STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2013AP1531-CR

STATE OF WISCONSIN,

Plaintiff-Appellant

v.

BRIAN S. KEMPAINEN,

Defendant-Respondent

BRIEF AND APPENDIX OF 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

Respectfully Submitted:

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BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUES

I. Whether the criminal complaint in this case failed to provide defendant-respondent Brian Kempainen sufficient notice of child sexual assault charges?

Trial Court Answered: **No.**

II. Alternatively, if the 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?

Trial Court Answered: The circuit court adopted the *R.A.R.* court's approach based on its understanding of *Fawcett* and correctly

declined to apply the first three *Fawcett* factors in its analysis.

STATEMENT ON ORAL ARGUMENT

The Defendant-Respondent believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

The Defendant-Respondent believes publication of this case is also unnecessary. Pursuant to Rule 809.23(1)(b), stats., this case involves the application of well-settled rules of law to a common fact situation.

STATEMENT OF FACTS AND CASE

On December 21, 2012, the State filed a complaint charging Kempainen with two counts of

Sexual Assault of a Child Under 13 Years of Age, in violation of Wis. Stat. §948.02(1) (R1 at1, Appendix 101). The complaint alleges that Kempainen committed the alleged offenses sometime between August 1, 1997 to December 1, 1997, a four-month time span, and March 1, 2001 to June 15, 2001, a three-and-a-half month time span. *Id.* At the time of the alleged crime set forth in Count 1, the alleged victim, LRT (d.o.b. 06/15/1989), was eight years old. *Id.*. At the time of the alleged crime set forth in Count 2, the alleged victim was either eleven or twelve years old. *Id.*

According to the complaint, LRT reported that she was in approximately second grade and believed to be six or seven years of age when the first alleged incident occurred. (R1 at 2, Appendix at 102). LRT later told Detective Retzer that she believed it was at the beginning of the school year and she was in second grade at a new school. *Id.* LRT stated that, late at

night, she was sleeping on the couch in the living room when Kempainen, smelling of alcohol, laid next to her and began to use her hand to massage his penis for approximately one to two minutes. *Id.* LRT stated that Kempainen performed oral sex on her and described him "eating her out" for "a very long time" before Kempainen passed out on the couch. *Id.* LRT reported crying, moving to a different area of the house, and falling asleep. *Id.*

LRT stated that approximately one week later, Kempainen was in the basement, where he spent a lot of time working and drinking, when he explained that "what he did was really bad". *Id.* According to LRT, Kempainen told LRT, "I know you were bad and he would get in trouble" if she told her mother. *Id.*

According to LRT, the second incident took place when she was in sixth grade and it was warm outside (R1 at 2, Appendix at 102). LRT stated that the

incident occurred in Kempainen's bedroom, whom she lived with at the time. LRT reported that her normal routine included waking Kempainen up at 4:30 p.m. so that he could go to work. (Rl at 2, Appendix at 102). LRT described laying at the foot of the bed when Kempainen woke up on his own and began rubbing her back under her clothes. *Id.* LRT stated that Kempainen moved his hand to the front of her chest, and was touching her breasts when she immediately left and went to a friend's house. (*Id*). LRT did not inform her friend of either incident. (*Id*).

LRT did not initially disclose the alleged abuse to anyone because she thought her mom would be mad at her and "was afraid of what her mom would do to Kempainen". *Id.* LRT stated that when she was in eighth grade, she confided in a male friend, JB. *Id.* Police contacted JB, who stated that when LRT was in eighth grade and he was possibly in seventh grade, LRT

and he were discussing virginity in class when LRT made a comment about being either molested or raped. (R1 at 4, Appendix at 104). JB could not recall the exact language used and stated that LRT did not describe the incident or identify the person who assaulted her. *Id.*

Additionally, LRT stated that years later, at an unspecified time on an unspecified date, she told her then-current boyfriend, JRR, that Kempainen had sexually assaulted her. *Id.* Police contacted JRR, who stated that while they were dating, an incident occurred, in which JRR was performing consensual oral sex on LRT and she began crying. (R1 at 4, Appendix at 104). JRR stated that LRT told him that her stepfather, Kempainen, "would often get drunk and that he molested her." ((*Id*). According to JRR, LRT informed him that, "when he would drink, her stepdad would eat her out." (*Id*).

LRT stated that she and JRR broke up in January of 2012 and JRR called LRT's mother to tell her that Kempainen touched or molested LRT while they were living together. (R1 at 3, Appendix at 103; R1 at 4, Appendix at 104). LRT's mother and Kempainen divorced in 2005. (R1 at 5, Appendix at 105).

Prior to trial, Kempainen filed a motion to dismiss the complaint, alleging that it was not sufficiently definite to provide adequate notice of the charges against him. (R11 at 1). Specifically, the Kempainen alleges that the four-month time span in count one and the three-and-a-half month time span in count two, along with the respective twelve and fifteen year gap between the alleged incidents and the charges were too indefinite and a violation of his due process rights. (R11 at 2).

At a motion hearing on May 21, 2013, the circuit court applied the four factors that this court, in

Fawcett, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988), identified as relevant considerations to the sufficiency of a complaint when the defendant does not allege that the State could have obtained a more definite statement through diligent efforts. (R32 at 12, Appendix at 117). The circuit court concluded that based on the four factors, the complaint was not sufficiently definite as to either count and dismissed the case. (R29, Appendix at 123).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE COMPLAINT WAS NOT SUFFICIENTLY DEFINITE.

The circuit court correctly applied the four factors from *Fawcett,* as the defendant did not allege that the State could have obtained a more definite statement through diligent efforts. Accordingly, the circuit court correctly dismissed the complaint.

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

The criminal complaint is a self-contained charge which must set forth facts that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable. *State v. Hoffman*, 106 Wis. 2d 185, 197, 316 N.W.2d 143, 151 (Ct. App. 1982). 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* identifies factors that should be considered in evaluating the sufficiency of a complaint

A criminal charge must be sufficiently stated to allow the defendant to plead and prepare a defense. *Blenski v. State*, 73 Wis. 2d 685, 695, 245 N.W.2d 906, 912 (1976). Where the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged. *See Hoffman*, 106 Wis. 2d at 198, 316 N.W.2d at 152. The test adopted by the Wisconsin Supreme Court regarding the sufficiency of the charge is set forth in *Holesome v. State*, 40 Wis. 2d 95, 102, 161 N.W.2d 283, 287 (1968).

> In 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 is able to plead and prepare a defense and whether

> conviction or acquittal is a bar to another prosecution for the same offense.

Id. Other states have adopted a more specific test. In *People v. Morris*, 461 N.E.2d 1256, 61 N.Y.2d 290 (1984), the New York Court of Appeals set out a "reasonableness test." The "reasonableness test" depends upon the nature of the challenge asserted. *Id.* In *Fawcett*, the court explained how the *Morris* court determined "reasonableness":

> [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 of time 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.

In *Fawcett*, this court adopted seven factors that are helpful in determining whether the complaint is sufficiently definite and whether the first prong of the *Holesome* test can be met:

> (1) the age and intelligence of the victim and other witnesses;
>
> (2) the surrounding circumstances;
>
> (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately;
>
> (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged;

> (5) the passage of time between the alleged period for the crime and the defendant's arrest;
>
> (6) the duration between the date of the indictment and the alleged offense; and
>
> (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Fawcett, 145 Wis. 2d at 253.

The allegations in this case involve two distinct acts of sexual assault of a child. (R1 at 1, Appendix at 101). In *Fawcett,* this court acknowledged the inherent difficulties of prosecuting sexual assaults of children, but also recognized that allegations may not outweigh an individual's constitutionally protected rights when it stated, "[N]o matter how abhorrent the conduct may be, a defendant's due process and six amendment rights to fair notice of the charges and fair opportunity to defend may not be ignored or trivialized. *Fawcett*, 145 Wis. 2d at 250.

C. The *R.A.R.* court correctly interpreted *Fawcett* to limit courts' consideration of factors depending on the defendant's allegations

In *R.A.R.*, this court noted that the first three factors only apply when the defendant claims that the State could have obtained a more definite date through diligent efforts. 148. Wis. 2d at 411.

The circuit court correctly noted that, in this case, there is no allegation that the State could have obtained a more definite statement through diligent efforts, so it correctly refused to apply the first three factors. (R32 at 12, Appendix at 113). In applying the four remaining factors, the circuit court correctly found that the complaint failed to provide Kempainen with sufficient notice.

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

The fourth factor requires the court to compare the length of the alleged period of time in relation to the number of individual criminal acts alleged. *Fawcett*, 145 Wis. 2d at 253. Count one alleged one act within a four-month period that LRT alleges occurred in the beginning of her second-grade school year. (R1 at 1, Appendix at 1). In its brief, the State argues that this court has found that similar period-to act ratios favored a finding of reasonableness. (Plaintiff-Appellant's br. at 10). However, the facts of this case are distinguishable from the cases that the State cites. In *Fawcett*, there were two alleged acts within a six-month period against a ten-year-old child. 145 Wis.2d at 254. In *R.A.R.*, there was a charging period of three single acts within three separate three-month periods. 148 Wis. 2d at 412.

In this case, there is only one allegation of a single act over a four month span. There is an important factual difference between one incident and

repeated sexual assaults. The alleged victim claims that she can recall that the incident occurred at the beginning of her second-grade school year. This court has recognized that:

> "some liberality must be permitted in this area because of the age of the prosecutrix. A person should not be able to escape punishment for such a...crime because he has chosen to take carnal knowledge of an infant too young to testify clearly as to the time and details of such...activity."

State v. Sirisun, 90 Wis. 2d 58, 65-66 n. 4, 279 N.W.2d 484, 487 (Ct. App. 1979) (quoting *State v. Rankin*, 181 N.W.2d 169, 172 (Iowa 1970)). In this case, the charging period in count one of the complaint is from August 1, 1997 to December 1, 1997. (R1 at 1, Appendix at 1), which spans a period from before the typical school session begins, through the end of summer, the majority of the fall season, and entering the holiday season. The State had one statement from the alleged victim to determine the charging period. Given the

alleged victim's own admission that she remembers the first incident occurring at the beginning of the school year, the charging period is overly broad and therefore the period-to-act ratio favors a finding of unreasonableness.

The fifth and sixth factors require the court to evaluate the time between the alleged act and criminal charges or proceedings. *Fawcett*, 145 Wis. 2d at 253. In this case, fifteen years separate the alleged incident and the charge. This is a significant departure from *Fawcett*, 145 Wis. 2d at 254, in which charges immediately followed the charging period. It is also three times as long as *R.A.R.*, 148 Wis. 2d at 412, with four and five year gaps between the alleged conduct and the charges supporting, in part, a conclusion that the complaint was insufficiently definite. The law includes some room for flexibility, but fifteen years separating a single alleged incident is unreasonable and unfairly

denies due process to the accused. The State attempts to diminish the significance of the fifteen year period by arguing that Kempainen himself is responsible for the delay in reporting. In its brief, the State argues that Kempainen's stepdaughter relationship, along with Kempainen's request that LRT not disclose the alleged abuse, delayed LRT's reporting. This argument fails because the legal familial relationship ended in 2005 when LRT's mother and Kempainen divorced. Had LRT come forward in 2005, there would have been an eight-year delay, but because the charges were not filed until 2012, a fifteen year delay occurred. Even if the court accepts LRT's statement that Kempainen requested she not disclose the alleged abuse as factually accurate, the statement included no threat of force or violence. According to LRT, the Kempainen made no mention of potential consequences of LRT's reporting other than, "he [Kempainen] would get in trouble." (R1

at 2, Appendix at 102). The State's claim that Kempainen is responsible for the delay is not supported by the criminal complaint and even if it were, the delay cannot overcome the prejudicial nature of filing an indefinite complaint more than fifteen years after the alleged conduct.

The seventh factor addresses LRT's ability to particularize the date and time of the alleged offense. *Fawcett,* 145 Wis. 2d at 253. In *Miller*, which involved a complaint alleging 30 to 40 assaults of a child over a four-year period, this court noted that despite the victim not being able to articulate specific dates and times, all of the sexual contact was described in detail and limited to his therapy appointments within the four-year period. *Miller*, 257 Wis. 2d 124. Despite the delay, the testimony was sufficient so as to enable Miller to adequately confront it and to prepare a defense. *Id.* Unlike *Miller*, this case does not limit the

allegations to professionally scheduled, documented periods, to which the defendant could refer back to in preparation of a legal defense. Likewise, this count only alleges one instance of conduct in a four-month period. (R1 at 1, Appendix at 101). While LRT describes some details of the alleged incident, she does not offer information as to the season. LRT fails to specify if it was a weeknight or weekend, which is something that a child of LRT's age, basing timing of the incident on the school year, should recall. LRT's statement that Kempainen was frequently intoxicated, combined with her statement to JRR that "when he would drink, he would eat her out" only makes the time period more vague and indefinite, as she alleges only one instance of inappropriate sexual conduct in the four-month period.

Each factor favors Kempainen's claim that the complaint is insufficiently definite and should be

dismissed. At the motion hearing, the circuit court went through each factor required for the *Fawcett* analysis and concluded that the Kempainen was not adequately informed of the charges.

The circuit court's conclusion that the complaint was insufficiently definite as to count one was correct and should be affirmed.

2. The allegations in count two likewise are not sufficiently definite

Count two alleged one act within a three-and-a-half month period. Like count one, that ratio is unreasonable. In *Fawcett*, this court held that two alleged acts within a six month period against a ten-year-old was reasonable. *Fawcett,* 145 Wis. 2d at 254. In this case, the complaint alleges only one act in over three months. Similarly, in *R.A.R.,* a charging period of three single acts within three separate three-month periods was shorter than the time designated in

Fawcett, but the complaint was held insufficiently definite. *R.A.R.*, 148 Wis. 2d at 412.

The fifth and sixth factors indicate an eleven-and-a-half year period between the alleged conduct and the charges. As previously stated, this is a significant amount of time. Unlike count one, nothing suggests Kempainen attempted to conceal the alleged abuse. The alleged incident occurred four years before LRT's mother and Kempainen divorced, while seven years passed since the divorce before any charges were filed.

The seventh factor favors Kempainen because LRT is unable to particularize the date and time of the alleged offense. LRT is unable to articulate the month and can only describe it as being "warm outside". (R1 at 2, Appendix at 102). "Warm" is a relative term that could describe a date in any month of the year. Further, the last day of the charging period is LRT's birthday,

yet she fails to describe the date of the incident in relation to it.

Each count involves long temporal gaps between the alleged conduct and the charges. Although *Fawcett* does requires some flexibility, the State is not entitled to receive unlimited discretion in charging when such charges would trample an individual's constitutionally protected right to due process.

The State alleges that because Kempainen appeared to prepare a theory of defense involving retaliation for pending criminal charges against LRT's mother, the complaint must have been sufficiently definite. (R33 at 10-11). A potential defense is not dispositive as to the constitutionality of the complaint. In support of their assertion, the State references an unpublished decision by this court which noted that the defendant's ability to present a defense, while not dispositive, supported the conclusion that the complaint

was sufficiently definite. *State v. Badzinski*, No. 2011AP2905-CR, slip. Op. at ¶19 (Wis. Ct. App. Nov. 27, 2012 (Appendix at 132-33)[1]. However, *Badzinski* is distinguishable because he was able to proceed through trial with a working defense. Here, the case was dismissed before trial. The State's argument that the defense prepared a defense is merely conjecture. A theory of defense can be found in almost any case; a theory is not synonymous with an actual defense. Nor does it meet the requirement that a complaint must be sufficiently definite to allow the defense to prepare and plead an actual defense.

Therefore, the circuit court's conclusion that the complaint was insufficiently definite as to count two was also correctly decided and should be affirmed.

In accordance with Wis. Stat. § 809.23(3)(b), a slip copy of *Badzinski* appears in the appendix to this brief. (Appendix at 124-41).

D. The second prong of the *Holesome* test need not be addressed in this brief

Both the circuit court and Kempainen chose not to address whether the second prong of *Holesome* was satisfied. Because the first prong of *Holesome* is not satisfied, this court need not address whether the second prong would be satisfied in this case.

In conclusion, the circuit court correctly decided that the complaint was not sufficiently definite as to counts one and two. Because the first prong of the *Holesome* test is not satisfied, this court should affirm the dismissal order.

II. ALTERNATIVELY, IF THE COURT CONCLUDES THAT THE CIRCUIT COURT'S APPLICATION OF THE FOUR *FAWCETT* FACTORS WAS TOO NARROW, *R.AR.* WAS CORRECTLY DECIDED WHEN IT LIMITED CONSIDERATION OF THE *FAWCETT* FACTORS DEPENDING ON THE DEFENDANT'S SPECIFIC ALLEGATIONS

This court, in *R.A.R.* correctly read footnote two in *Fawcett* to limit the 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 Kempainen's view, the *R.A.R.* court correctly interpreted *Fawcett*, and in that way *R.A.R.* was correctly decided.

This court is bound by its own prior precedent and may not overrule, modify, or withdraw language from its prior published opinions. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). 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. *Id* at 190.

In order to properly respond to the State's assertion that *R.A.R.* was wrongly decided, Kempainen

sets forth the following reasons as to why *R.A.R.* was correctly decided.

A. The *Fawcett* court applied all seven factors because Fawcett alleged lack of diligence

In *Fawcett*, the court notes that Fawcett was originally charged with one count of first-degree sexual assault contrary to sec. 940.225(1)(d), Stats. with an allegation that the assault took place on December 7, 1985. *Fawcett*, 145 Wis. 2d at 248, n. 1. An amended complaint charged Fawcett with two counts of first-degree sexual assault and one count of enticing a child for immoral purposes, contrary to sec. 944.12, Stats., during "the six months preceding December of 1985." *Id.* The amended complaint also charged Fawcett with additional counts of sexual assault and enticing a child for immoral purposes (both later dismissed). *Id.* These latter offenses were alleged to have occurred in late November or early December of 1985. *Id.* An

information was filed charging Fawcett with two counts of first-degree sexual assault and two counts of enticing. An amended information was then filed charging Fawcett with only two counts of first-degree sexual assault occurring in the six months preceding December, 1985. *Id.*

Fawcett argued that the six-month period of time alleged in the complaint and information was too expansive to allow him to prepare an adequate defense. Fawcett was originally charged with one count of first-degree sexual assault on a specific date and ultimately charged with two counts of first-degree sexual assault, with the time span changing from one day to six months. It may have been reasonable for the State to increase the time span when the additional counts of enticing a child were charged. However, it is unreasonable to expand the charging period to six months for two counts of first-degree sexual assault

when one incident is alleged to have occurred on a specific date. Although the court does not mention whether Fawcett specifically alleged lack of investigatory diligence, it is reasonable to infer that the State failed to obtain more specific information for the charging document. Given that reasonable inference, it logically follows that the court in *Fawcett* evaluated all seven factors in its "reasonableness test".

The State's claim that the *Fawcett* court did not understand its own footnote to establish a precedent is beyond speculative; it is an incorrect reading of this court's decision. The second footnote in *Fawcett* was not meant to simply provide background information for the origin of the seven factors. In *Fawcett*, the court originally certified the case to the Wisconsin Supreme Court inquiring whether the reasonableness test should be adopted as the law of this state. *Fawcett*, 145 Wis. 2d at 252. A part of that reasonableness test, included in

footnote two, is the inquiry into the defendant's specific allegation that the State failed to obtain more specific information due to a lack of diligent investigatory efforts. *Fawcett*, 145 Wis. 253 at n. 2. This court's certification demonstrates its appreciation for the reasonableness test asserted in *Morris*. It is erroneous to read *Fawcett* as adopting and applying all seven factors in every case. This court's opinion in *R.A.R.*, along with the circuit court's reliance on *R.A.R.* when it dismissed the case against Kempainen for insufficient definitiveness in the complaint, stem directly from an accurate reading of *Fawcett*.

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

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. The State argues that the first three factors will likely weigh in favor of a determination that the complaint satisfies due process notice requirements. The State argues that because the first three factors will often favor the State, it is unfair to exclude them from some sufficiency analyses. However, just because an application of the first three factors would make it easier for the State to prosecute individuals does not mean that it is in compliance with due process requirements. The *Fawcett* court considered this when it held that a court may look to the first three factors to determine whether a more specific date could have been alleged. *Fawcett,* 145 Wis. 2d at 251, n. 2. The State argues that, "this 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." (Plaintiff-Appellant's br. at 17).

A defendant challenging the sufficiency of a complaint generally is practically different from a defendant challenging the sufficiency of a complaint alleging that the State was not diligent in obtaining a more definite date. The former challenge can only succeed when the State has narrowed down the designated period of charging time to that supported by diligent investigatory efforts and is still found to be insufficiently definite.

The State argues that 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. (Plaintiff-Appellant's br. at 18). If that is true, several of the State's earlier arguments must be discounted. For instance, in section one, the State argued that *Fawcett* requires a flexible approach to evaluating complaints in child-victim cases based on a child's typical reluctance to immediately report abuse and "and because LRT and Kempainen had a stepdaughter-stepfather relationship" (Plaintiff-Appellant's br. at 11). The State argued that this court should consider the above-mentioned facts when evaluating the fifth and sixth factors in the *Fawcett* analysis.

The court maintains an extremely flexible analysis when it applies the four factors. The seventh factor, the ability of the victim to particularize the date and time of the alleged offense, offers significantly greater flexibility and discretion to the court than the first factor, the age and intelligence of the victim. This

court should not be persuaded to believe that all seven factors are necessary for the court to consider when the sufficiency of a complaint is challenged. The court, when correctly applying the four factors, has enough flexibility.

C. The *Miller* court's application of the seven factors is consistent with both *Fawcett* and *R.A.R.*

In *Miller*, 247 Wis. 2d 124, this court applied all seven factors from *Fawcett* after Miller challenged a four-year long charging period on notice grounds. Specifically, the State was aware of the expansive time frame and offered to amend the information to allege two narrower charging periods. This court rejected the State's argument, holding that amending the information to allege two charges covering shorter time periods would have exposed Miller to the risk of multiple convictions. *Miller*, 257 Wis. 2d at ¶ 16. In essence, Miller did allege that the State was aware of

the expansive charging period and, exerting more diligent investigatory efforts, could have made the designated charging period more reasonable. Given this allegation by the defendant, it comports with both *Fawcett* and *R.A.R.* when it applied all seven factors. This allegation by the defendant in *Miller* is distinguishable from both *R.A.R.* and the decision from the circuit court.

III. IF THE COURT BELIEVES THAT *R.A.R.* WAS WRONGLY DECIDED, THE COMPLAINT WOULD STILL BE INSUFFICIENTLY DEFINITE

Even if the Court were to apply the first three factors, the complaint would still be insufficiently definite. The alleged victim was eight years old during the time period in count one and either eleven or twelve years old during the time period alleged in count two. In regard to the surrounding circumstances, Kempainen ceased being the legal stepfather to the

alleged victim in 2005. While the relationship existed, the alleged victim reported no threats of violence. In fact, her statement that she feared the repercussions of reporting the alleged abuse are rebutted by her own alleged confidences to another classmate when she was in eighth grade. As for the third factor, the nature of the offense, the allegation is that there were only two specific incidents, separated by approximately three-and-one-half years. Yet in the same complaint, it is alleged that the alleged victim informed JRR that "every time Kempainen drank, he would eat her out". Even if all seven factors were to be applied, which this court does not have the authority to decide, the complaint would still be insufficiently definite.

CONCLUSION

In summary, the circuit court correctly decided that the complaint here lacked sufficient definiteness.

The court was 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 not satisfied. Further, even if this Court agrees with the State and certifies the case to the Wisconsin Supreme Court, the application of all seven factors would still result in a finding that the complaint lacked sufficient definiteness.

For the foregoing reasons, the Defendant respectfully asks that this court affirm the decision of the circuit court dismissing the complaint.

Dated this 23rd day of December, 2013.

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Attorney for Defendant-Respondent

CERTIFICATE OF DELIVERY

I hereby certify that this brief and appendix was mailed to the Clerk, Wisconsin Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin, on December 23, 2013.

Dated this 23rd day of December, 2013.

Respectfully submitted,

KIRK OBEAR, ATTORNEY AT LAW

By: 

Melissa L. Mroczkowski
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Attorney for Defendant-Respondent

CERTIFICATE OF COMPLIANCE WITH 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 s. 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 23rd day of December, 2013.

Respectfully submitted,

KIRK OBEAR, ATTORNEY AT LAW

By: 

Melissa Mroczkowski
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CERTIFICATION AS TO CONTENTS OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court; and
(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of December, 2013.

Respectfully submitted,

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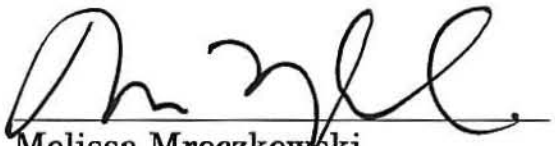
CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 6567 words.

Dated this 23rd day of December, 2013.

Respectfully submitted,

KIRK OBEAR, ATTORNEY AT LAW

By: 

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