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STATE OF WISCONSIN
IN SUPREME COURT

APPEAL NUMBER 2013AP558-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent-Petitioner,

v.

JOEL 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 HON. DAVID G. MIRON, PRESIDING, THAT DENIED IN PART AND GRANTED IN PART A MOTION FOR POST-CONVICTION RELIEF, AND REMANDING TO THE CIRCUIT COURT WITH DIRECTIONS TO DISMISS THE CHARGE WITHOUT PREJUDICE

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The court of appeals' decision adequately states the facts of the case. *State v. Hurley*, 2013 AP 558-CR, slip op. (May 6, 2014). Hurley will supplement the argument below with additional facts as needed.

ARGUMENT

I. The State's Petition Was Improvidently Granted. The Case Should Be Remanded to the Circuit Court Consistent With the Court of Appeals' Decision.

This case presents no issue of law needing clarification or development, nor does the State demonstrate that this case presents a conflict in the case law requiring reconciliation by this Court. The State's brief makes clear that the *Holesome/Fawcett* line of cases provides sufficient guidance for lower courts in evaluating notice challenges in child sexual assault cases, including cases of repeated sexual assault of a child. Accordingly, the State's petition for review should be dismissed as improvidently granted, and the case should be remanded to the circuit court consistent with the court of appeals' decision.

A. Contrary to Its Petition for Review, the State Concedes that *Fawcett* Is Adequate for Evaluating Notice Challenges to Charges of Repeated Acts of Child Sexual Assault

In its petition for review, the State argued that review should be granted to "clarify the standards that apply to due process notice challenges to a charge of repeated acts of sexual assault of a child; as presently constituted, the test established by the court of appeals in *Fawcett/R.A.R.* is inadequate to address such claims." (State's Pet. at 15). The State more specifically argued that "the *Fawcett* test, as limited by *R.A.R.*, does not fairly and adequately assess notice

challenges to charges of repeated sexual assault of a child." (Id. at 18).

Now, in its brief to this Court upon acceptance of review, the State writes:

> …*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 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.

(States Br. at 12) (emphasis added). These two factors, however, are not unique to the charge of repeated acts of child sexual assault and are considerations already accounted for in the *Fawcett* framework, as the State's quotations from that case make clear. (State's Br. At 14, 17, 19); *see also State v. Fawcett*, 145 Wis. 2d 244, 252 n.3, 426 N.W.2d 91 (Ct. App. 1988).

In addition, the State's concern about *R.A.R.*'s "limitation" of the *Fawcett* "test" is not at issue in this case; rather that question is to be answered by this Court in *State v. Kempainen*, 2014 WI App 53, 354 Wis. 2d 177, 848 N.W.2d 320. *Kempainen*, a published case, noted that it was appropriate to consider all seven factors of *Fawcett* regardless of whether a defendant asserts that the State could have obtained a more specific charging period. *Kempainen*, 2014 WI App 53 at ¶¶ 11-14. The unpublished decision of the court of appeals in this case discussed all seven factors, as did *Kempainen*, and concluded that Hurley's due process rights were violated. The court of appeals in this case did not fail to consider all seven factors, as the State's petition would suggest.

B. *Fawcett* does not establish a test; it proposes factors for consideration when reviewing whether a criminal charge provides constitutionally adequate notice

The Sixth Amendment to the United States Constitution and Article 1, § 7 of the Wisconsin Constitution provide that an accused is entitled to be informed of, and to demand, the nature and cause of the accusation against him. When reviewing a claim by the accused that a charge violates his constitutional due process right to notice, this Court has held that "[i]n order to determine the sufficiency of the charge, two factors are considered. They are whether the accusation is such that the defendant determine whether it states an offense to which he 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, 287 (1968).

The language of *Holesome* is "extremely broad and arguably states nothing more than the constitutional right to notice and the constitutional protection against double jeopardy in different terms. *State v. Fawcett*, 145 Wis. 2d 244, 251, 426 N.W.2d 91, 94 (Ct. App. 1988). Ultimately, the question of whether a certain charge meets constitutional notice requirements is one simply of reasonableness. In order for a defendant to make his defense "with all reasonable knowledge and ability" and to have "full notice of the charge," it is important that the indictment "charge the time and place and nature and circumstances of the offense with clearness and certainty." *United States v. Cruikshank*, 92 U.S. 542, 566 (1875). The standard is that of reasonableness; "[r]easonable certainty, all will agree, is required in criminal pleading." *Id.* at 568; *see also Wong Tai v. United States*, 273 U.S. 77, 81 (1927) (indictment was sufficient as it stated "reasonable particularity as to time and place.")

In *Fawcett*, the court of appeals was faced with a notice challenge to child sexual assault charges. Recognizing

that the *Holesome* "test" did not provide much guidance for making the reasonableness determination attendant to such a challenge, the *Fawcett* court looked to other states that had adopted a "reasonableness test." *Fawcett*, 145 Wis. 2d at 251. In so doing, the *Fawcett* court looked to New York and *People v. Morris*, 61 N.Y.2d 290, 473 N.Y.S.2d 769, 461 N.E.2d 1256 (1984). Hurley will discuss *Morris* in detail below, as it serves as the backbone of *Fawcett*.

In *Morris*, the defendant was indicted on two counts involving unlawful sexual conduct with a child. The allegations were that he had unlawful sexual contact with two girls who lived with him, ages five and six, and that both events occurred "during the month of November 1980." *Id.* at 1257. In response to a bill of particulars from the defendant, the State narrowed the time frame of the assaults to "on or about and between Friday, November 7, 1980 and Saturday, November 30, 1980." *Id.* The State also filed a demand for alibi, to which the defendant responded that he was unable to determine whether he was at the scene of the crimes because the exact dates of the offenses were not set forth. *Id*. at 1258. The defendant moved to dismiss the indictment, on the grounds that it violated his right to adequate notice under the state and Federal constitutions. *Id.*

The *Morris* court recognized that where time is not an element of the offense, as in the child sexual assaults before it, the lack of a precise date is not a fatal defect to an indictment and that time may be stated in approximate terms. *Id.* at 1259. The court further recognized that "[t]he determination of whether sufficient specificity to adequately prepare a defense has been provided to a defendant . . . must be made on *an ad hoc* basis by considering <u>all relevant circumstances.</u>" *Id.* (emphasis added) The court identified two factors as significant: (1) the span of time set forth in the charge; and (2) the knowledge the State has or should have of the exact date or dates of the crime. *Id.*

With these two "significant factors" in mind, the court then set forth a multi-step procedure for addressing these types of challenges. First, the time period should be examined. "It may be that the interval ascribed for a particular crime is so excessive that, on its face, it is unreasonable and dismissal should follow." *Id.* at 1259-60. The court identified four factors a court might consider when making such a determination, taking specific care to mention that this was not intended to be an exhaustive or exclusive list:

- the length of the alleged period of time in relation to the number of individual criminal acts alleged;
- the passage of time between the alleged period for the crime and defendant's arrest;
- the duration between the date of the indictment and the alleged offense; and
- the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Id. at 1260.

The *Morris* court also set out different inquiries to undertake relative to the second "significant factor" — the knowledge the State has or should have of the exact date or dates of the crime. The court differentiated between two different scenarios in this regard: (1) where a defendant alleges that the State knew but purposely failed to allege the most specific date possible; and (2) where a defendant alleges that the State is able but failed to allege a more specific time period due to a lack of diligent investigatory efforts. *Id.*

Relative to an allegation of purposeful failure, the court noted that a hearing should be held to establish the defendant's allegations and give the State an opportunity to demonstrate good cause for its intentional conduct. The court stated that absent such a showing the charge would have to be dismissed. *Id.*

In a case where a defendant alleges that the time period could be or could have been narrowed through more diligent investigatory efforts, the court mentioned three factors that a court "might consider, among other things" in determining whether a more specific date could have been obtained:

- the age and intelligence of the victim and other witnesses;
- the surrounding circumstances; and
- the nature of the offense, including whether it is likely to occur at a specific time or is likely to be discovered immediately.

Id. Again, these considerations, per the *Morris* court, go to the "significant factor" of the extent of the government's knowledge about the exact date or time.

The Wisconsin court of appeals in *Fawcett* found the factors described in *Morris* to be of assistance in determining whether the *Holesome* test was satisfied. *Fawcett*, 145 Wis. 2d at 253. The court in *Fawcett* did not break down the factors between distinct inquiries as did the *Morris* court; rather, it simply listed the seven specific factors and identified them as factors that could be considered in applying *Holesome*. And like *Morris*, the *Fawcett* court did not dictate that the listed factors were exhaustive or exclusive. They are simply of assistance to the court in making a determination of whether the time period encompassing the charge was reasonably narrow in the constitutional sense.

C. *Fawcett* accounts for the factors that the State claims are missing.

1. The impact of repeated assaults on a child's memory

The State's suggestion that *Fawcett* does not take into account "the impact of the repeated nature of the criminal acts on the child's ability to recall dates and times of the

individual act" is flat-out wrong. (State's Br. at 12). From *Fawcett*:

> Child molestation often encompasses a period of time and a pattern of conduct. As a result, a singular event or date is not likely to stand out in the child's mind.

Id. at 254. Remarkably, the State's brief acknowledges this:

> 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."

(State's Br. at 17, citing *Fawcett* at 254).

The State then makes a clear admission that *Fawcett* does take into account the very thing the State earlier claimed it did not, thereby warranting review by this court:

> …[A]s *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."

(State's Br. at 19, citing *Fawcett* at 254).

2. The impact on defenses, including alibi, has been considered by *Fawcett* and the reasonableness cases upon which it is based

The State's claim that this Court needs to step in and direct courts to consider defenses ignores the *Fawcett* court's discussion of the relevance of alibi. It wrote:

> Fawcett complains that it is virtually impossible to prepare an alibi defense for a six-month period. However, an alibi defense does not change the nature of the charges against the defendant or suddenly incorporate time as a necessary element of the offense. *State v. Hoban*, 738 S.W.2d 536, 541 (Mo.Ct.App.1987). As we have already noted, a certain leeway is necessary in this area. If we required that a complaint be dismissed

> for lack of specificity when a defendant indicated a desire to assert an alibi defense, such a holding would create potential for an untenable tactic: a defendant would simply have to interpose an alibi defense in order to escape prosecution once it became apparent that a child victim/witness was confused with respect to the date or other specifics of the alleged criminal event. *People v. Naugle*, 152 Mich.App. 227, 393 N.W.2d 592, 596 (1986). We decline to adopt such a rule.

Fawcett, 145 Wis. 2d at 254, n.3. This squarely addresses the State's argued deficiency, and this fairly simple discussion fits with the *Morris* court's position that the difficulty of preparing an alibi defense to a period of time rather than a specific date does not invalidate the charge. *Morris*, 461 N.E.2d at 1260.

Fawcett also cited *State in re interest of K.A.W.*, 515 A.2d 1217 (N.J, 1986), a New Jersey case addressing the same issue. The New Jersey Supreme Court, like the *Fawcett* court, found the factors outlined in *Morris* to be an instructive guide. The court in *K.A.W.* also held that the issue of how a broad charging period could impact a defense was another factor "to be placed in the scales." *Id.* at 1223.

The defendants in *Fawcett*, Morris and *K.A.W.* all argued that the broad charging periods precluded an alibi defense, requiring dismissal. Each court considered this issue as a factor in the calculus while concluding that this problem alone did not warrant dismissal of a complaint. *Fawcett*, 145 Wis.2d at 254; *K.A.W.* at 1223; *see also Morris*, 461 N.E.2d at 1263.

In sum, the issue of defenses and how they factor-in to the notice analysis, specifically alibi, was not heretofore unmentioned or unheard of as the State suggests. To the contrary, the inability to pursue an alibi due to the broad nature of the charging period is just another non-dispositive consideration in the balance. It is an issue that enjoys no special status.

The State cites to a series of California cases on the issue of defenses, but its citation to these cases is inapt. (State's Br. at 20). *Fawcett*, its progeny, and the cases from which *Fawcett* developed do not provide for dismissal where a defendant claims he cannot assert an alibi defense because of the broad nature of the charging period; rather, these cases treat it only as a factor like any other. The suggestion of the California cases is that in the "residential child molester" situation, no charging period can be too broad. This is simply not the law, and the State does not argue that this is or should be the law. To the contrary, *Fawcett* recognized the existence of an accused's due process rights and their importance even in the context of cases involving allegations of child sexual assault. 145 Wis. 2d at 250. In short, the California cases provide no guidance to this Court, and the State's cursory discussion thereof should highlight to this Court that they are unworthy of consideration.

The ultimate relief the State seeks is for this Court to "direct" lower 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* rubric. (State's Br. at 21). In the end, however, this court is faced with the precise situation as it was in *State v. Gajewski*, 2009 WI 22, 316 Wis. 2d 1, 3, 762 N.W.2d 104.

In *Gajewski*, the defendant was convicted of third-degree sexual assault after a trial. The defendant raised ineffective assistance of counsel in post-conviction proceedings. Those claims were denied in the circuit court but granted in the court of appeals, which ordered a new trial. This Court granted the State's petition for review, which claimed that the court of appeals failed to follow the standards for ineffective assistance of counsel in several ways. After briefing and oral argument, this Court dismissed the petition as improvidently granted:

> The State asks us to jump into this morass in order to clarify and put a gloss on longstanding principles for evaluating the effectiveness of a defendant's counsel at trial. After examining the evidence, we decline to do so.
>
> In the end, this review is more about error correction than law development and more about the significance of undisputed facts than about a need to clarify the law. We conclude that the petition for review was improvidently granted, and we remand the cause to the circuit court in conformity with the decision of the court of appeals.

Id. at ¶¶ 10-11 (internal citations omitted).

The State has asked this Court to step in and "direct" lower courts to consider factors that have already been identified and addressed in existing case law. Further, the very "test" that lower courts need further direction in applying, according to the State, is clearly not a test in the sense that it requires application of specific, delineated factors. Rather, the cases clearly show that *Fawcett* serves as a guide for lower courts in making the *Holesome* inquiry. The factors of *Fawcett* are not mandatory nor are they exhaustive. Accordingly, it would be wholly inconsistent for this Court to "direct" lower courts to consider the State's two identified factors, when consideration of any or all of the factors is not required.

Lastly, it must be said that up until the moment the State lost this case in the court of appeals, the State believed that *Fawcett* was well-established and provided an adequate framework and guidance for lower courts in assessing notice challenges in child sexual assault cases. For example, in its cross-respondent brief in the court of appeals and its statement on oral argument and publication, the State argued that Hurley's claims, including the due process notice claim, could be settled by "applying well-established legal principles to the facts." (Cross-Resp. Brief at 14). Having

been rebuffed by the court of appeals, the State has scrambled to try and identify some greater shortcoming in the case law in order to get this Court to engage in what amounts to simple error-correction. The State's brief makes clear that this case presents no issue worthy of this Court's attention and intervention. The State's petition should be dismissed.

II. Consideration Of All the Factors Shows That The Charge Violates Hurley's Constitutional Due Process Right to Notice

In looking at the relevant circumstances of this case, and taking into considerations the factors suggested by *Fawcett*, the charging documents in the case violate Hurley's constitutional due process right to notice of the charges against him.

A. The Complaint Alleges Approximately Five Assaults

Hurley will first address the State's inventive but dubious effort to generate additional acts in an attempt to save this clearly defective complaint.

The State, as it did for the first time in the court of appeals, in a last-ditch effort to save this complaint, claims that it contains 26 alleged acts of sexual assault, not five[1]. (State's Br. at 22-24). It does so, in part, by inappropriately pointing to facts outside the complaint. (State's Br. at 23-24). The court of appeals in this case recognized that a review of a complaint for determining whether it meets constitutional notice requirements is limited to the complaint itself, and extrinsic evidence is not to be considered. *Hurley* at ¶ 17, *citing State v. R.A.R.*, 148 Wis. 2d 408, 410-11, 435 N.W.2d 315 (Ct. App. 1988). This Court should ignore the State's resort to extrinsic information to support its new math.

[1] It is worth noting that the Assistant District Attorney who issued the complaint did not attempt to defend the complaint in the circuit court by arguing it detailed at least 26 sexual assaults. (42).

The State gets to the number 26 by adding the allegations in the complaint that Hurley weighed M.C.N. naked "in excess of 20 times" and the single instance in which M.C.N. alleged that Hurley had her "touch" him, to the approximate five instances of finger-to-vagina intercourse alleged. (State's Br. at 22-23).

The argument that a sexual assault occurred when M.C.N. "touched" Hurley should be dispatched with quickly. The complaint does not allege where Hurley supposedly had M.C.N. "touch" him. (4:2; Pet-Ap. 130). Absent a specific allegation that M.C.N. touched an intimate part of Hurley's body at his direction, there is insufficient information in the complaint to count this "touching" as a sexual assault.

The bulk of the State's new math centers on the argument that the allegations of Hurley weighing M.C.N. naked are reasonably interpreted as instances of unlawful sexual contact of M.C.N.'s "intimate parts" under Wis. Stats. §§ 948.01(5)(a), 939.22(19). (State's Br. at 23). The complaint, however, is simply insufficient to support such a tortured interpretation.

The State urges that the complaint sufficiently alleges sexual contact during these instances because "[w]hen 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." (Id.) This statement is simply unsupported by the complaint, which states: "the defendant would have her take her clothing off and would put her on his shoulders to take her into the bathroom. He would then put her on the scale. . . . M.C.N. stated that during these encounters, the defendant would not go any further than have her naked on her shoulders and weigh her." (4:2; Pet.-Ap. 130). The complaint does not warrant the conclusion, as the State suggests, that her intimate parts were in touch with any part of Hurley. Further, contrary to the State's argument, the details of the

complaint imply no sexual intent; rather, the only reasonable inference is that he weighed her, since he simply put her on the scale and went "no further."

The court of appeals was faced with this dispute; rather than resolve the issue, the court of appeals assumed without deciding that 26 acts were alleged, then proceeded to weigh this factor in Hurley's favor anyway. *Hurley* at ¶ 28-29. While Hurley agrees with the court of appeals that this factor weighs in his favor regardless, Hurley asserts that the complaint only reasonably alleges five incidents of sexual assault.

B. Application of the Factors Shows Hurley Is Clearly Entitled to Dismissal

The first three factors are: (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; and (3) the nature of the alleged offense, including whether it is likely to occur at a specific time or to have been discovered immediately. *Fawcett*, 145 Wis.2d at 252.

As to the age and intelligence of the victim and other witnesses, M.C.N. is the only witness. Based on the complaint, the alleged assaults occurred at some unspecified time between 2000 and 2005, a period of 6 years. M.C.N. was either 6, or 11, or somewhere in between. It is reasonable to conclude that M.C.N.'s intelligence and ability to remember and recall details and events would be greater at 11 than at 6, but there is no basis to conclude at which end of the spectrum the alleged events would have fallen. Accordingly, this factor must weigh in Hurley's favor.

The State complains that the court of appeals in this case 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's Br. at 25, citing *Hurley* at ¶ 35). The State

claims that the court of appeals is in error because the complaint states that "M.C.N. recalled that the assaults began shortly after the marriage at the residence that they lived in on Kowalski Rd." (4:2; State's Br. at 25). But this vague statement provides no basis to conclude or infer with any degree of specificity when the assaults supposedly occurred. Accordingly, the complaint provides no basis to conclude that the court of appeals erred in its statement.

Regarding the second and third factors, the complaint alleges simply that Hurley, M.C.N.'s stepfather, came into M.C.N.'s bedroom at night to say good night, and on approximately five occasions during the six-year period he got in bed with her and placed his fingers in her vagina. (4: 2; Pet-Ap. 130). Contrary to the State's assertion that "the alleged criminal acts occurred in the home when Hurley was alone with M.C.N.," (State's Br. at 27), the complaint states that M.C.N. was unsure whether her mother was home when these events occurred. (Id.) Given the fair inference that M.C.N. went to bed every night, the general allegation that the events occurred when Hurley came to say good night in no way serves to narrow the possible days or timeframe in which these few alleged assaults occurred. Further, M.C.N.'s inability to say whether she and Hurley were home alone when these events supposedly occurred provides no basis to conclude that the assaults were not likely to have been discovered immediately. These factors also weigh in Hurley's favor, as they suggest that the time period cannot be further narrowed.

The next four factors suggested for consideration by *Fawcett*—(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—also weigh in Hurley's favor, and strongly so.

Applying the fourth factor, the complaint alleges "approximately five" assaults over a 6-year period. The complaint does not allege when in the 6-year period any of the assaults occurred, whether by school grade, season, or age. Nor does the complaint state when any of the alleged assaults occurred in relation to one another. The charging period spanned 6 years, or 2190 days. This results in an alleged assault once every 438 days, on average. This huge swath of time, with absolutely no narrowing detail, weighs strongly against a finding of adequate notice. Even by its own estimation, working off of 26 alleged assaults, the State recognizes that this factor does not weigh in its favor as strongly as it believes other factors do. (State's Br. at 28).

Factors five and six relate to the time between the offense period and the defendant's arrest and charging. The court of appeals recognized that this factor goes to "address the problem of dimmed memories and the possibility that the defendant may not be able to sufficiently recall or reconstruct the history regarding the allegations." *Hurley* at ¶ 30; *citing State v. Miller*, 2002 WI App 197, ¶35, 257 Wis. 2d 124, 650 N.W.2d 850. The charging period was from 2000-2005, and Hurley was charged in June of 2011, 5-10 years after the alleged assaults. The State again points to facts outside the complaint to try and minimize the negative impact these facts have on the calculus, but those assertions again must be ignored. (State's Br. at 28). Even looking to these improper considerations, the State concedes that this factor "would appear to weigh against a determination of notice." (Id.) It certainly does.

Lastly, factor seven looks to the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense, and this too weighs in Hurley's favor. The complaint provides no basis to conclude that M.C.N. can provide any greater particularity than exists

therein. This inability suggests that there would be nothing in future court proceedings that would serve to narrow the charging period to within constitutional bounds. The inability to narrow the charging period suggests that the blanket 6-year period is as good as it will get.

Hurley will also address the issue of alibi, which the State has raised. Incidentally, in order to consider this issue in the calculus, it is necessary to consider information outside the complaint itself, for few if any complaints would ever contain a defendant's alibi or potential alibi. In this case, there was evidence at trial that Hurley traveled a significant amount for work. M.C.N. testified that Hurley was "gone a lot" for work, and Hurley testified that he traveled frequently, anywhere from 1 day to 1 week at a time. (63:123, 277-78). Accordingly, with a narrower charging period it is conceivable that Hurley could have raised an alibi defense. Because, however, the broad charging period prevents this from happening, this factor would weigh in Hurley's favor.

Not only do the factors of *Fawcett* and the relevant circumstances of the case weigh heavily in Hurley's favor, existing precedent compels a result in Hurley's favor.

In *State v. R.A.R.*, 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988), the defendant was charged with three counts of first degree sexual assault, alleging sexual contact or intercourse with a child under 12, and one count of second degree sexual assault, alleging sexual contact or intercourse with a child between the ages of 12 and 16. *Id*. at 409. The complaint was issued on August 18, 1987 and alleged that the first and second charges occurred "during the spring of 1982," the third charge occurred "during the summer of 1982," and the last charge occurred "during the summer of 1983." *Id*. The trial court ruled that the complaint did not allege the dates of the offenses with sufficient precision to satisfy the defendant's right to due process and the right to be informed of the nature and cause of the accusation. *Id*. at 410. The court of appeals affirmed the trial court, applying the

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

The time periods alleged in *R.A.R*. cover 3 spans of 3 months, totaling 9 months. During this total 9 month period, R.A.R. was alleged to have committed four assaults. In this case, the complaint and information covered a far longer period of 6 years: "between 2000 and 2005." During that 6-year period, M.C.N. alleged that Hurley assaulted her an estimated 5 times. The complaint did not provide any specific information sufficient to narrow the time frame of the assaults.

Similar to *R.A.R*., the original complaint was not filed in this case until 5-6 years after the end of the time period alleged, and similar to *R.A.R.*, Hurley was not arrested until after the complaint was filed, 5-6 years after the end of the time period alleged. The complaint and information in this case—alleging five assaults over five years, and filed over 5 years after the end of the time period in which the assaults allegedly occurred—are worse than those in *R.A.R.*, and fall woefully short of satisfying the minimum requirements of due process relative to providing sufficient notice to Hurley.

III. The Constitutional Insufficiency of the Charging Documents Is Properly Addressed As Either Plain Error or Ineffective Assistance of Counsel

Hurley's trial counsel did not move to dismiss the complaint. At the conclusion of the preliminary hearing, trial counsel argued for dismissal of the case, saying he was "not sure if there is enough information here, your Honor, to move forward." (59: 21-22) That motion to dismiss was denied and Hurley was ordered bound over for trial. At the arraignment, counsel for Hurley entered not guilty pleas on Hurley's behalf, and asked that the Court set the matter for jury trial "raising all jurisdictional objections and the sufficiency of the information." (R.60 at 2). Trial counsel's apparent objection

to the sufficiency of the information was not acknowledged by the Court, nor was there any further argument or discussion about it by either party. Nevertheless, Hurley contends that his trial counsel's objection was sufficient to preserve the issue for appeal. Even if counsel's statements at the arraignment were not sufficient, Hurley is entitled to relief under the doctrines of plain error and ineffective assistance of counsel.

A. Plain Error

The constitutional deficiencies of the complaint and information constitute plain error, one that this Court can and must address regardless of whether trial counsel failed to raise this objection before trial. Plain error is "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *State v. Sonnenberg*, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984) (citation omitted). "Where a basic constitutional right has not been extended to the accused," the plain error doctrine should be utilized. *Id*. (internal citations omitted).

In *Virgil v. State*, 84 Wis. 2d 166, 192, 267 N.W.2d 852, 865 (1978), this Court wrote that "A trial conducted in violation of the defendant's confrontation rights is a trial that flouts fundamental concepts of justice basic to our system. Where a defendant is convicted in a way inconsistent with the fairness and integrity of judicial proceedings, then the courts should invoke the plain-error rule in order to protect their own public reputation."

As demonstrated above, the complaint and information in this case violated Hurley's constitutional due process right to sufficient notice of the charges. These charging documents form the core of the case, and the right to sufficient notice of the charges goes directly to the fundamental fairness of the proceedings in which Hurley's very liberty is at stake. *Virgil* demands that the Court invoke the plain-error rule to address

the fundamental right at issue and to protect the reputation of the criminal justice system.

The State's brief cursorily addresses the issue of plain error. (State's Br. at 30). The State argues that plain error does not apply because "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." (Id.) In short, the State's position is that there was no error; the State does not attempt to argue that, if there was error, the doctrine of plain error should not apply. Accordingly, the State has conceded its application, as it did in the court of appeals. *Hurley* at ¶ 17, n.3.

Even if the Court disagrees with the assertion of plain error, trial counsel's failure to object to the complaint and information on this basis constituted ineffective assistance of counsel, requiring reversal.

B. Ineffective Assistance of Counsel

The State argues that Hurley's trial counsel was not ineffective for failing to file a motion to dismiss the complaint and information on due process grounds. (State's Br. at 29-30). It cites two reasons. First, the State argues that trial counsel "research[ed] the issue and concluded that the charge was not defective under existing case law." (Id. at 29). Second, the State argues that counsel's decision not to move to dismiss was a reasonable strategic decision. (Id. at 30). Neither of the State's arguments hold up to scrutiny.

The standards for ineffective assistance of counsel are well-established. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

Trial counsel testified at the post-conviction motion hearing and did not provide a reasonable explanation for his failure to seek dismissal on due process grounds. Counsel testified that he recognized and researched the potential constitutional issue regarding the vagueness of the time period. (66 at 9-10; Pet-A. 202-03). Counsel testified that he discussed the issue with Hurley and explained that it was his belief that if he was successful in winning the motion and getting a dismissal, the State would simply re-file the case "based on the nature of [it]." (Id. at 12; Pet-Ap. 205). Counsel could not recall whether he reviewed *State v. R.A.R.*. (Id. at 13; Pet-Ap. 206), nor could counsel cite any law or specific research he conducted that led him to conclude that the constitutional challenge would be unsuccessful due to the charge being amended to repeated acts of sexual assault. (Id. at 15-16; Pet-Ap. 208-09).

Counsel testified that he reconsidered whether to file for a dismissal after the preliminary hearing when M.C.N. could not narrow down the timeframe of the assaults, but said that he decided not to "based on the fact that the Court found that there was probable cause to move forward," and that in his experience "motions after prelims—they usually don't go very far." (Id. at 18; 211). He further said that he believed that even if he was successful in arguing a motion to dismiss, the State would re-file the case due to the other acts evidence and evidence of Hurley offering M.C.N. money for a car. (Id. at 21-24; 214-17). When asked to explain how those factors would cure a defect for vagueness when M.C.N. could not further narrow the time frame of the alleged assaults, counsel stated that the defect would not be cured; he then stated that he did not file the motion because it did not have merit due to the charge falling under the repeated acts statute. (Id. at 24; Pet-Ap. 224).

Counsel's testimony about his research was vague and unspecific, and his reasons for not filing a motion to dismiss changed as his testimony progressed. Counsel did not cite a

case or any research that led him to conclude that a notice challenge would be unsuccessful because the charge was amended to repeated acts of sexual assault. In fact, there is no such case, and counsel's testimony does not credibly establish that his decision-making was based on any specific research.

The State also argues that counsel's decision was a reasonable strategic decision because "it would not benefit him in the long run." This argument must be rejected. Counsel's explanation that the State would simply re-file the charges if he successfully challenged the complaint was not a reasonable explanation, because success on the motion would necessarily entail a finding that the charge was unconstitutional as presented. With M.C.N. unable to narrow the time frame, the case could not be re-filed. Similarly, counsel's statement that Hurley would not be helped even if the charging period was limited to 1-2 years makes no sense, as counsel knew from M.C.N.'s preliminary hearing testimony that she was unable to narrow the time frame in any form or fashion. In short, counsel's post-hoc explanations do not demonstrate reasonable strategic decision-making.

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

Prejudice could also not be clearer. As shown above, the time periods alleged in the complaint and information were clearly insufficient to satisfy Hurley's due process rights. M.C.N.'s testimony made it clear that she was unable to narrow the time frame of the alleged assaults beyond that which was laid out in the charging documents. Accordingly, had counsel filed the motion, the case would have been dismissed based on the State's inability to narrow the time

period to bring it in line with constitutional requirements. Further, the State does not attempt to argue that counsel's error would be harmless.

By failing to move to dismiss the complaint and/or information, Hurley's trial counsel was constitutionally deficient.

The court of appeals decision as to the unconstitutionality of the charging documents must be affirmed, and the case should be remanded to the circuit court with directions to dismiss the case without prejudice.

IV. The Circuit Court Erroneously Admitted Other Acts Evidence

The circuit court erroneously admitted other acts evidence by admitting the evidence for improper purposes and in violation of controlling precedent. The court of appeals' decision correctly concluded that the trial court's admission of the evidence was erroneous and prejudicial.

Further, this issue does not meet the criteria for review by this Court under Wis. Stats. §809.62(1r). The State simply seeks error-correction review. The court of appeals' decision on this issue should be summarily affirmed.

A. Facts

Prior to trial, the State moved to admit other acts evidence via the testimony of Hurley's sister, Janell G. (R.14). An evidentiary hearing on the State's motion was held on December 20, 2011, during which the State proffered Janell's testimony. (R.61) Janell said that Hurley was "four to five years" older than her. (Id. at 7) She described her memory of the events as "very faint." (Id. at 7) She said that "the things that [she] remember[s]," she thought occurred "between the ages of eight and ten." (Id.)

Janell said that, "usually," when she went in the bedroom Hurley would be naked on the bed or underneath the

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

Janell agreed that she never came forward with any of this information until she heard about M.C.N.'s allegations, even though she had been in counseling over the years. (Id. at 13, 16, 18) She further agreed that she was not 100% positive about everything in her allegations. (Id. at 18)

The State argued that the acts Janell described were similar and were relevant to show Hurley's opportunity and intent or motive to be sexually gratified in the assaults alleged by (Id. at 24-26). The State further argued that a limiting instruction would be sufficient to alleviate any prejudice to Hurley. (Id.).

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

The circuit court ruled that Janell's testimony was admissible to show Hurley's opportunity and method of operation. (Id. at 34) The circuit court swiftly distinguished *McGowan*, saying that *McGowan* involved a single previous incident whereas Janell's testimony alleged acts occurring "for quite a long time." (Id. at 33) The circuit court concluded: "So this isn't the same as *McGowan* by any stretch of the imagination." (Id.)

The circuit court concluded that there was "great similarity" between Janell's allegations and those of M.C.N. (Id. at 35). The court said the girls were in the same age range; that M.C.N. talks about Hurley "playing some kind of game with her, trying to get her to touch him," and that Hurley had Janell "do this dress up game;" that M.C.N. alleged that Hurley inserted his fingers in her vagina, and Janell talked about Hurley "fingering her, the oral sex, and then she talked about this humping." (Id. at 35). The court concluded that these similarities "[went] towards the alleged method of operation of Mr. Hurley and how he goes about this." (Id. at 36) The court concluded that Janell's evidence was relevant because it "bolster[ed] the credibility of [M.C.N.]" and "relate[d] to a fact of proposition of whether it occurred or not." (Id.) The circuit ordered that a jury instruction read both before Janell's testimony and again at the close of the case. (Id. at 38). Janell's trial testimony was consistent with her testimony at the pre-trial evidentiary hearing. (63 at 173-198)

The court of appeals reversed the trial court. First, the court of appeals held that the trial court was incorrect when it concluded that the evidence was offered for the acceptable purposes of opportunity and method of operation. *Hurley* at ¶ 43. As to opportunity, the court of appeals noted that Hurley had arguing convincingly that the evidence was not probative of opportunity, and that the State had not even attempted to argue that the circuit court was correct in admitting it for that purpose, thereby conceding the circuit court's error on this

point. *Id.* at ¶ 44. The court of appeals also concluded that the similarities between the allegations of Janell and M.C.N. were insufficient to support admission to show Hurley's method of operation. *Id.* at ¶¶ 44-46. Lastly, the court of appeals rejected the State's attempt to save the circuit court's ruling by arguing that the other acts were relevant to show motive rather than opportunity. *Id.* at ¶¶ 47-49.

B. Standards

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

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

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

In deciding the admissibility of other acts evidence under § 904.04(2), a court must engage in a three-step analysis. First, the must consider whether the evidence is being offered for an acceptable purpose under Wis. Stats. § 904.04(2). Second, the court must determine whether the evidence is relevant under Wis. Stats. § 904.01. Lastly, the court must consider whether the probative value of the evidence is substantially outweighed by the danger of unfair

prejudice, confusion, or delay under Wis. Stats. § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). In child sexual assault cases, courts permit greater latitude of proof as to other like occurrences. *McGowan* at ¶14 (citing *State v. Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606).

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

The circuit court was presented with controlling authority on strikingly similar facts, but ruled against that authority. That authority, *McGowan,* compels the conclusion that the other acts evidence was not admitted for a proper purpose, was not relevant, and was prejudicial. Accordingly, the court of appeals was correct to award Hurley a new trial on this basis.

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

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

The trial court admitted Janis's testimony over defense objection, concluding that it was admissible to show intent and motive. *Id*. at ¶ 10. The court of appeals reversed, concluding that, even acknowledging the greater latitude rule, Janis's testimony did not pass the *Sullivan* analysis because it was not relevant and its prejudicial effect was substantially outweighed by the danger of unfair prejudice. *See Id*., generally.

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

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

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

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

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

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

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

significant or sufficient similarity to warrant admissibility. See *McGowan* at ¶ 20.

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

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

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

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

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

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

The trial court ruled that Janell's testimony was admissible to show a method of operation by Hurley and to show that Hurley had the opportunity to commit the assaults against M.C.N. (61: 34) The court of appeals correctly concluded that this was error. *Hurley* at ¶¶ 43-46.

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

These "great similarities," in the trial court's mind, showed a method of operation by Hurley and therefore bolstered M.C.N.'s credibility. (61: 35-36) Such a conclusion, however, is not reasonable given the evidence and conflicts with *McGowan*, which is directly on point. The court of appeals also rejected the trial court's conclusion, finding insufficient similarities to render the evidence probative of Hurley's method of operation. *Hurley* at ¶ 46.

While the trial court also deemed the evidence probative of Hurley's opportunity to assault M.C.N. years later, the State has not endeavored to justify its admission on

that basis, conceding the circuit court's error. *See Hurley* at ¶ 44.

E. The Evidence Is Not Probative of Motive

The State re-asserts its argument that Janell's testimony was probative of Hurley's motive to assault M.C.N. (State's Br. at 37-40). The court of appeals rejected this argument primarily on the grounds that Hurley's conduct as a 12-14 year old child did not provide evidence of his motive to allegedly assault M.C.N. 15-20 years later. *Hurley* at ¶ 49. The court of appeals' ruling on this point is directly consistent with *McGowan*, 2002 WI App at ¶ 20.

The State attempts to get around this glaring deficiency by arguing that the court of appeals suggested that motive was not a proper purpose in cases of sexual intercourse because intent is not an element. (State's Br. at 38-39). The State then cites *Hunt* for the proposition that other acts evidence can be admissible to show motive in sexual offense cases. However, what the court of appeals focused on in Hurley's case has nothing to do with *Hunt*. The court of appeals' decision identified the huge difference in Hurley's age between the other acts and the charged offenses as the fatal problem rendering the other acts not probative of Hurley's motive years later. The court of appeals was absolutely correct.

F. The Evidence Was Prejudicial

The State argues that the evidence was not unfairly prejudicial to Hurley. It posits that the probative value of the evidence was not *substantiall*y outweighed by the unfair prejudice of evidence of instances of youthful incest. The State claims that because Hurley was accused of committing incest with his step-daughter, and because the court gave a cautionary instruction, the evidence was not unfairly prejudicial. (State's Br. at 43).

The court of appeals rightly concluded that the evidence was unduly prejudicial to Hurley because testimony about repeated acts of incest by Hurley with his sister when they were children would arouse the jury's sense of horror and instincts to punish. *Hurley* at ¶ 52. This conclusion was again consistent with *McGowan*. The court of appeals also rightly rejected the State's argument that the cautionary instruction would limit the prejudice because the instruction was based on using the evidence to show opportunity and method of operation, which were improper bases for the admission of the evidence. Accordingly, the instruction could not serve to cure the prejudice. *Hurley* at ¶ 53.

G. The State Has Conceded That Admission of the Evidence Was Not Harmless

An error is harmless if the beneficiary of the error (here, the State) proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. McGowan, at ¶25 (internal citations omitted). In other words, the State must prove beyond a reasonable doubt that the error did not contribute to the verdict. The State has conceded that the admission of this evidence, if erroneous, was not harmless. (State's Br. at 44, n.8).

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

A. Standard of Review

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

The circuit court ruled that a new trial was required in this case because the prosecutor asked the jury in closing arguments to draw an inference that he knew was false. (66:70-73). The circuit court reviewed *State v. Weiss*, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 66, analyzed the facts of this case under *Weiss*, and determined that Hurley deserved a new trial. The circuit court's analysis was correct, was a proper exercise of its discretion, and the order granting a new trial must be affirmed.

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

The State argues only that the prosecutor's comment was proper because he did not "suggest or imply that Hurley had *never* denied the allegations to anyone." (State's Br. at 47) (emphasis in original). This is simply not a reasonable reading of the record; even if it was, the circuit court's conclusion is equally reasonable and, accordingly, must be upheld as a proper exercise of discretion.

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

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

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

> or not, it was do you recall? That's different than it didn't happen.

(R.64:25-26). In contrast to this argument from the prosecutor, a police report provided by the State in discovery stated in no uncertain terms that Hurley had denied Janell's allegations when confronted: "Joel denied having any kind of inappropriate sexual contact with her." (39:15). Further, the prosecutor himself, under questioning from the circuit court at the post-conviction hearing, agreed that he knew that Hurley had denied the allegations and that these denials were in the discovery materials. (66:59)

The State makes no effort to argue that the circuit court's grant of a new trial was an abuse of discretion. The State simply states in conclusory fashion that the prosecutor's remark "does not warrant the extraordinary remedy of discretionary reversal." (State's Br. at 46).

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

The State claims this case is unlike *State v. Weiss*, which the trial court relied upon in granting Hurley relief.

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

The court of appeals reversed in the interests of justice, noting that the prosecutor's argument was not objected to.

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

The State claims a factual distinction in that in this case, unlike in *Weiss*, the prosecutor did not comment on whether Hurley had previously denied the allegations to authorities or to anyone else. (State's. Br. at 46). This is a distinction without a difference. The prosecutor here argued to the jury that Hurley did not deny Janell's allegations, answering only that he could not recall whether those events occurred. The prosecutor made this argument despite the existence of a police report in his possession stating that Hurley had denied ever having inappropriate sexual contact with Janell. Contrary to the State's claim, and as recognized by the trial court, this case is exactly like *Weiss*, and the State does not attempt to argue that *Weiss* is no longer good law or that the trial court's reliance thereon was unreasonable. The trial court's reliance on *Weiss* to grant Hurley a new trial in the interests of justice was a proper exercise of discretion.

CONCLUSION

Wherefore, based on the foregoing, Hurley respectfully requests that this Court dismiss the States' petition as improvidently granted, and remand the case to the circuit court consistent with the court of appeals' decision. In the alternative, Hurley respectfully requests that this Court affirm the court of appeals in total, affirm the circuit court's grant of a new trial, and remand the case to the circuit court

with instructions consistent with the court of appeals' decision.

Dated this 10th day of November, 2014.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Response Brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(b) and (c) for a Response produced with a proportional serif font. The length of this Response Brief is 10,992 words.

Dated this 10th day of November, 2014.

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

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

Dated this 10th day of November, 2014.

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