STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP1531-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BRIAN S. KEMPAINEN,

Defendant-Respondent.

ON APPEAL FROM AN ORDER DISMISSING TWO CRIMINAL COUNTS ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY, THE HONORABLE TERENCE T. BOURKE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. Did the circuit court err in concluding that the criminal complaint in this case failed to provide defendant-respondent Brian Kempainen sufficient notice of child sexual assault charges?

   - The circuit court applied four of the seven factors identified in *State v. Fawcett*, 145 Wis. 2d 244, 250-51, 426 N.W.2d 91 (Ct. App. 1988) in evaluating Kempainen's motion to dismiss charges of child sexual assault of his stepdaughter LRT in 1997 and 2001. The court concluded that the several-month-long periods alleged and long gap

between the alleged crimes and complaint compelled the conclusion that the charges were not sufficiently definite, without considering the circumstances of the alleged abuse, including the facts that Kempainen was LRT's stepfather; that Kempainen had a role in discouraging the young LRT from reporting the abuse; and that LRT, despite not being able to identify a specific date, recalled specific details of the abuse and its attendant circumstances.

2. Alternatively, if this court concludes that the circuit court did not so err, was this court's decision in *State v. R.A.R.*, 148 Wis. 2d 408, 411, 435 N.W.2d 315 (Ct. App. 1988), wrongly decided inasmuch as it interpreted *Fawcett* to limit its seven-factor test to just four factors depending on how a defendant characterized his claim?

   - The circuit court did not expressly address this issue. However, it adopted the *R.A.R.* court's approach based on its reading of a footnote in *Fawcett* and declined to apply the first three *Fawcett* factors in its analysis.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State anticipates that the parties' briefs will provide all of the relevant law and facts necessary to resolve this matter and does not expect that oral argument will be necessary. Publication likewise is not requested.

STATEMENT OF THE CASE AND FACTS

The criminal complaint and underlying allegations.

In December 2012, the State filed a criminal complaint against Kempainen alleging two counts of sexual assault of a child under 13 years old in violation of Wis. Stat. § 948.02(1) (1:1; A-Ap. 101). The charges were based upon reports by Kempainen's stepdaughter, LRT, that Kempainen had sexual contact with her "on or about August 1, 1997 to December 1, 1997" when she was eight years old and "on or about March 1, 2001 to June 15, 2001" when she was 11 to 12 years old (*id.*).

According to the complaint, LRT reported to police that the first assault occurred at the beginning of the school year when she was in second grade, which she recalled specifically because that was her first year of attending school in Sheboygan after moving there (1:2; A-Ap. 102). LRT stated that she was sleeping in the family home on the living room couch late one night when Kempainen, smelling of alcohol, came into the room and laid down next to her (*id.*). She reported that Kempainen began rubbing her vagina through her pajamas, then took her hand, placed down his sweatpants, and used her hand to massage his penis for a few minutes (*id.*). LRT reported that Kempainen then moved his head between her legs and performed oral sex on her by "sticking his tongue inside her vagina" for what seemed to be "a very long time" before Kempainen passed out on the couch (*id.*). LRT said at that point she got up, cried, and fell asleep in a different part of the house (*id.*).

LRT reported that about a week after the assault, Kempainen pulled her aside and told her that he was "really drunk" on the night of the incident and that what he had done was "really bad" but asked her not to tell her mother (*id.*). According to LRT, Kempainen further told LRT that he would get in trouble if she told her mom and told LRT "I know you were bad" (*id.*).

LRT said that the second incident also occurred in the family home during her sixth-grade year while "it was warm outside" (1:2; A-Ap. 102). During that time, she was generally responsible for waking Kempainen for his 4:30 p.m. work shift (1:3; A-Ap. 103). On the day of the incident, she was lying sideways at the foot of Kempainen's bed watching television and waiting to wake him up (*id.*). She told police that Kempainen woke up on his own and began rubbing her back under her clothes before moving his hand to the front of her chest and feeling her breasts (*id.*). LRT reported that she was scared but immediately left and went to a friend's house (*id.*).

LRT did not disclose the assaults because she was afraid of her mother's reaction to both her and Kempainen (*id.*). LRT told police, however, that she did confide in two friends in the time between the assaults and her eventual disclosure to police. First, she told police that she had told a male friend, JB, of the assaults in eighth grade (1:3, 4; A-Ap. 103, 104; 33:11). Police got in touch with JB, who told the investigator that he and LRT were in eighth grade together and were having a discussion about virginity (1:4; A-Ap. 104). According to JB, LRT then told him that she had been raped or molested, but did not provide further details (*id.*).

Second, LRT stated that she told her first serious boyfriend, JRR, of the assaults while they were dating in 2012 (1:4; A-Ap. 104). According to both LRT and JRR, a consensual sexual encounter between the two triggered an emotional reaction in LRT and at that point, LRT revealed that Kempainen had sexually assaulted her (*id.*). Despite JRR's recommendations that LRT tell her mother and call the police, LRT did not disclose the abuse because she remained frightened of the consequences of reporting (1:4; A-Ap. 104).

In October 2012, months after he and LRT had ended their relationship, JRR told LRT's mother of LRT's claims of Kempainen's abuse (*id.*). LRT disclosed the abuse to her mother and police soon after (*id.*).

The motion to dismiss.

After the initial appearance, preliminary hearing, and the filing of the information, Kempainen filed a motion to dismiss the complaint for failure to provide adequate notice of the charges against him (11:1). Specifically, he claimed that the four-month time span in count one and the three-and-a-half-month time span in count two were too vague to allow him to prepare a defense (11:2).

The circuit court granted the motion to dismiss. In so doing, it applied only four of the seven factors that this court in *Fawcett*, 145 Wis. 2d at 253, identified as relevant considerations as to the sufficiency of a complaint (32:12; A-Ap. 113):

- As for the length of time between the offense and charge, the court noted that the charges involved two incidents within two broad periods of time, but that the victim was eight at the time of one charge and eleven at the time of the other, which in the court's view did not support either side (32:15-16; A-Ap. 116-17).

- As for the passage of time between (a) the alleged crimes and the arrest and (b) the alleged crimes and the indictment, the court found that the passage of time of approximately fifteen and twelve years between the alleged incidents and the charges weighed in favor of Kempainen (32:16-17; A-Ap. 117-18).

- As for the ability of the victim to particularize the date and time of the crimes, the court found that LRT's particularization of count one occurring "around the start of school" in 1997 was indefinite but did not favor either side (32:20; A-Ap. 121). However, her failure to particularize count two beyond a time when Kempainen was getting ready

to go to work over a three-and-a-half-month period was not sufficiently definite (*id.*).

Accordingly, the court concluded that based on those determinations, the complaint was not sufficiently definite as to either count and dismissed the case (32:21; A-Ap. 122). This State's appeal follows.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE COMPLAINT WAS NOT SUFFICIENTLY DEFINITE.

Here, the circuit court's application of four of the seven factors from *Fawcett* was too limited given the *Fawcett* court's requirement that courts take a flexible approach to evaluating complaints in which the victim is a young child. Accordingly, the circuit court erred in dismissing the complaint.

A. This court independently reviews questions of whether a pleading is sufficient.

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

B. *Fawcett* requires a more flexible approach to sufficiency-of-the-complaint issues in cases in which a child alleges sexual assault.

To determine whether a complaint is sufficient, courts apply a two-prong test: *First*, "whether the accusation is such that the defendant [can] determine whether it states an offense to which he [is able to] plead and prepare a defense"; and *second*, "whether conviction or acquittal is a bar to another prosecution for the same offense." *Holesome v. State*, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968).

In *Fawcett*, this court identified seven factors that are helpful in evaluating the complaint and determining whether the first prong of the *Holesome* test is satisfied:

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

Fawcett, 145 Wis. 2d at 253.

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

The charges in this case involve acts of sexual assault of a child (1:1; A-Ap. 101). This court in *Fawcett* explained the inherent difficulties of prosecuting sexual assaults of children:

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

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

Moreover, this court observed, "child molestation is not an offense [that] lends itself to immediate discovery. Revelation usually depends upon the ultimate willingness of the child to come forward." *Id.* at 254. Thus, in cases involving a child victim, "a more flexible application of notice requirements is required and permitted." *Id.* "The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony," this court held, "rather than to the legality of the prosecution in the first instance." *Id.* "Such circumstances ought not prevent the prosecution of one alleged to have committed the act." *Id.*

C. *R.A.R.* interpreted *Fawcett* to limit courts' consideration of factors depending on the specific allegations.

The *Fawcett* court adopted its seven-factor "reasonableness" test primarily from a New York case, *People v. Morris*, 461 N.E.2d 1256, 1260 (N.Y. 1984). In identifying that case, the *Fawcett* court explained how the *Morris* court developed its reasonableness test. A portion of that explanation follows:

> [A] defendant may contend that the prosecutor is able but has failed to obtain more specific information due to a lack of diligent investigatory efforts. [*Morris*, 473 N.E.2d at 1260] This inquiry also embraces good faith. *Id.* In evaluating the possibility that a more specific date could have been obtained through diligent efforts, the court may look to the following factors to determine whether a more specific date could have been alleged: (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; and (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately. *Id.*
>
> If after this exercise the state is found to have exerted diligent investigatory efforts, the charging document should then be examined to determine whether, under the circumstances, the designated period of time set forth is reasonable. *Id.* Factors relevant to this determination include but are not limited to:
>
> 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 the 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.*

Fawcett, 145 Wis. 2d at 251 n.2.

Subsequently, in *R.A.R.*, this court understood that footnote in *Fawcett* to instruct that "the first three factors [in *Fawcett*] apply [only] when the defendant claims that the state could have obtained a more definite date through diligent efforts." 148 Wis. 2d at 411 (citing *Fawcett*, 145 Wis. 2d at 251 n.2).

Here, the circuit court likewise read footnote two in *Fawcett* to limit its inquiry into the sufficiency of the complaint only to the final four factors, given that Kempainen did not specifically allege that the State could have obtained a more definite date through diligence (32:12; A-Ap. 113).

D. The circuit court's application of the *Fawcett* factors to the facts of this case was too limited.

A flexible application of *Fawcett* factors four through seven demonstrates that the complaint provided Kempainen with sufficient notice.

1. As for count one, LRT's allegations of sexual assault over a four-month period in 1997 are sufficient.

The fourth factor requires an evaluation of the length of the alleged period of time in relation to the number of criminal acts alleged. *Fawcett*, 145 Wis. 2d at 253. Count one alleged one act within a four-month period that LRT recalled to occur in the beginning of her second-grade school year. This court has found that similar period-to-act ratios favored a finding of reasonableness. *See, e.g.*, *Fawcett*, 145 Wis. 2d at 254 (two alleged acts within six-month period against a 10-year-child); *cf. R.A.R.*, 148 Wis. 2d at 412 (noting that charging period of three single acts within three separate three-month periods was shorter than the time designated in *Fawcett*).

The fifth and sixth factors consider the time between the alleged act and criminal charges or proceedings. *Fawcett*, 145 Wis. 2d at 253. "[T]hese factors 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." *State v. Miller*, 2002 WI App 197, ¶35, 257 Wis. 2d 124, 650 N.W.2d 850.

In this case, the gap between the conduct alleged and the charge was a significant fifteen years. *Cf. Fawcett*, 145 Wis. 2d at 254 (charges immediately followed the charging period); *R.A.R.*, 148 Wis. 2d at 412 (four- and five-year gaps between the alleged conduct and the charges supported, along with other factors, the conclusion that the complaint was insufficiently definite). That said, given *Fawcett*'s requirement for a flexible approach to evaluating complaints in child-victim cases based on a child's typical reluctance to immediately report abuse, the weight of these factors in Kempainen's favor should be lessened given that there is evidence that Kempainen had some role in the delay in reporting: LRT and Kempainen had a stepdaughter-stepfather relationship. Further, LRT claims that shortly after the alleged act, Kempainen asked LRT, who was then eight years old, not to disclose the abuse, or else he (or she) would get into trouble with her mother.

The seventh factor addresses LRT's ability to particularize the date and time of the alleged offense. *Miller*, 257 Wis. 2d 124, ¶36. Here, the circuit court considered simply LRT's ability to identify the relevant time period of the alleged assaults (32:19-20; A-Ap. 120-21). That approach is too narrow, given that courts have considered facts beyond the ability of the victim to particularize the dates alleged. For example, in *Miller*, which involved a complaint alleging 30 to 40 assaults of a child over a four-year period, this court noted that despite not providing precise dates and times of the abuse, the victim notably *was* able to describe "the sexual contact in detail" and to narrow down the occurrences to his therapy

appointments within the four-year period. *Miller,* 257 Wis. 2d 124, ¶36.

Here, LRT likewise could not provide specific dates as to the abuse, but was able to describe the sexual contact in detail—including the approximate time of day of the assault and Kempainen's actions leading up to and after it—and was able to narrow the period of time in count one down to the four-month period marking the beginning of her second-grade year and her family's recent move to a new house (1:2; A-Ap. 102). In light of that, this factor does not support the conclusion that the allegations were not sufficiently definite.

Taken together, only the combined fifth and sixth factors arguably favor Kempainen's claim. That said, a long interval between the conduct and the charges does not alone render charges insufficiently definite. *R.A.R.*, 148 Wis. 2d at 412. Further, unlike in *R.A.R.*, where there was no evidence relative to the seventh factor presented, *id.*, the other factors here favor the determination that the complaint is sufficiently definite. Furthermore, the circuit court's application and conclusion did not comport with the rationale set forth in *Fawcett*. *Accord* 145 Wis. 2d at 254 ("The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony rather than to the legality of the prosecution in the first instance.").

Hence, the circuit court's conclusion that the complaint was insufficiently definite as to count one was erroneous and should be reversed.

2. The allegations in count two likewise are sufficiently definite.

Count two alleged one act within a three-and-a-half month period. Similar to count one, that ratio again is within the bounds of ratios found to be reasonable. *See, e.g.*, *Fawcett*, 145 Wis. 2d at 254 (two alleged acts within

six-month period against a 10-year-child); *cf. R.A.R.*, 148 Wis. 2d at 412 (noting that charging period of three single acts within three separate three-month periods was shorter than the time designated in *Fawcett*).

The fifth and sixth factors indicate an eleven-and-a-half-year period between the alleged conduct and the charges. As noted above, this is a substantial period. Unlike the first count, there is no evidence that Kempainen specifically confronted LRT after the abuse and asked her to not report it. That said, the stepfather-stepdaughter relationship at that time suggests why LRT did not immediately disclose the abuse and somewhat mitigates the impact of this factor.

Further, as for the seventh factor, LRT again was able to recount specific details of the abuse: It occurred shortly before 4:30 p.m. when she was supposed to awaken Kempainen for his work shift; it occurred on a bed in the attic where he slept while she watched Disney on television; and Kempainen awoke early, began rubbing her back, and then moved his hands across her front and felt her breasts. Although LRT could not pin down an exact date for the assault other than her sixth-grade year while it was warm outside, she was able to provide specific details of the allegations and the who, what, when, where, and how required.

In sum, both counts one and two involve long temporal gaps between the alleged assaults and the charges. However, a long delay "do[es] not alone render the charges insufficiently definite." *See R.A.R.*, 148 Wis. 2d at 412. Despite that delay, LRT's testimony provides the who, what, when, where, and how of the allegations to allow Kempainen to present a defense.

Indeed, in this case, it appears that Kempainen was preparing to present a defense that his ex-wife—LRT's mother—put LRT up to making the accusations, in part based on pending criminal charges against the ex-wife after she confronted Kempainen (33:10-11). Although the

fact that Kempainen has a potential defense available is not dispositive as to the constitutionality of the complaint, it supports the conclusion that the complaint was sufficient enough for Kempainen to prepare a defense against the charges. *See, e.g.*, *State v. Darryl J. Badzinski*, No. 2011AP2905-CR, slip op. at ¶19 (Wis. Ct. App. Nov. 27, 2012) (A-Ap. 132-33) (noting that *Badzinski*'s ability to present a defense, while not dispositive, supported the conclusion that the complaint was sufficiently definite)[1]; *cf. Fawcett*, 145 Wis. 2d at 254 n.3 (defendant's inability to prepare an alibi defense for the period does not require dismissal of the complaint).

Hence, the circuit court's conclusion that the complaint was insufficiently definite as to count two was likewise erroneous and should be reversed.

E. The second prong of the *Holesome* test is likewise satisfied.

Kempainen did not argue, nor did the circuit court reach, the question of whether the second prong of the *Holesome* test is satisfied. Briefly, that prong—which requires the court to consider whether conviction or acquittal is a bar to another prosecution for the same offense—is satisfied here.

As in *Fawcett*, if Kempainen is convicted or acquitted of the charges, he cannot again be charged with any sexual assault growing out of the two acts alleged. *See Fawcett*, 145 Wis. 2d at 255. Accordingly, double jeopardy is not a realistic risk in this case. Hence, the second prong of *Holesome* is likewise satisfied.

[1] In accordance with Wis. Stat. § 809.23(3)(b), a slip copy of *Badzinski* appears in the appendix to this brief (A-Ap. 124-41). The State further notes that *Badzinski* is currently submitted to the supreme court on review based on challenges to other parts of that case, not the *Badzinski* court's application of *Fawcett*.

In summary, the circuit court erred in concluding that the complaint was not sufficiently definite as to counts one and two. Because both prongs of the *Holesome* test are satisfied as to both counts, this court should reverse the dismissal order.

II. ALTERNATIVELY, IF THIS COURT CONCLUDES THAT THE CIRCUIT COURT'S APPLICATION OF THE FOUR *FAWCETT* FACTORS WAS TOO NARROW, *R.A.R.* WAS WRONGLY DECIDED INASMUCH AS IT LIMITED CONSIDERATION OF THE *FAWCETT* FACTORS DEPENDING ON THE DEFENDANT'S SPECIFIC ALLEGATIONS.

As explained above, this court in *R.A.R.* and the circuit court read footnote two in *Fawcett* to limit consideration of its seven factors to only the final four unless the defendant alleges that the State was not diligent in obtaining a more definite date. *R.A.R.*, 148 Wis. 2d at 411. In the State's view, the *R.A.R.* court misinterpreted *Fawcett*, and in that way *R.A.R.* was wrongly decided.

The State recognizes that this court is bound its own precedent and that it cannot overrule or withdraw language in *R.A.R.* Nevertheless, the Wisconsin Supreme Court has observed that when this court believes that a prior court of appeals case was wrongly decided, the court of appeals may signal its disfavor by certifying the appeal to the supreme court. *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

In order to preserve this issue for potential supreme court review, the State sets forth its reasons for why it believes *R.A.R.* was wrongly decided.

A. The *Fawcett* court applied all seven factors despite there being no indication that Fawcett alleged lack of diligence.

In *Fawcett*, notably, there is nothing to suggest that Fawcett alleged that the State was not diligent. Rather, he appeared to be challenging generally the sufficiency of the complaint. *See Fawcett*, 145 Wis. 2d at 249. Nevertheless, the *Fawcett* court considered all seven factors of the reasonableness test and concluded that the charging period set forth in that case provided adequate notice. *Fawcett*, 145 Wis. 2d 254. Thus, the *Fawcett* court did not appear to understand its footnote to say what the circuit court or this court in *R.A.R.* understood it to say.

Given that, note two in *Fawcett* simply provides background information for the origin of the seven factors. The court's adoption and application of all seven factors in its opinion does not comport with the circuit court's—or this court's in *R.A.R.*—interpretation of that note.

B. The *R.A.R.* court's understanding of the factors is impractical and inconsistent with *Fawcett.*

Again, the first three *Fawcett* factors are (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; and (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately. *Fawcett*, 145 Wis. 2d at 253. In cases involving allegations of sexual assault of a young child victim by a family member or other trusted adult, those first three factors will be especially pertinent and likely to weigh in favor of a determination that the complaint satisfies due process notice requirements.

Indeed, in applying all seven factors of the test, the *Fawcett* court explained that in cases involving a child victim,

> a more flexible application of notice requirements is required and permitted. The vagaries of a child's memory more properly go to the . . . weight of the testimony rather than to the legality of the prosecution in the first instance. Such circumstances ought not prevent the prosecution of one alleged to have committed the act.

Fawcett, 145 Wis. 2d at 254 (citation omitted). The first three factors—more than the remaining four—address the *Fawcett* court's requirement for flexibility in cases of child sexual assault.

Accordingly, by drawing a line in the analysis between (1) claims in which the defendant is alleging that the State was not diligent in obtaining a more definite date or time period and (2) claims of general inadequate notice, the language in *R.A.R.* creates a perverse incentive: Defendants in cases involving delayed reporting by a young child may avoid the three factors most likely to weigh against him or her by simply declining to allege a lack of diligence by the State.

To that end, there is no practical difference between a claim that a complaint is insufficient generally and a claim that a complaint is insufficient because the State was not diligent in obtaining a more definite date. In both cases, the defendant is ultimately challenging the sufficiency of the complaint. Further, regardless of whether the complaint is generally insufficient or if it is insufficient as a result of the State's failure to act diligently, the result is the same: The court may dismiss the complaint without prejudice to allow the State to attempt to identify a more specific date. To be sure, the circuit court in this case did just that (32:21; A-Ap. 122).

Moreover, by avoiding the first three factors, defendants can avoid the flexibility counseled in *Fawcett* for cases of sexual assault involving a young victim by avoiding having the court take into account the circumstances of alleged conduct, the relationship between the victim and the alleged abuser, and allegations that the abuser had a role in preventing the conduct from being reported or discovered sooner. Rather, under *R.A.R.*, courts focus simply on temporal factors involving the ratio of the alleged span of time to the number of alleged criminal acts, the passage of time between the conduct and the complaint, and the ability of the victim to identify a specific date and time of the offense. That limited view is counter to *Fawcett*'s flexibility requirement and does not take into account reasons why a charging period is relatively broad or the gap in reporting is relatively significant.

C. In *Miller*, this court likewise understood the seven factors in *Fawcett* to apply generally to challenges to the complaint based on notice.

In *Miller*, 257 Wis. 2d 124, ¶27, Miller challenged a four-year long charging period on notice grounds. This court, invoking *Fawcett*, applied all seven factors in rejecting Miller's argument. *Id.* ¶29. In that case, the victim was 13 years old at the time of the alleged assaults, which occurred during appointments in which the victim was in therapy with Miller. According to the victim, Miller told the victim not to tell anyone what happened during their therapy sessions and the victim felt ashamed and embarrassed by what Miller had been doing to him. *Id.* ¶30. The court further noted that although the four-year charging period was long, the fact that the abuse was alleged to have happened during scheduled therapy appointments reduced the relevant times to 34 sessions occurring within the four-year time frame. *Id.* ¶32. It further observed that Miller had his notes and records of those appointments and was not unduly prejudiced by the

five-year reporting delay. *Id.* ¶35. Finally, the victim was able to describe the sexual contact in detail and recall that the contact did not begin until he had been in treatment with Miller for approximately one year. *Id.* ¶36.

The State has not identified any other published case in which this court has either invoked *R.A.R.* or note two in *Fawcett* for the proposition that courts are to forgo considering the first three *Fawcett* factors unless the defendant specifically alleges a lack of diligence by the State in obtaining a more definite date. The closest example is in an unpublished case, *Badzinski*, slip op. at ¶17 (A-Ap. 132) (acknowledging that Badzinski's concession that the first three factors of *Fawcett* were not applicable to his case). However, this court did not appear to take any position on whether Badzinski's position was correct, given that it could reject Badzinski's claim on the four remaining *Fawcett* factors alone. *See id.* ¶¶18-19 (A-Ap. 132-33).[2]

In sum, *Fawcett* is straightforward: To determine whether the first prong of the *Holesome* test is satisfied, courts are to consider all seven factors, especially in cases involving a child victim. A reading of that case to limit the consideration of factors depending on whether the defendant challenges the State's diligence in designating a more definite date is impractical and inconsistent with *Fawcett*'s holding and rationale. Accordingly, the circuit court here erred in declining to consider the first three factors in its determination.

[2] In researching this case, counsel for the State has identified numerous unpublished court of appeals cases invoking the *Fawcett* factors, none of which are citable under Wis. Stat. § 809.23(3)(a) or (b). Counsel's review of those cases indicates inconsistent applications of *Fawcett* where the defendant alleges a general insufficient-complaint claim: In some cases, this court applied all seven *Fawcett* factors, while in others this court invoked *R.A.R.* or note two in *Fawcett* and applied only the final four factors.

Again, if this court agrees that *R.A.R.* was wrongly decided, the court of appeals may signal its disfavor by certifying the appeal to the supreme court or by deciding the appeal but stating its belief that *R.A.R.* was wrongly decided. *See Cook*, 208 Wis. 2d at 190.

CONCLUSION

In summary, the circuit court erred in concluding that the complaint here lacked sufficient definiteness. The court was not barred from factoring in the surrounding circumstances in its evaluation, given the *Fawcett* court's preference for flexibility in cases involving child sexual assault. Here, taking into account the circumstances of the assaults, the factors weigh in favor of a finding that the first prong of the *Holesome* test is satisfied. Further, there appears to be no risk of double jeopardy under the circumstances. Accordingly, the circuit court erred in dismissing the complaint.

Alternatively, the State preserves the argument that *R.A.R.*—inasmuch as it counsels courts to apply only the last four *Fawcett* factors unless the defendant specifically alleges lack of diligence by the State—is wrongly decided. In the event that this court disagrees with the State's first argument in this appeal, the State asks this court to consider certifying the second issue to the supreme court.

For the foregoing reasons, the State respectfully asks that this court reverse the decision and order of the circuit court dismissing the complaint and remand for further proceedings.

Dated this 12th day of November, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5187 words.

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Sarah L. Burgundy
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 12th day of November, 2013.

_____

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