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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EVAN K. SAUNDERS,

Defendant-Appellant.

AN APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED AND SENTENCE IMPOSED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE ELLEN R. BROSTROM PRESIDING

BRIEF OF DEFENDANT-APPELLANT

CASE NO.: 2013AP001229 CR

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STATE OF WISCONSIN,

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EVAN K. SAUNDERS,

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BRIEF OF DEFENDANT-APPELLANT

ISSUES PRESENTED

1. Whether the Trial Court erred in denying the Appellant's post conviction motion to dismiss on sufficiency of evidence grounds?

2. Whether the Trial Court erred in denying the Appellant's motion for severance?

STATEMENT ON ORAL ARGUMENT

The Appellant submits that the legal issues raised upon this appeal are clearly set forth in the brief and the factual situation is properly reflected in the statement of facts and brief. Oral argument would serve to clarify any additional questions the Court may have after reviewing the record and briefs.

STATEMENT ON PUBLICATION

The Appellant respectfully submits that publication of the court's opinion is warranted by the criteria set forth in § 809.23, Stats. This will serve to clarify existing law surrounding issues of sufficiency of evidence and joinder/severance.

STATEMENT OF THE CASE

On September 13, 2011, a criminal complaint was filed charging the Appellant, Evan K. Saunders, M.D., with four counts of Fourth Degree Sexual Assault in violation of § 940.225(3m), Stats., and four counts of Disorderly Conduct in violation § 947.01, Stats. (Record 2:pages 1-7). An amended complaint was filed on the day of trial amending the offense date on Counts Five and Six from February 18, 2011, to February 10, 2011. (R. 13:1-7)

The amended complaint alleged that the Appellant sexually assaulted four women during gynecological examinations. The allegations involved four different women on four separate dates. The Disorderly Conduct counts were alleged to have occurred at the same time as the sexual assaults. Counts One (Fourth Degree Sexual Assault) and Two (Disorderly Conduct) allegedly occurred on September 19, 2008, and involved alleged victim Candace D. (R. 13:1). Counts Three and Four occurred on November 20, 2010, and

involved Alyssa S. (Id.). Counts Five and Six occurred on February 10, 2011, and involved Diane C. (Id. at p. 1-2). Counts Seven and Eight occurred on February 18, 2011, and involved Roksana S. (Id. at p. 2).

On February 23, 2012, a motion for severance was filed by the Appellant. (R. 6:1-2). On May 3, 2012, the motion was denied by Branch 40, the Honorable Rebecca Dallet presiding. (R. 47:5-12).

On September 17, 2012, a jury trial commenced before Branch 06, the Honorable Ellen R. Brostrom presiding. On September 21, 2012, the jury returned guilty verdicts on all eight counts. The Appellant's motion to dismiss at the close of the State's case was denied. (R. 57:3).

On November 15, 2012, the Appellant was sentenced to ninety days consecutive on Counts Two, Four, Six, and Eight. (R. 37:1-2). The Court imposed and stayed nine months consecutive on Counts One, Three, Five, and Seven, and placed the Appellant on probation for a term of three years. (R. 36:1-3).

On March 15, 2013, the Appellant filed a post conviction motion requesting that the trial court overturn the verdicts on sufficiency of evidence grounds. (R. 38:1 & 39:1-18). In the alternative the Appellant requested a new trial on the basis that charges were not properly joined for

trial. On May 14, 2013, the trial court issued an order denying the Appellant's post-conviction motion. (R. 44:1-3). A Notice of Appeal was filed on May 30, 2013. (R. 45:1).

STATEMENT OF FACTS

The Appellant, Evan Saunders, M.D., is a medical doctor who specialized in obstetrics and gynecology. (R. 57:7-9). The Appellant had been a medical doctor since 1990 and gynecologist since 1994. (R. 57:7). The Appellant has had approximately 55,000 patient care encounters and has examined approximately 12,000 different patients over the past eighteen years. (Id. at pp. 9-10).

The Appellant's office had set procedures for when clients, new and old, would check into his office for an appointment. (R. 57:13-16). Clients would fill out a medical questionnaire at each visit prior to seeing the Appellant and were interviewed by a medical assistant before all appointments. The questionnaire helped identify areas of concern and potential health problems for the client. (R. 57:13-14; 52:24; 53:9).

At the time of the allegations in Counts One and Two the Appellant had been Candace D.'s doctor for two to three years. (R. 50:5; R. 52:34). She had gone to the Appellant for examinations on a number of occasions. (Id.). No

chaperone was ever requested by her. Her initial complaint on September 19, 2008, was for vaginal discharge, abdominal pain, diarrhea, and possibly an infection. (R. 50:6). Prior to meeting with the Appellant she filled out the medical questionnaire and consent form for the examination. (R. 52:24). Candace D. previously revealed on a medical questionnaire dated 4/11/07 that she had pain during intercourse, and that she had concerns or difficulties during sex. (R. 52:26-27). On September 19, 2008 she was complaining of pelvic pain or abdominal pain, vaginal discharge, and diarrhea. (R. 52:57). Her records also indicated that she was complaining of anorgasmia which is a medical term describing inability to achieve orgasm. (R. 57:17; 54:51-52).

She testified that during the examination the Appellant asked her questions about whether she had problems having an orgasm and other questions related to sexual activity. (R. 50:13-14). She testified that during the exam the Appellant repeatedly explained to her that he felt she was suffering from loss of sensation in her vagina. (R. 52:91). This was a medical concern the Appellant had based on patient history and symptoms the patient exhibited. (R. 57:32-33, 38-39).

The Appellant conducted a complete exam of Candace D. (R. 57:21-23). During this examination he used an ultra-

sound to check on cysts that were discovered on her ovaries during earlier visits. (R. 50:20-21; R:57:29-30). A "nerve distractor" was also used to determine if she was suffering from loss of sensation. (R. 52:14, 20; 57:32-35). Felice Gersh, M.D. testified that this is a device sometimes used by gynecologists to check for loss of sensation. (R. 59:16-17, 48-49). Frederik Broekhuizen, M.D., also testified that the device would be appropriate to use in certain situations when a patient presents with sexual disorder or anorgasmia. (R. 54:37, 58-59) Candace made no complaints to Appellant or his staff.

Roksana S. was a new patient to Doctor Saunders. (R. 53:6; 58:5). She testified that the only purpose of her visit was a pap smear. (R. 53:7, 11). She revealed on her questionnaire and in speaking with the Appellant that she was sexually active, was in a relationship, and was prescribed the Nuvaring for birth control. (R. 51:6-7, 58:6-7, 29). She further revealed on the questionnaire that she has symptoms that "feels like pregnant symptoms." (R. 51:30; 58:9). The questionnaire revealed that she had vaginal discharge, itching, burning, and cramping. (R. 51:7, 28). She also indicated that she had pain with intercourse "sometimes" and she left the boxes next to the question "do you have concerns or difficulties during sex" unanswered.

(R. 51:9; 58:9). Finally, she indicated on the questionnaire that she was interested in breast feeding. (R. 51:27; 58:16-17).

All the medical professionals who testified at trial, testified that it would be inappropriate for a doctor under those circumstances to simply conduct a pap smear. (R. 54:70-71; 59:19-20). Rather the medical experts testified that a full medical history and examination would be appropriate in this situation. (R. 54:66-71; 59:20).

While Roksana S. expressed concern in her testimony over the nature of the exam and the use of an ultrasound, the testimony of all the medical professionals indicated that it was reasonable under the circumstances. (R. 54:65-67; 59:26). Similarly, while she expressed concerns over the Appellant conducting a breast exam, including examination of her nipples, the testimony established that was normal procedure for a wellness exam. (R. 54:68, 72 59:21). Given that she was a new patient, the number of issues revealed in the questionnaire and her patient history, merely conducting a pap smear would not have been medically appropriate. (R. 59:20). Roksana testified that she was never comfortable with her inverted nipples.

Diane C. started seeing the Appellant as a patient in 2003. (R. 51:81). She had a hysterectomy in 2004 which was

performed by the Appellant.(Id.) She was a regular patient of the Appellant and had complained of issues related to sex after her hysterectomy including painful intercourse. (R. 51:82; 58:27). Her history revealed that these sexual issues caused problems in her marriage and that she had at times revealed difficulty with reaching climax. (R. 51:82, 116-117, 124-25; R. 54:16). In 2010 the Appellant had prescribed a cream for vaginal dryness. (R. 51:84). In April of 2011 she scheduled an appointment with the Appellant because she was experiencing some lack of sensitivity during sex. (R. 51:86; 58:27). The Appellant prescribed a testosterone cream and instructed the patient on how and where to apply it. (R. 51:101; 54:6-8; 58:30, 35-36). Felice Gersh, M.D., testified that it would be appropriate for a doctor to explain how and where to apply the cream. (R. 59:31-32).

Diane C., a medical professional herself, testified that because she felt the Appellant's behavior was inappropriate, she was initially going to send him an anonymous letter indicating that he should be careful about the way he treats his patients and respecting patient privacy. (R. 51:79, 104-105). It was not until she heard about the criminal allegations against the Appellant that she contacted the police and made the sexual assault

allegations. (R. 51:106-107).

The last patient to testify was Alyssa S. (R. 54:82). She testified that in November of 2010 she went to the emergency room at St. Lukes Hospital. (R. 54:84). She was informed she had an ectopic pregnancy. (R. 54:85). Emergency life-saving surgery was performed by the Appellant. (R. 54:85-86). During the procedure one of her fallopian tubes was removed and a follow-up examination was necessary. (R. 54:87). She returned for the follow-up exam to the surgery later in November. (R. 54:88).

At trial she questioned the Appellant's manner when examining her breasts, specifically her nipples. (R. 56:5-8). Alyssa S. had just had emergency surgery for an ectopic pregnancy and all the medical witnesses testified that an examination of the breast and nipple would be expected. (R 56:9; 58:41; 59:33-34). She also questioned the nature of her pelvic examination, though she could not recall if a speculum was used during the exam. (R. 56:41). She had just gone through an emergency surgery because of an ectopic pregnancy wherein a fallopian tube was removed. (R. 54:87; 58:38). Testimony of the medical experts at trial established that touching her vagina was necessary as a part of the follow up examination. Further discussion of sexual activity and birth control was also natural and necessary

given the nature of the emergency surgery. (R. 54:42; 58:39:40; 59:35).

It should be noted that Alyssa S. did not call the police after her examination with the Appellant. Rather, she waited until she saw a news report of the allegations against the Appellant before reporting the Appellant's actions during the exam as a sexual assault. (R. 56:21).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS FOR INSUFFICIENT EVIDENCE.

A. Standard of Review

When a Defendant challenges a verdict based on sufficiency of the evidence, the court gives deference to the jury's determination and views the evidence in the light most favorable to the State. *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis.2d 1, 681 N.W.2d 203. If more than one inference can be drawn from the evidence, the court must adopt the inference that supports the conviction. *State v. Hamilton*, 120 Wis.2d 532, 541, 356 N.W.2d 169 (1984). The court will not substitute their own judgment for that of the jury unless the evidence is so lacking in probative value and force that no reasonable jury could have concluded, beyond a reasonable doubt, that the Defendant was guilty. *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752

(1990).

B. The evidence at trial was insufficient to support the guilty verdicts for Fourth Degree Sexual Assault.

Fourth Degree Sexual Assault in violation of § 940.225(3m), Stats., has two elements that must be proven beyond a reasonable doubt: (1) that the Defendant had sexual contact with the alleged victim; and (2) that the alleged victim did not consent to the sexual contact. Sexual contact "is an intentional touching by the Defendant of the vagina and/or breasts of the victim. . . . The touching may be done by any body part or by any object, but it must be an intentional touching. *Sexual contact also requires that the Defendant acted with intent to become sexually aroused or gratified or to sexually degrade or humiliate the victim.*" (See Wis. JI-Crim. 1219; R. 59:58, emphasis added). Each patient did sign a consent form agreeing to the breast examination and pelvic examination.

The issue as to the four counts of Fourth Degree Sexual Assault was whether the contact at issue was "sexual contact" as defined by law. There was no issue as to whether the Appellant touched the vagina or breasts of the four alleged victims. The Appellant was acting as their doctor and the touching of these intimate parts occurred as part of their medical examinations. The sole issue was

whether the contact was "sexual contact", that is whether the touching was done by the Appellant to become "sexually aroused or gratified or to sexually degrade or humiliate the victim."

The testimony established that the physical touching or palpitation of the vagina and breast is necessary as part of a gynecological exam. (See testimony of Fredrik Broekhuizen, M.D., (R. 54:34-35, 42, 68); testimony of Felice Gersh, M.D., (R. 59:10-11, 21, 33); testimony of Evan K. Saunders, M.D., (R. 57:21-24; R. 58:32)).

Trial testimony also established that the discussion of patient history and of sexual activity was proper and necessary during gynecological examinations. (See testimony of Felice Gersch, M.D., at R. 59:11-13, 15; testimony of Fredrik Broekhuizen, M.D., at R. 54:34, 68-69). The Appellant further testified that he takes a patient history and his patients fill out a patient questionnaire containing information about sexual histories, complaints, and anything relevant to their history. (R. 57:13, 16, 63). Patient questionnaires were filled out by all the four alleged victims in this case. Prior to the exams all of the questionnaires contained information relevant to the type of examination performed by the Appellant.

Candace D. complained about the nature of the exam and

the use of the "nerve distractor". Yet she presented to the Appellant a complicated history including sexual dysfunction. The medical professionals testified that the ultrasound and use of a device to test for loss of sensation are appropriate in certain circumstances. The Defendant believed the circumstances warranted the examination to check for sensation around the vagina.

Roksana S. indicated that she only came in for a pap smear. She further felt that the Appellant's questions and examination were not necessary. Three medical professionals testified at the hearing. All doctors/experts testified that a pap smear is just one part of a wellness exam. Furthermore, a complete examination was warranted given her history, the complaints listed on her medical questionnaire, and the fact that this was her initial examination. All the medical professionals also agreed that a breast exam is a necessary part of an examination.

Diane C. also presented with a lengthy and complicated history including issues related to her sexual functioning. On the day in question, the Appellant prescribed her a new medication after an examination. The Appellant also instructed her on how and where the medication should be applied. She asserted that the Appellant made certain comments that she felt were inappropriate which Appellant

denied. Even if that were true, it would not indicate that any "touching" was done for sexual gratification. She also admitted that she was initially just going to write a letter to the Appellant about how he treats patients and that she only contacted the police after she saw a news story accusing the Appellant of an unrelated assault.

Finally, Alyssa S. saw the Appellant for a follow up to an emergency surgery related to an ectopic pregnancy. She complained about the way the Appellant conducted the examination including the breast exam. Yet there is no dispute that a breast exam was necessary given the circumstances. (R 58:41; 59:33-34). A complete examination was necessary given the circumstances. She also did not report an assault until after hearing of the other allegations against the Appellant on the local news stations.

There was absolutely no evidence presented by the State that the Appellant's touching of any of the alleged victims was done to "become sexually aroused or gratified". Nor was there any evidence that any touching was done to "sexually degrade or humiliate" any of the alleged victims. Rather the touching in all four incidents occurred during gynecological exams. The evidence further established that the touching was done as part of the general examination or

related to specific complaints made by the patients. There was absolutely no testimony in this record that the Appellant became sexually aroused during any of the examinations. Nor was there testimony that the Appellant made statements indicating he was sexually aroused while doing the examinations.

The testimony of the alleged victims may have established that the Appellant was insensitive or abrupt in his bedside manners and when discussing gynecological related issues. However, such conduct this does not amount to touching for sexual arousal or gratification. Rather his bedside manners may have been insensitive, as he has done approximately 55,000 exams with approximately 12,000 patients over the last eighteen years and they have become far too routine for him.

All of the contact occurred during examinations and were medically necessary as parts of a gynecological exam. There is no evidence that the Appellant did anything to become sexually aroused. Viewing the evidence in a light most favorable to the State, the evidence established that the alleged victims were not comfortable during the exams and with some of their conversations with the Appellant. However the record does not establish than any contact was "sexual contact" as defined by Wisconsin law.

Simply because a patient felt uncomfortable during a gynecological examination and with some topics discussed with the Appellant, is not evidence that the Appellant engaged in any of the touching for sexual arousal or gratification. Arguments that the Appellant's conduct may have fallen below the professional standard of care is not evidence that he had "sexual contact" with any of these four patients.

For the aforementioned reasons the Appellant respectfully requests that Counts One, Three, Five, and Seven be dismissed on insufficiency of evidence grounds.

C. The evidence introduced at trial did not support the guilty verdicts for Disorderly Conduct.

Disorderly Conduct requires that the State prove the following two elements beyond a reasonable doubt: (1) that the Defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct; and (2) that the conduct of the Defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

Viewing the evidence in a light most favorable to the State, the evidence does not support the convictions for disorderly conduct and no reasonable jury could have concluded beyond a reasonable doubt that the Defendant committed disorderly conduct. The State's theory was that

the Defendant's conduct supporting the charges of Fourth Degree Sexual Assault also constituted a Disorderly Conduct. Therefore, if the Court agrees that the evidence was insufficient to support the guilty verdicts for Fourth Degree Sexual Assault, then there would also be insufficient evidence to support the guilty verdicts for Disorderly Conduct for the same reasons as argued above.

There was no evidence introduced at trial showing that the Defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct. Nor did he engage in conduct that tended to cause or provoke a disturbance. The evidence merely established that the Defendant performed his duties as a doctor. Again, poor bedside manners does not amount to Disorderly Conduct.

II. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR SEVERANCE.

A. Standard of Review.

On appeal the review of joinder is a two-step process. First, the court reviews the initial joinder determination. *State v. Locke*, 177 Wis.2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). Whether the initial joinder was proper is a question of law reviewed without deference to the trial court. *Id.*

In reviewing trial court decisions on severance, the Court will reverse the decision of the trial court if it erroneously exercised its discretion. *Id.* at 597.

B. The counts were not properly joined for trial.

The State may charge crimes in a single complaint or information if, among other things, they are of the same or similar character, or constitute parts of a common scheme or plan. § 971.12 (1), Stats. To be of the "same or similar character", crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap. *State v. Hamm*, 146 Wis.2d 130, 138, 430 N.W.2d 584 (Ct.App.1988).

The State charged all eight counts in a single complaint. The Appellant filed a motion for severance seeking four separate trials, one trial related to the allegations of each alleged victim. The Appellant asserts that the crimes were not properly joined in that they were not the same or similar character or parts of a common scheme or plan.

All the counts joined for trial did not occur over a relatively short period of time. Counts One and Two allegedly occurred on September 19, 2008. The time period was over two years between Counts One and Two and Counts Three and Four which allegedly occurred on December 10,

2010. Counts Five and Six allegedly occurred on February 10, 2011, and Counts Seven and Eight allegedly occurred on February 18, 2011. Given this timeline, it was clear error to join Counts One and Two for trial with the other counts as it was not a short period time between those counts and the additional counts.

The evidence in this case did not truly overlap as required by *State v. Hamm*, 146 Wis.2d 130, at 138. The only evidence and witness testimony that overlapped in the State's case was that of Fredrik Broekhuizen, M.D., the State's expert witness. However, Dr. Broekhuizen's testimony overlapped because he was asked hypothetical questions regarding the different circumstances of the alleged victims presented. The testimony of the four women did not overlap as to times, places and actions. Each incident was completely unique. There were no witnesses called whose testimony overlapped in any way.

C. The Appellant was substantially prejudiced by the joinder of the counts for trial.

Although § 971.12(1), Stats., is liberally construed in favor of initial joinder, relief may still be granted if the otherwise proper joinder appears prejudicial. Under § 971.12(3), Stats., if a Defendant appears prejudiced by joinder, "the court may order separate trials of counts ... or provide whatever other relief justice requires."

A motion for severance is committed to the trial court's discretion. *State v. Locke*, 177 Wis.2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). The court must determine what, if any, prejudice would result from a joined trial, then weigh the potential prejudice against the public interest in conducting a trial on multiple counts. *Id.* An erroneous exercise of discretion does not exist unless the Defendant can establish that failure to sever the counts resulted in substantial prejudice. *Id.*

"Some" prejudice is insufficient to justify severance, as any joinder is likely to involve some prejudice. *See Hoffman,* 106 Wis.2d 185, 209, 316 N.W.2d 143 (Ct. App. 1982). However, the danger of prejudice from joinder of offenses is "generally not significant" if evidence of the counts would be admissible in separate trials. *State v. Bettinger,* 100 Wis.2d 691, 697, 303 N.W.2d 585 (1981).

Section 904.04(2), Stats., prohibits admission of "other crimes, wrongs, or acts ... to prove the character of a person in order to show that the person acted in conformity therewith." The admissibility of "other acts" evidence under § 904.04(2) is governed by a three-step analytical framework. *See State v. Sullivan,* 216 Wis.2d 768, 771, 576 N.W.2d 30 (1998). These steps require the consideration of three questions: (1) whether the other acts

evidence offered for an acceptable purpose under such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) whether the other acts evidence relevant, considering the two facets of relevance set forth in §904.01, Stats.; and (3) whether the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence under § 904.03, Stats. Id. at 772-73.

The evidence of the other sexual assault allegations was not offered for an acceptable purpose as required under the first prong of the *Sullivan* test. The evidence was offered to bolster the credibility of the individual alleged victims. Permitting the State to join all the charges together for trial, allowed the State to introduce repeated testimony that the Appellant was a bad person or a bad doctor and must have done something wrong during the examinations. Each incident involved unique circumstances that were particular to each patient. The only fact in common was that they were patients being seen for a gynecological exam and that the exam involved sensitive issues and parts of their body.

The State argued that the evidence would be offered for "intent" under this analysis and the trial court agreed with that argument. (R. 47:9-10). However, the intent element for all of sexual assault allegations is necessarily the same as it is a specific element of the offense. This is not a case where the Appellant was arguing that the touching was accidental and the other acts evidence would show that claim to be false given the number of times it happened. In this case there is no dispute that there was touching of intimate body parts. The dispute is whether it was for sexual gratification or arousal. The testimony of one alleged victim simply does not support the intent element as relates to separate alleged victims.

The second prong, relevancy, of the *Sullivan* analysis is similar to the first argument. Evidence related to the allegations of one of the alleged sexual assaults was not relevant to a determination of whether the Appellant was guilty of the other unrelated counts. For example, evidence of what occurred during Candace D.'s doctor visit on September 19, 2008, in no way made the existence of any fact related to Counts Seven and Eight more or less probable. Each allegation involved a separate patient seeing the Appellant for different reasons. While the evidence was not relevant, it did allow the State to portray the Appellant in

an unfavorable light by stacking the witnesses' testimony about the Appellant on top of each other. Through this repeated testimony the State was able to argue that the Appellant was a bad doctor and therefore it was more likely than not that he committed the offenses as charged. Individually, the cases would not have succeeded.

The third admissibility prong asks whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, or confusion of the issues. "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, 576 N.W.2d 30.

Here the testimony of the four alleged victims at a single trial caused substantial prejudice to the Appellant. The single trial caused the jurors to base their decision on sympathies related to feelings of all the alleged victims. It also increased the likelihood that the jury did not properly consider each crime separately as they were required to do. Rather than considering each situation, what the patient was seeing the Appellant for, what their

complaints were, and what the proper examination would entail, the jury based their verdicts on the cumulative effect of the alleged victims' testimony. This is particularly apparent when considering that there was no evidence that the Appellant did anything for sexual gratification or arousal.

For all of these reasons the joinder of all of the counts was an error that substantially prejudiced the Appellant in this matter.

CONCLUSION

For the aforementioned reasons, the Appellant respectfully requests that the Court enter an order reversing the trial court's decision denying the Appellant's motion to dismiss and reversing the trial court's order denying the Appellant's motion for severance.

Dated at Milwaukee, Wisconsin, this 26th day of August, 2013.

Respectfully submitted,

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CERTIFICATION

I, MICHAEL J. STEINLE, certify that this brief meets the form and length requirements of §§ 809.19(8)(b)and(c), for a petition and appendix produced with a monospaced font. The length of this petition excluding the appendix is 24 pages and contains 4,769 words.

I further certify that this brief has been electronically filed and that the test of the electronic copy is identical to the text of the paper copy of the brief.

_____

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