective assistance of counsel.

To prove a claim of ineffective assistance, a defendant must show that counsel's performance was deficient, and that the deficient performance was prejudicial. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433.

Counsel renders deficient performance only by committing errors so serious that he or she ceases to function as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Because of the difficulties inherent" in evaluating the reasonableness of counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id. at* 689 (quoted source omitted).

To show prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 693).

4. Plain error rule.

If a party fails to object to an error that affects substantial rights, then that error implicates the plain error doctrine. *See* Wis. Stat. § 901.03(4), *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77. 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." *Id.* (citations and internal quotation marks omitted). "The error, however, must be 'obvious and substantial.'" *Id.* The defendant has the burden to prove the error is fundamental, obvious and substantial. *Id.* ¶ 23. If the defendant meets this burden, the State may nonetheless show that the error was harmless. *Id.* ¶ 45.

C. In Assessing a Notice Challenge to a Charge of Repeated Child Sexual Assault, Courts Must Consider: (a) The Impact of the Repeated Nature of the Assaults on the Child's Ability to Recall Specifics, and (b) the Available Defenses.

No published Wisconsin case has addressed a notice challenge to a complaint charging repeated sexual assault of the same child under Wis. Stat. § 948.025. The State submits that there are at least two considerations unique to a charge of repeated sexual assault under Wis. Stat. § 948.025 that courts must address in evaluating notice challenges to charges under the statute.

First, as *Fawcett* itself suggests, due weight must be given to the impact of the repeat nature of the assaults on the child's ability to provide details about individual acts. 145 Wis. 2d at 254. A person who commits serious crimes against a child should not evade prosecution just because the number of criminal acts prevents the child from recalling the specifics of individual assaults. *Id.* at 249.

Second, review of a notice challenge to a charge of repeated child sexual assault should look beyond the math of the case—i.e., the number of individual assaults relative to the length of the offense period—and consider whether the extended offense period actually impacted the defendant's right to prepare a defense in light of the defenses available to him or her.

While no Wisconsin court has addressed in a published decision a notice challenge to a charge of pattern sexual assault, California courts have, and their approach is instructive here. *See People v. Jones*, 792 P.2d 643, 645 (Cal. 1990), *as modified* (Aug. 15, 1990); *People v. Moreno*, 211 Cal. App. 3d 776, 787-88 (Cal. Ct. App. 1989); *People v. Obremski*, 207 Cal. App. 3d 1346, 1352-53 (Cal. Ct. App. 1989). In *Jones*, the California Supreme Court observed that, in many repeated child sexual assault cases, the accused is a family member who lives with the child—the so-called "resident child molester." 792 P.2d at 657. While this person, like all accused persons, has the due process right to prepare a defense, the defenses available to him or her are usually limited by the fact that he or she lived with and had regular access to the victim. *Id.*

As the *Jones* court explained, "only infrequently can an alibi or identity defense be raised in resident child molester cases. Usually, the trial centers on a basic credibility issue—the victim testifies to a long series of molestations and the defendant denies that any wrongful touchings occurred." *Id.* "[I]f the defendant has lived with the victim for an extensive, uninterrupted period and therefore had continuous access to the victim,

neither alibi nor wrongful identification is likely to be an available defense." *Id.*

Wisconsin courts should likewise consider the defenses available to the accused in assessing whether a charge of repeated child sexual abuse provided adequate notice to prepare a defense. Failure to do so will result in dismissal of charges when no actual denial of the right to present a defense has occurred; the defendant who could not have used a shorter offense period in preparing a defense should not be able to claim that a longer offense period denied his or her due process right to prepare a defense. *Cf. Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("(D)ue process is flexible and calls for such procedural protections as the particular situation demands").

To recognize these two unique considerations relevant to a notice challenge to a charge of repeated child sexual assault, this court need not modify the seven-factor *Fawcett* test that Wisconsin courts have used for over twenty-five years.

Rather, this court should direct courts to address (a) the impact of the repeated nature of the criminal acts on the ability of the child to provide specific dates and times, and (b) the availability of defenses under factors two and three of the *Fawcett* test. These factors are the surrounding circumstances and the nature of the offense, respectively. *Fawcett*, 145 Wis. 2d at 253.

Of course, the availability of factors two and three in the review of this notice claim (and most other notice claims) depends on this court's decision in the *Kempainen* case. 354 Wis. 2d 177,

¶¶ 13-14. The analysis in the next section applies all seven factors to Hurley's notice claim, addressing the two considerations addressed above under factors two and three of *Fawcett*.

D. Applying The *Fawcett* Test, The Complaint Was Sufficient To Satisfy Hurley's Due Process Right To Prepare A Defense, And Thus Counsel's Decision Not To Seek Dismissal Was Reasonable, And There Was No Plain Error.

1. The complaint alleges twenty-six acts of assault.

In the court of appeals, the parties disputed how many individual assaults the complaint alleged. *Hurley*, slip op. ¶ 27 (Pet-Ap. 113). The court of appeals assumed without deciding that the complaint alleged at least twenty-six separate assaults. *Id.* ¶ 28 (Pet-Ap. 113).

The complaint plainly alleges twenty-six acts of first-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(1)(b) and (e), which Wis. Stat. 948.025(1)(d) identifies as qualifying offenses under the repeated sexual assault of a child statute (4:1-2; Pet-Ap. 129-30).

Six acts occurring in M.C.N.'s bed are alleged: five acts of digital penetration of the vagina contrary to Wis. Stat. § 948.02(1)(b), and one act of forced touching of Hurley's genitals,

contrary to Wis. Stat. § 948.02(1)(e) (4:2; Pet-Ap. 130).

Additionally, at least twenty acts of sexual contact with a child under the age of thirteen, contrary to Wis. Stat. § 948.02(1)(e), are alleged for the after-school "weighing" incidents. "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., "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).

According to the complaint, Hurley had M.C.N. take off all of her clothes when she got home from school "in excess of 20 times" "and would put her on his shoulders to take her into the bathroom" to be weighed (4:2; Pet-Ap. 130). This allegation was sufficient to put Hurley on notice that he might have to defend against these allegations as incidents of sexual contact. When Hurley had M.C.N. take off her clothes so that he could carry her naked "on his shoulders," her "intimate parts" (buttocks, groin, vagina or pubic mound) would necessarily have been in contact with "any part" of Hurley, specifically his neck and shoulders. Moreover, the circumstances are sufficient to draw a reasonable inference that Hurley acted with sexual intent during these incidents. In fact, at trial, Hurley defended against these incidents as acts of assault under

Wis. Stat. §§ 948.02(1)(e) and 948.025 by testifying that he carried M.C.N. to be weighed only once, and then with her clothes on and like "a sack of potatoes" over one shoulder (63:274-75).

While testimony was elicited at trial from M.C.N. (as well as Hurley) about the weighing incidents (63:98), the prosecutor chose to emphasize the acts of digital penetration in trying the case (64:21-25) (Pet-Ap. 190). However, this trial decision is irrelevant to the issue of whether the weighing incidents "count" for notice purposes, which focuses on the allegations in the four corners of the charging document. *R.A.R.*, 148 Wis. 2d at 410 n.1.

2. Application of *Fawcett*.

In concluding that the complaint was insufficient to satisfy Hurley's due process right to prepare a defense, the court of appeals relied extensively on its prior decision in *R.A.R.*, 148 Wis. 2d at 409-12, which upheld a court's dismissal of four single-act sexual abuse charges occurring during multiple three-month periods. *See Hurley*, slip op. ¶¶ 25, 29, 31, 35-36 (Pet-Ap. 111, 113, 114, 116-17). This reliance was misplaced.

R.A.R.'s result was largely driven by the court's decision to limit the analysis to factors four through seven of the *Fawcett* test. *R.A.R.*, 148 Wis. 2d at 411. The *R.A.R.* court concluded that factors one through three were inapplicable because R.A.R. did not allege that prosecutors could have obtained a more narrow offense period. *Id.* But, as the court of appeals later concluded in *Kempainen*, the decision to limit the factors in the

analysis was contrary to *Fawcett*. *Kempainen*, 354 Wis. 2d 177, ¶¶ 13-14.

Based on the parties' briefs submitted before the *Kempainen* decision, the court declined to address factors one through three upon the parties' agreement that *R.A.R.* prohibited consideration of these factors. *Hurley*, slip op. ¶¶ 25-26 (Pet-Ap. 111-12). Although the court added that, even if these factors were applied, the outcome would not have been different, its consideration of factors one through three was cursory. *See Hurley,* slip op. ¶ 26 (Pet-Ap. 112) As with *R.A.R.*, the court of appeals' limit on the factors to be considered in evaluating the notice claim ultimately drove the result in Hurley's case.

A proper application of the *Fawcett* factors to Hurley's charge shows that factors one, two, three, and seven weigh strongly in favor of a determination that the charge provided sufficient notice, while factor four also supports a notice determination.

As to factor one, the age and intelligence of the victim and other witnesses, the complaint alleges that the assaults began "shortly after the marriage at the residence" when M.C.N. was six (4:2; Pet-Ap.130).[5] While M.C.N.'s capacities at age eleven would have been different than those at age six, M.C.N. was still only in early adolescence

[5] The court of appeals therefore erred by asserting that "it is possible [the assaults] did not begin until she was eleven" "[b]ecause M.C.N. failed to identify how closely the assaults occurred in relation to each other." *State v. Hurley*, No. 2013AP558-CR, slip op. ¶ 35 (Wis. Ct. App. May 6, 2014) (Pet-Ap. 116).

at the end of the offense period. She was very young when the offenses began, and still quite young when the last offense occurred. There were no other witnesses.

Regarding factor two, the surrounding circumstances, Hurley was M.C.N.'s stepfather, and lived in the same household for the entire offense period. While Hurley had a right to present a defense, some defenses were not available to him. Because he lived with M.C.N. during the offense period, and he allegedly committed many individual assaults against her, he could not have used a more narrow charging period to have fashioned an alibi or mistaken identity defense. *See Jones*, 792 P.2d at 657. The general defense available to Hurley was a credibility defense, which, in fact, he aggressively pursued at trial (63:255, 274-81).

Even if a much more narrow offense period had been alleged, Hurley still could not have credibly made an alibi or mistaken identity defense. While Hurley testified at trial that his job involved occasional travel during which he would be away for one day to one week at a time (63:277-78), an offense period even as short as one year would not have changed his defense under the circumstances. Hurley was alleged to have committed many separate criminal acts over an extended period of time against a person he lived with. Moreover, in his postconviction motion alleging ineffective assistance and plain error, Hurley did not explain how a more narrow offense period would have aided his defense. In sum, the extended offense period in the charge did not deny Hurley his due process right to prepare a defense because there is no indication that a more narrow

charging period would have changed or aided his defense under the circumstances.

As to factor three, the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately, the charged pattern of abuse was not readily detectable. The alleged criminal acts occurred in the home when Hurley was alone with M.C.N., either in M.C.N.'s bed at night or after school (4:2; Pet-Ap. 130).

Additionally, the crimes were repeated in nature, which would have contributed to M.C.N.'s inability to recall the dates and times of specific incidents. The six alleged assaults occurring in M.C.N.'s bed were frequent enough, and were similar enough to each other, that the young child would have difficulty distinguishing the individual incidents. The twenty or more "weighing" incidents occurred with such frequency, and were so similar in nature, that it is understandable that no single incident would have stood out in M.C.N.'s memory.

Factor seven also concerns the victim's ability to particularize dates and times of the offenses, and supports a notice determination for reasons discussed in factors one and three. Again, at age six when the first offense allegedly occurred, M.C.N.'s ability to recall such details was very limited, and her ability to recall particular assaults was hampered by the repeated nature of the assaults and the similarity of the assaults.

As for factor four, the length of the offense period in relation to the number of criminal acts alleged, the State submits that this factor also leans in favor of a notice determination, if not as strongly as factors one, two, three and seven. The complaint alleges a total of at least twenty-six separate criminal acts occurring over a six-year period. While the complaint did not contain details indicating whether some acts occurred close together in time, or whether the acts occurred at more regular intervals,[6] it alleged a large number of offenses consisting of two different types of acts.

Factors five and six, which address the time between the alleged criminal acts and the initiation of criminal proceedings, would appear to weigh against a determination of notice. The offense period ended at the conclusion of 2006, while the investigation began in September 2010, and Hurley was charged in June 2011 (1:1; 4:1; Pet-Ap. 129). However, this delay was not without reason: At trial, M.C.N. explained that she did not report the incidents because she was "scared" that Hurley would "come after me" (63:100). She ultimately "felt safe" to come forward in the summer of 2010 after Hurley had moved to Indiana (63:100-01).

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[6] Addressing this issue, the court of appeals stated: "All of the acts could have occurred within a single month in 2000, or within a single month in 2005." *Hurley*, slip op. ¶ 29 (Pet-Ap. 113-14). This statement is incorrect (4:2; Pet-Ap. 130). And while it is certainly true that children often have difficulty recalling dates and times with specificity, it is unreasonable to suggest that the assaults may have all occurred in one month when M.C.N. reported that they occurred over several years.

Based on the foregoing application of the *Fawcett* factors, the State submits that the complaint provided sufficient notice to satisfy Hurley's right to present a defense. Accordingly, counsel's decision not to file a motion to dismiss on notice grounds was reasonable professional assistance. *Wheat*, 256 Wis. 2d 270, ¶ 14 (no deficient performance for failing to raise a meritless motion). Moreover, plain error does not apply because no error occurred.

There are at least two additional reasons why Hurley cannot establish that counsel was ineffective for declining to seek dismissal of the charge.

First, to the extent that the notice issue may be a close one in this case, counsel did not render ineffective assistance for failing to move for dismissal. Counsel testified that he concluded upon researching the issue that the charge was not defective under existing case law (66:24; Pet-Ap. 217). This determination was not unreasonable where Hurley was charged with repeated child sexual assault under Wis. Stat. § 948.025, and no case law plainly established when a charge under this statute fails to provide sufficient notice. *See State v. Van Buren*, 2008 WI App 26, ¶ 19, 307 Wis. 2d 447, 746 N.W.2d 545 (failure to take an action did not violate professional norms where prior case law did not establish a clear duty to act); *State v. Wery*, 2007 WI App 169, ¶ 17, 304 Wis. 2d 355, 737 N.W.2d 66. (Deficient performance "is limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue.").

Second, counsel made a reasonable strategic decision not to file a motion to dismiss because he concluded it would not benefit his client in the long run. Counsel testified that, even if the court granted a dismissal motion, he believed, based on his experience in prior cases, that the State would likely cure any defect in the charge by refiling it with a more narrow offense period (66:13, 25; Pet-Ap. 206, 218). And a refiled charge with even "a one- or two-year timeframe" period would not have helped Hurley's defense because "it would still not necessarily pinpoint the times in which the acts occurred" (66:25; Pet-Ap. 218).

Finally, if counsel erred in declining to file a motion to dismiss, the circumstances do not warrant reversal under the plain error rule. *State v. Lammers*, 2009 WI App 136, ¶ 12, 321 Wis. 2d 376, 773 N.W.2d 463 (rule should be used "sparingly" when the error is "so fundamental" that relief must be granted). Hurley claims the charge failed to provide adequate notice for him to prepare a defense. But, as discussed, Hurley offered a robust credibility defense, and a more narrow offense period would not have aided this particular defense, or allowed him to pursue a different defense. These circumstances do not justify reversal of Hurley's conviction for an unpreserved error.

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

A. 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," is admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Stated differently, the statute "favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993).

In *Sullivan*, 216 Wis. 2d at 772-73, 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; (3) if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, waste of time or needless presentation of cumulative evidence. *See Sullivan*, 216 Wis. 2d at 772-73.

"[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). "[O]ne of the reasons behind the rule is the need to corroborate the victim's testimony against credibility challenges." *Id.* ¶ 40 (quoted source omitted).

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 may not find an erroneous exercise of discretion. *State v. Hunt*, 2003 WI 81, ¶¶ 34, 42, 263 Wis. 2d 1, 666 N.W.2d 771 (citation omitted).

B. 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 younger sister, J.G., on a regular basis when she was approximately age eight to ten when Hurley was age twelve to fourteen (14:2). 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, J.G. testified she was between the ages of eight and ten at the time of the assaults (61:7; Pet-Ap. 138). J.G. testified that the assaults occurred when her parents were gone

and always in her parents' bedroom (61:7-8; Pet-Ap. 138-39). J.G. said she was the youngest child, and had three older brothers (61:7; Pet-Ap. 138).

J.G. 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; Pet-Ap. 139-40). J.G. testified Hurley would have her "perform oral sex on him and vice versa" (61:10; Pet-Ap. 141). J.G. testified Hurley would insert his fingers in her vagina, and that Hurley would have her "fondle him" (61:10; Pet-Ap. 141). J.G. could not recall if Hurley had attempted penis-to-vagina intercourse (61:10; Pet-Ap. 141).

J.G. estimated the assaults occurred about "once a week" for "probably a good couple years" (61:12, 18; Pet-Ap. 143, 149). J.G. testified that, when she heard about the alleged abuse of M.C.N., she realized she "just d[id]n't want that to happen to anyone else" and finally "had enough strength . . . to come out with it" (61:13; Pet-Ap. 144).

The court granted the State's motion, concluding that the evidence was admissible to show opportunity and method of operation (61:34; Pet-Ap. 165). The court stated that there was "great similarity" between J.G.'s and M.C.N.'s allegations, noting, among other things, the ages 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; Pet-Ap. 166-68). The court further found the evidence "bolsters the credibility of [M.C.N.]" (61:36; Pet-Ap. 167).

The court agreed to give a limiting instruction both before J.G.'s testimony and again at the close of the case, and did so at trial (61:38; 63:170-71; 64:47-48; Pet-Ap. 169).

J.G.'s trial testimony was consistent with her hearing testimony, and further developed matters raised at the hearing.

C. As To Each Prong Of The *Sullivan* Test, The Record Supports The Court's Discretionary Decision To Admit Other Acts Evidence, In Light Of The Greater Latitude Rule.

The court of appeals erred in concluding that the trial court misused its discretion in admitting J.G.'s testimony about the prior assaults. Respectfully, the State submits that, in reaching this conclusion, the appellate court substituted its own judgment for that of the trial court. *See State v. Payano*, 2009 WI 86, ¶ 52, 320 Wis. 2d 348, 768 N.W.2d 832 (a ruling to admit other acts evidence must be upheld on review if it "was *not* a decision that no reasonable judge could make") (emphasis in original).

As developed below, the testimony was admissible for at least two proper purposes: method of operation and motive. The trial court properly concluded within its discretion that J.G.'s testimony was plainly relevant where the allegations were similar in important ways to the charged assaults. And the trial court properly determined within its discretion that the probative value of the testimony was not outweighed by the danger of unfair prejudice. Due consideration of

the greater latitude rule further demonstrates that the circuit court did not misuse its discretion in admitting J.G.'s testimony. *Davidson*, 236 Wis. 2d 537, ¶¶ 46-48 (greater latitude rule applies to each *Sullivan* prong).

1. Acceptable purposes.

a. Method of operation.

As noted, one of the purposes for which the trial court admitted J.G.'s testimony was to show method of operation (61:34; Pet-Ap. 165). The court of appeals concluded that J.G.'s testimony did not show that Hurley had a "distinct 'method of operation,'" and that the assaults were "not similar enough to show a common method of operation." *Hurley*, slip op. ¶¶ 45-46 (Pet-Ap. 119-20). The State submits that the trial court's contrary conclusion must be upheld under a discretionary review.

At trial, M.C.N. testified that, when she was in elementary school, her stepfather Hurley assaulted her on multiple occasions at night in her bed by digitally penetrating her vagina (63:94-96). Although she could not remember how many times this happened, M.C.N. said it became a "regular thing," and agreed it happened at least three times (63:95). M.C.N. also testified that Hurley would put her naked on his shoulders to carry her to the bathroom scale, which happened "a lot," chased her around the house once and took off all her clothes; and came into the shower with her once when she was in Middle School (63:96-99).

J.G.'s trial testimony was largely consistent with her hearing testimony about the assaults. J.G. also added at trial that, when she would ask Hurley to stop, Hurley would say, "I love you," and urge her not to tell their parents (63:178). J.G. said that, growing up, she was very close to her older brother, and "was always tagging up with Joel or like following Joel around" (63:188). Although J.G. had two other brothers, including one who was closer to her in age, "Joel was always the one I always leaned towards and I always—he was always the one I was just the closest to" (63:178, 188).

The trial court acted within its discretion in admitting J.G.'s testimony for the purpose of method of operation. J.G.'s testimony showed that Hurley's preferred sexual target was an elementary-school-age girl who lived in the home and was a member of his immediate family. The testimony illustrated that Hurley used for sexual purposes girls of a particular age over whom he had some measure of control, and with whom he was in a relationship of implied trust—in J.G.'s case, an older brother, the one J.G. "always leaned towards" growing up. J.G.'s testimony also showed that, while Hurley's conduct with J.G. involved a wider variety of sexual acts, digital penetration of the vagina was among Hurley's preferred sexual acts, and Hurley would engage in such acts regularly over a period of years with his victims. These facts are sufficient for a trial court to conclude within its discretion that J.G.'s testimony could be offered to show Hurley's method of operation, particular in light of the rule allowing greater latitude for like occurrences in cases of child sexual assault.

Of course, Hurley was much younger when he allegedly assaulted J.G., and he was much closer in age to J.G. when he committed those acts. But, as an adolescent of twelve to fourteen years of age, he was old enough for his motives to be sexual in nature. Moreover, the similarities discussed above—both victims were young girls of the same age who were immediate family members over whom Hurley had some control; both assaults occurred in the home, involved digital penetration, and occurred repeatedly over a period of years—are sufficient to establish mode of operation, despite the difference in Hurley's age when he allegedly committed the assaults.

b. Motive.

J.G.'s testimony was also admissible to show motive, specifically, his predilection for incest with preadolescent girls in his immediate family. *See Hunt*, 263 Wis. 2d 1, ¶ 52 ("[A]n appellate court may consider acceptable purposes . . . other than those contemplated by the circuit court"). The court of appeals rejected this argument, concluding that Hurley's conduct at age twelve to fourteen was not relevant to show sexual motive

as an adult many years later. *Hurley*, slip op. 49 (Pet-Ap. 121).[7]

By this, the court of appeals appeared to suggest that a person's sexual experiences in their formative years have no bearing on their sexual preferences as adults. But another court could easily conclude otherwise—particularly when those early experiences include deviant acts like incest. Within its discretion, a circuit court could conclude that Hurley's repeated acts of incest with a younger female family member in his formative years was relevant to show Hurley's desire as an adult to target another girl of the same age within his immediate family for sexual gratification.

The court of appeals also suggested that motive is not a permissible purpose in crimes for which intent is not an element. Noting that the State's case at trial focused on these acts of finger-to-vagina intercourse, the court said it had previously questioned "'whether [other acts] evidence could properly be admitted as evidence of motive and intent in a case where intent is not at issue,'" *Hurley*, slip op. ¶ 48 (Pet-Ap. 121) quoting

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[7] The court of appeals relied on *State v. McGowan*, 2006 WI App 80, ¶ 20, 291 Wis. 2d 212, 715 N.W.2d 631. In *McGowan*, the court of appeals concluded that McGowan's assault of a five-year-old female cousin when he was ten years old did not provide evidence of McGowan's motive to assault another cousin when he was eighteen. However, McGowan was only ten when he committed the other act, while Hurley was between the ages of twelve and fourteen. Additionally, the result in *McGowan* was driven by the difference in the nature of the two sets of acts—the other act alleged a single act of McGowan forcing oral sex and urinating in the younger child's mouth, while the charged offense alleged repeated acts of oral, vaginal and anal sex. *Id.* ¶¶ 20, 23.

State v. McGowan, 2006 WI App 80, ¶ 17, 291 Wis. 2d 212, 715 N.W.2d 631.

However, motive is relevant to a jury's understanding of all crimes, even those for which intent is not an element. The pattern jury instructions distinguishes motive from intent, advising that in crimes of intent that "[i]ntent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not." Wis. JI Criminal 175 (Rel. No. 38—4/2000). Further, the instruction to be given "in *all* cases where an instruction on motive is believed to be appropriate" whether or not intent is an element states that "motive may be shown as a circumstance to aid in establishing the guilt of a defendant." Wis. JI-Criminal 175 (emphasis added).

In *Hunt*, this court concluded that other-acts evidence was admissible to show motive, among other purposes, in a prosecution for multiple sexual offenses, including those alleging sexual intercourse. 263 Wis. 2d 1, ¶ 60 (charging, among other offenses, first-degree sexual assault resulting in the pregnancy of the child, Wis. Stat. § 940.225(1)(a)). This court then stated: "There is no doubt that sexual assault, *involving either sexual contact or sexual intercourse*, requires an intentional or volitional act by the perpetrator." *Id.* (emphasis added). While the jury was not required to find motive to convict Hurley in this case, evidence offered to show Hurley's motive would have greatly assisted a skeptical jury in understanding why Hurley would assault a young girl in his family. J.G.'s testimony showing Hurley's desire for sexual contact with young girls

in his immediate family would have shed valuable light on Hurley's motive for assaulting M.C.N.

2. Relevance.

The determination of whether the other act evidence is relevant focuses on the similarity between the charged offense and the other act. *Hunt*, 263 Wis. 2d 1, ¶ 64. "Similarity is demonstrated by showing the 'nearness of time, place, and circumstance' between the other act and the alleged crime." *Id.* (quoted source omitted). "The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." *Sullivan*, 216 Wis. 2d at 787 (footnote omitted).

The court of appeals concluded that J.G.'s testimony was not relevant to show that Hurley assaulted M.C.N., asserting that "[t]he only true similarity between the alleged assaults is the victim's ages." *Hurley*, slip op. ¶¶ 46, 49, 51 (Pet-Ap. 120, 121, 122). The State respectfully disagrees.

The age of the victims was but one of the following many similarities: (1) both victims were members of Hurley's immediate family; (2) both lived in the same household as Hurley; (3) both were female; (4) Hurley was older than both victims, and had a degree of control over both; (5) Hurley was in a relationship of implied trust with both victims; (6) both assaults involved finger-to-vagina intercourse; (7) both occurred in the home and in the bedroom; and (8) both involved acts repeated over a period of years.

Likewise, in *State v. Friedrich*, 135 Wis. 2d 1, 398 N.W.2d 763 (1987), this court found prior

offenses involving two other girls admissible, noting that the assaults

> 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.

Id. at 24.

The semblances between the assaults in this case more than off-set the main differences, namely, Hurley's age, and the fifteen-year gap between the assaults. Moreover, "[i]t is within a circuit court's discretion to determine whether other acts evidence is too remote" in time. *State v. Hammer*, 2000 WI 92, 236 Wis. 2d 686, ¶ 33, 613 N.W.2d 629. "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." *Id.*; *see also State v. Opalewski*, 2002 WI App 145, ¶¶ 19-22, 256 Wis. 2d 110, 647 N.W.2d 331 (permitting evidence about a sexual assault that occurred over a quarter of a century before the sexual assault charged). Placed in context, the time gap between the assaults tells the following story: Hurley targeted two generations of young girls from his immediate family for sexual gratification.

The circuit court acted within its discretion in concluding that J.G.'s testimony was relevant.

3. Prejudice.

Other acts evidence is not unfairly prejudicial just because it may harm the opposing party's case; 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. The party opposing the admission of evidence bears the burden of showing that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Marinez*, 331 Wis. 2d 568, ¶ 41. 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." *Speer*, 176 Wis. 2d at 1115.

The court of appeals deemed evidence that Hurley committed acts of incest with his sister unfairly prejudicial, concluding it was "likely to arouse the jury's sense of horror and provoke its instinct to punish." *Hurley*, slip op. ¶ 52 (Pet-Ap. 123). Respectfully, the State submits the

appellate court substituted its own judgment for that of the trial court in reaching this conclusion.

Any allegation of incest is, of course, likely to arouse strong feelings among jurors. But Hurley was already charged in this case with having committed repeated acts of incest. And a trial court could determine within its discretion that the charged offenses were far more "likely to provoke [an] instinct to punish" than the assaults of J.G. because, while J.G. was a sibling four years' Hurley's junior, M.C.N. was a six-year-old child in Hurley's direct care when the first assault occurred. Admission of the prior assaults was not unfairly prejudicial to Hurley where incest was already a key fact in the case—again, M.C.N. was Hurley's stepdaughter—and the prior assaults of J.G. showed Hurley's method of targeting young girls in his immediate family for sexual gratification.

Additionally, the danger of unfair prejudice was further reduced by the court giving appropriate cautionary instructions before J.G.'s testimony and at the close of the case. The instructions 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. Before J.G.'s testimony, the court advised the jury that, if it found the other acts allegations occurred,

> 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.
>
> . . . .
>
> 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).

Accordingly, the court acted within its discretion in concluding that the probative value of J.G.'s testimony was not substantially outweighed by the risk of unfair prejudice to Hurley, a risk that was appropriately minimized by the court giving two cautionary instructions.

For the foregoing reasons, the circuit court did not erroneously exercise its discretion by admitting evidence of the prior assaults, particularly in light of the greater latitude rule.[8]

III. THE CIRCUIT COURT ERRED IN CONCLUDING THAT A REMARK BY THE PROSECUTOR IN CLOSING ARGUMENT WARRANTED A NEW TRIAL.

The circuit court ordered a new trial in this case based on the prosecutor's unobjected-to remark highlighting Hurley's testimony that he

[8] The State does not assert harmless error.

did not "recall" assaulting J.G. The court of appeals declined to review this issue based on its disposition of the notice issues. *Hurley*, slip op. ¶ 3 (Pet-Ap. 102). As discussed below, the circuit court misapplied *Weiss* in concluding that the prosecutor's remark warranted a new trial.

At trial, Hurley was asked on direct examination whether he "recall[ed] having an encounter" with J.G., and whether he "recall[ed] any of the allegations [J.G.] brought up here today?" And Hurley answered "No" and "No, I do not" to these questions (63:265, 267; Pet-Ap. 186, 188).

In his closing argument, the prosecutor noted Hurley's failure to make a strong denial of J.G.'s allegations, stating, "The question [asked on direct examination] wasn't did you do this or not, it was do you recall? That's different than it didn't happen." (64:25-26; Pet-Ap. 190-91).

In his postconviction motion, Hurley provided a police report indicating that J.G. had confronted Hurley with her allegations over the phone, and that Hurley had denied them to her (39:15). Based on this report, Hurley argued that the prosecutor's statement about Hurley's failure at trial to make a more emphatic denial was improper, apparently because the prosecutor knew or should have known that Hurley had previously denied the allegations to J.G. The circuit court agreed, and concluded that the unobjected-to remark warranted a new trial under *Weiss* (66:68-73; Pet-Ap. 261-66).

In *Weiss*, the defendant was charged with two counts of second-degree sexual assault of a

minor, and testified at trial, denying the allegations against him. *Weiss*, 312 Wis. 2d 382, ¶¶ 2-4. Weiss also denied the allegations in two separate pre-trial 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*." "*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. "Prosecutors may not ask jurors to draw inferences that they know or should know are not true," explained the *Weiss* court. *Id.* The court further concluded that this misrepresentation prevented the controversy from being fully tried, and reversed the circuit court's order under the court of appeals' power of discretionary reversal. *Id.* ¶¶ 16-17.

The prosecutor's unobjected-to remark in this case was not improper, and does not warrant the extraordinary remedy of discretionary reversal. Unlike his counterpart in *Weiss*, the prosecutor here did not ask the jury to draw an

inference that he knew or should have known was untrue. The prosecutor did not suggest or imply that Hurley had *never* denied the allegations to anyone. He merely commented on Hurley's testimony at trial, and appropriately held him to that testimony. It was noteworthy that Hurley did not make a strong denial of J.G.'s allegations at trial, particularly where Hurley had never addressed the allegations in prior police interviews. The record indicates that the only time Hurley denied J.G.'s allegations was to J.G. in a private phone conversation (39:15). Counsel's decision not to object to the prosecutor's remark was the correct one.

In sum, there was nothing improper about the prosecutor's remark, and the circuit court misapplied *Weiss* in ordering a new trial.

CONCLUSION

For the foregoing reasons, this court should reverse the court of appeals' decision, which itself reversed that part of the circuit court's order denying Hurley postconviction relief, and remanded for the circuit court to dismiss the complaint without prejudice. This court should also reverse that part of the circuit court's order granting Hurley postconviction relief, and reinstate Hurley's judgment of conviction for repeated sexual assault of the same child.

Dated this 20th day of October, 2014.

Respectfully submitted,

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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 10,438 words.

Dated this 20th day of October, 2014.

_____
Jacob J. Wittwer
Assistant Attorney General

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Dated this 20th day of October, 2014.

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