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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2013AP002686-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS C. SALINAS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Brown
County, the Honorable Marc A. Hammer, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

1. Did the circuit court err when it joined two sets of charges for trial, where a) one set of three charges (10-CF-542) alleged multiple sexual assaults of V.G. by Luis Salinas; b) the other set of charges (10-CM-1571) alleged victim intimidation of V.G. and her mother, M.S., by Mr. Salinas, with whom they both lived; c) the alleged intimidation of V.G. and M.S. predated V.G.'s accusations of sexual assault; d) the alleged intimidation related to sentencing in a *separate* domestic abuse case (09-CF-1267); and e) 09-CF-1267 included allegations that a knife-wielding Mr. Salinas had threatened to kill M.S. and their young son, who was standing next to Mr. Salinas at the time?

Over a defense objection, the court found that the charges were sufficiently related for joinder and would not unduly prejudice Mr. Salinas.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. This case presents undisputed facts and a question of law that will be resolved by well-established precedent.

STATEMENT OF THE CASE AND FACTS

This case involves the joining two sets of charges for trial. One set of charges, involving repeated sexual assaults of V.G., was filed under Brown County No. 10-CF-542. (1; App. 101-103). The other set of charges, comprising two

counts of misdemeanor intimidation of a victim, was assigned Brown County Case No. 10-CM-1571. (143; App. 104-109). There was one count involving V.G., and one count involving V.G.'s mother, M.S. (143:1; App. 104). Both charges involved a series of telephone calls made by Mr. Salinas, primarily to M.S, in April and May of 2010.¹ (143:2-6; App. 105-109). The 10-CM-1571 complaint alleged that Mr. Salinas had sought to influence victim statements at his sentencing in a separate domestic violence case, Brown County No. 09-CF-1267, for which Mr. Salinas had already entered pleas and been convicted. (*Id.*). Both V.G.² and M.S. were victims in the domestic violence incident, with M.S. suffering more severe and extensive abuse. (143:4-5; App. 107-108).

Timeline of charging and pre-trial proceedings

April 24, 2007 – October 26, 2009: In a statement given on May 13, 2010, V.G. said that she had been repeatedly sexually assaulted by Mr. Salinas over this two-and-a-half year time period. (1:1-3; App. 101-103). (See the entry for May 13, 2010, for additional details.)

October 26, 2009: Officers from the Green Bay Police Department were dispatched to Mr. Salina's home, where M.S., M.S.'s daughter, V.G., and Mr. Salinas' son (with M.S.) lived. (143:4; App. 107). There, officers spoke first

¹ At the close of evidence in the above-captioned trial, the state moved to amend the dates on the information. Originally, Mr. Salinas was charged with making phone calls from April 15 – April 19, 2010. (143:1-2; App. 104-105). The final information alleged calls from April 15 – May 11, 2010. (77:2; App. 128).

² The charge of Child Abuse – Intentionally Causing Harm, was dismissed and read-in for sentencing. (143:5; App. 108).

with M.S. (*Id.*). She provided a written statement outlining her allegations against Mr. Salinas. (*Id.*).

[M.S.] stated she and the defendant had been arguing because the defendant wanted to take the children to Mexico because he believed they don't behave properly. She stated they continued to argue and the defendant hit her on the side of the face. She stated she told the defendant they were breaking up and the defendant then threw a small object at her. [M.S.] stated the defendant said he was going to kill her and grabbed a computer chair, so she started to leave the residence. She stated the defendant then grabbed her and grabbed a hold of her neck, using both hands to choke her. She stated the defendant pressed her against the wall while he choked her and she could not breathe. She stated the defendant choked her for less than a minute and at the time, it hurt. [M.S.] stated she began to pull the defendant's hair to get him to let her go and she was able to get away. She stated the defendant then grabbed a knife in the kitchen and at that point, she yelled for V.G. to leave the residence and V.G. did run out of the house. [M.S.] stated the defendant then stood in the doorway with their six year old son, having their son tell [M.S.] to come back to the residence. [M.S.] stated V.G. then ran across the street and called the police. She stated the defendant told [M.S.] that if she didn't come back to the residence, he would kill their son and kill himself.

(143:4; App. 107).

Police then spoke with V.G., then 15 years old. (143:4-5; App. 107-108). V.G. gave a statement to officers. (*Id.* at 5; App. 108).

...on October 26, 2009, at around 3:00 a.m., her mother, [M.S.], was preparing to go to work when [M.S.]'s live-in boyfriend, the defendant, became angry with [M.S.] and said she couldn't go to work because of the way she

was dressed. V.G. stated she laid in her bed and the defendant came into the room, hit her on the right side of her face and the back of her head, made her get up and yelled at her for about an hour. She stated she went back to bed and woke up around 8:00 a.m. to the sound of her mother and the defendant arguing. She heard the defendant threatening to kill her mother and then she heard a loud noise that sounded like furniture being thrown. V.G. stated she saw the defendant grab her mother by the neck with both hands. She yelled at the defendant to let her mother go. She stated the defendant was yelling back at her and at one point, she heard her mother yell for her to get out of the house, so she did and ran out of the house and went across the street to call the police.

(143:5; App. 108).

October 27, 2009: In Brown County Case No. 09-CF-1267, Mr. Salinas was charged with four counts arising from the previous day's incidents: Strangulation and Suffocation-Domestic Abuse, a felony, Physical Abuse of a Child-Intentionally Causing Bodily Harm, a felony, Battery-Domestic Abuse-Use of a Dangerous Weapon, a misdemeanor, and Disorderly Conduct-Domestic Abuse-Use of a Dangerous Weapon, a misdemeanor. (143:4; App. 107).

March 8, 2010: Mr. Salinas entered Alford pleas to two counts: Strangulation and Suffocation-Domestic Abuse and Battery-Domestic Abuse-Use of a Dangerous Weapon. The other two counts charged were dismissed and read-in. (76:Exh. 3:7; 143:5; App. 108).

April 15-19, 2010: According to the criminal complaint in 10-CM-1571, Mr. Salinas attempted to call M.S. from jail many times. (143:2; App. 105). On four occasions, Mr. Salinas and M.S. had conversations, which were

recorded. (*Id.*). The review of the jail calls occurred in August and September of 2010, resulting in the issuance and filing of the complaint on October 5, 2010. (143; App. 104-109).

In a call recorded on April 15, Mr. Salinas referred to a letter:

Mr. Salinas: Did you get my letter?

M.S.: Yes.

Mr. Salinas: Then you know what to do that is enough.

M.S.: I don't have to do anything, Luis. You are wrong. We don't want nothing to happen to you. We don't want you to hurt yourself. We don't want none of that.

(143:3; App. 106).

In two calls recorded on April 19, Mr. Salinas expressed frustration and anger with M.S. (143:2-3; App. 105-106). Mr. Salinas acknowledged that M.S. was the mother of his son, and because of that, Mr. Salinas said that he didn't "want to be mean" to M.S. (*Id.* at 3; App. 106). In other portions of the conversations, Mr. Salinas insulted M.S., using obscene language. (143:2-3; App. 105-106). Some of Mr. Salinas' comments were threats to M.S.: "you don't know what I'm able to do;" "[y]ou don't know what I have done or what I could do;" "you don't know who I am;" "you better start thinking that one day I'm coming out;" "you don't want me to kick your ass;" "you are going to piss me off and I'm going to send someone there and you are not going to like it;" "[i]f I get out, you are going to be sorry, my darling." (143:2-3; App. 105-106).

During one of the April 19 calls, a letter was again discussed.

M.S.: I didn't pay my daughter to write you or dictated the letter to her.

Mr. Salinas: You were going to pay her last time so she could go to court and say you know what.

M.S.: Yes, because you were the one telling me to do that.

(143:2-3; App. 105-106).

May 11, 2010: Mr. Salinas was sentenced for the two counts in 09-CF-1267 to which he pled. (143:5; App. 108). Both M.S. and V.G. made statements indicating that they wanted Mr. Salinas to come back home. (*Id.*). There was a joint recommendation for two years of probation with 12 months in jail as a condition. (76:Exh. 3:6). Mr. Salinas, in his allocution, apologized to his family and took responsibility for his actions. (76:Exh. 3:9). He also admitted to a violent past, but said, as his attorney had, that he was sick on the day of the offenses, and "wasn't thinking right." (76:Exh. 3:12). He noted that his most recent criminal conviction was ten years earlier, his most recent felony six years before that. (*Id.*). Mr. Salinas said that he now knew how grave his mistake was, and that he now understood his priorities and had experienced compassion, pain and heartache. (*Id.*). Sentence was withheld, and Mr. Salinas was placed on probation for three years, with a total of nine months in jail as a condition. (76:Exh. 3:13). He was also ordered not to have contact with M.S. or other family members for a period of six months, though he was allowed contact with M.S. at their common place of employment. (76:Exh. 3:16). Mr. Salinas was given credit for 197 days of presentence custody against his condition time. (76:Exh. 3:15, 17).

May 13, 2010: V.G. provided a written statement to police, accusing Mr. Salinas of having sexually assaulted her repeatedly over a two-and-a-half year period. (1:1-2; App. 101-102). The period spanned April 24, 2007 to October 26, 2009. (*Id.* at 1; App. 101).

V.G. told police that the assaults had occurred when her mother, M.S., was not at home. (1:2; App. 102). V.G. said that if her younger brothers were not with M.S., they would be sent outside or to the park. (*Id.*). V.G. said that the sexual assaults occurred six to twelve times a month, beginning when she was 13 years old. (*Id.*). The last alleged assault occurred on October 26, 2009. (*Id.*).

If V.G. resisted or rejected Mr. Salinas' sexual advances, she stated, Mr. Salinas would "hit her, and he would sometimes punch and slap her." (1:2; App. 102). She also told police that Mr. Salinas said that if V.G. told M.S., Mr. Salinas would say that V.G. was making advances to him. (*Id.*). If V.G. were to go to the police, Mr. Salinas said that the police would take V.G.'s brothers from M.S. (*Id.*).

On October 26, 2009, according to the 10-CF-542 complaint, after M.S. left for work,³ Mr. Salinas ordered V.G. to come over by him. (1:2; App. 102). V.G. inferred that this meant that Mr. Salinas wanted to have sex with her. (*Id.*). V.G. told Mr. Salinas no, that she was not going to do so and she "was tired of doing it." (*Id.*). V.G. said that Mr. Salinas was going to tell M.S., and blame it on V.G. (*Id.*). Mr. Salinas then hit her in the face with his hand, and forced her to have sexual intercourse. (*Id.*). V.G. said that afterward, Mr. Salinas began arguing with and yelling at V.G. (*Id.*).

³ This would have been around 3:00 a.m. (143:5; App. 108).

On May 13, 2010, V.G. told her boyfriend that Mr. Salinas had been assaulting her. (1:2; App. 102). Her boyfriend made her tell M.S., who brought her to the police station to make a statement. (*Id.*). The same day, M.S. gave a statement, saying that she and V.G. had recently learned that Mr. Salinas would soon be released from jail [for the domestic abuse case]. (*Id.*). M.S. said that V.G. had not come home from school on May 13. (*Id.*). M.S. said that she believed that V.G. was afraid that Mr. Salinas might return home and assault V.G. (*Id.*). M.S. stated “for the past three years, V.G. has told her that she did not want the defendant living with them anymore. She also remembers the defendant asking her to have V.G. not live at the house anymore. [M.S.] stated she never understood why he would ask her that.” (*Id.*).

May 19, 2010: A criminal complaint was filed in Brown County Case No. 10-CF-542, charging Mr. Salinas with the repeated sexual assault of V.G. (1; App. 101-103).

August and September, 2010: Police listened to, and translated from Spanish, recorded jail calls from Mr. Salinas to M.S. (143:2-3; App. 105-106). Police then interviewed M.S. and V.G. regarding the calls. (143:2-4; App. 105-107). Each of them provided a statement. (*Id.* at 3-4; App. 106-107).

M.S. told police that:

...she recalled that conversation and that the defendant had requested many times for V.G. to write him a letter, but V.G. had refused. She stated after V.G. refused to write him, the defendant began threatening to kill himself, so V.G. broke down and wrote him a letter. She stated this is what the defendant was talking about in the phone call. She stated the defendant did tell her to offer V.G. anything so that V.G. would come to court and say the defendant did not hit her. She stated she bought V.G.

a \$20 phone card so she would go to court. She stated the defendant said it would get worse if she didn't. She stated the defendant was threatening her and pressuring her to do this. She stated V.G. did go to court to speak on the defendant's behalf for [M.S.], so it would not be worse for [M.S.]. [M.S.] stated she would like to add that the statement she gave to the officers for the domestic violence offense [was] true and correct. She stated the defendant pressured her to change that statement that she originally gave to officers. She stated she and the defendant lived together for seven years. He continues to send her letters, but puts someone else's name on the envelope so that a third party would give them to her. She stated at no time did V.G. want to go to court and speak on the defendant's behalf unless it was going to be the truth about what happened. She stated the reason V.G. did go to court was because she pressured her to do so. [M.S.] stated the defendant told her it would make him look good to the judge that his family supported him.

(143:2-3; App. 105-106).

In her statement, V.G. said:

...she was supposed to go to court to testify that the defendant did not hit her. She stated the defendant was writing her and her mother, [M.S.], and he called many times. She stated the defendant was pressuring them to change what they had said happened and she did not want to change what she said had happened. V.G. stated she did go to court for the defendant's sentencing. She stated she did speak to the court and told the judge that her brother wanted his father home and missed him. She stated she did this hoping that the defendant would stop pressuring her and her mother and he would stop annoying them and it would just go away. She stated her mother did give her a \$20 phone card for going to court and talking to the judge. She stated she got the phone

card after she went to court, but was told she would get the phone card if she went to court. V.G. stated the defendant would threaten her mother and herself when he called. She stated the defendant would also tell her brothers things to manipulate them into liking him and making them go against their mother and V.G.

(143:3; App. 106).

October 5, 2010: A criminal complaint was filed in Brown County Case No. 10-CM-1571, charging Mr. Salinas with two counts of Misdemeanor Intimidation of a Victim, Domestic Abuse, for the telephone calls. (143:1; App. 104). One count alleged intimidation of M.S.; the other, V.G. (*Id.*).

October 18, 2010: The state filed a motion to join files 10-CM-1571 and 10-CF-542 for trial. (15; App. 110-112). The state argued that the cases shared common victims, the charges in the cases arose within six months of one another, the evidence in both cases overlapped, and joinder of the files would relieve the victims from having to testify twice regarding the events. (15; App. 110-112).

October 20, 2010: The motion for joinder was heard. (121; App. 113-117). The state's argument was brief:

Thank you, Your Honor. The state did file the motion for joinder which outlines the reasons it believes the two files should be joined. The incidents in both files are close in time, involve the same victims, and the testimony would be intertwined because the files are related.

For those reasons, we feel that joinder would be appropriate.

(121:2; App. 113).

Counsel for Mr. Salinas opposed the motion.

Your Honor, from around October to May my client was charged with making five hundred something phone calls to [M.S.], but it was not on the matter at hand now in 10-CF-542. It's not about a sexual assault of V.G. It was -- it was about another case on which he was revoked (*sic*) and for which he was going to be released from the jail on May the 20th. Charges in this matter were filed just about that time. In fact, my Order Appointing Counsel is dated May 20th of this year.

So I really I just don't see what one has to do with the other. We can say that he -- he called [M.S.] and was rude to her and used curse words at her, but it didn't have anything to do with the sexual assault. He's not trying to intimidate anybody about the sexual assault because these charges weren't filed until after all the phone calls were over. So one case simply has nothing to do with the other.

(121:2-3; App. 113-114).

The court found that the cases were appropriate for joinder, acknowledging the prejudice to Mr. Salinas.

Well, but the fact that the charges hadn't been filed doesn't minimize the status of V.G. as a victim. I mean, the victimization occurs at the time of the assaults (*sic*) between April 15th and April 19th of 2010.

This file, 10-CM-1571, has two counts. The second count, Misdemeanor Intimidation of a Victim, is directly related to V.G., the victim in the Repeated Sexual Assault of a Child in 10-CF-542. So that there would be a logical reason to connect those two for purposes of trial.

The thought then occurs to me that were I to say that the first count, the Misdemeanor Intimidation of a Victim as

it relates to [M.S.] on something unrelated should be separated for purposes of trial, I would expect that I'm going to get a motion for other-acts evidence to include these very instances to be part of the felony trial.

So that what I'm really doing is allowing in all of the information without having an actual trial, and if there would seem to be a likelihood that I would consider other-acts evidence based upon the repeated contact, alleged repeated contact by Mr. Salinas with [M.S.], then I ought to try that case as well as Count 2 at the same time as I'm trying the felony case.

I don't think that the jury is going to be confused by this. Certainly, this is something that is prejudicial to your client. All of these things are prejudicial, but the probative value outweighs that prejudice, under these circumstances.

There is a strong likelihood that all of this evidence in this file would come in under other-acts evidence, and if that's the case, and since Count 2 is related to the felony file, Count 2 in the misdemeanor file related to the felony file, I see no reason not to include them as part of one trial in this matter.

(121:3-5; App. 114-116).

March 18, 2011: The state filed an amended information, joining the felony and misdemeanor cases. (31; App. 118-119).

August 23, 2011: The parties stipulated (43) to the filing of another amended information, this one clarifying the dates of the alleged offenses and the identity of the alleged victim in one of the misdemeanor intimidation charges. (44:1-2).

March 2, 2012: At a status conference pre-trial, defense counsel⁴ raised the possibility that Mr. Salinas would enter pleas to the misdemeanor intimidation counts but go to trial on the felony charges. (133:5; App. 121). The state said that it intended to present evidence related to the charges regardless of any resolution by pleas. (*Id.*). Defense counsel objected to the admission of the evidence under those circumstances. (133:6; App. 122). Counsel noted that the intimidation involved sentencing on a strangulation case (09-CF-1267) in which M.S. was the victim. (*Id.*). Mr. Salinas had already been convicted in 09-CF-1267, and his “trying to get them (V.G. and M.S.) to consider a better sentencing recommendation from Mr. Salinas is completely separate from any sort of sexual assault allegation.” (*Id.*).

The court⁵ said that it was “having a difficult time right now understanding how counts 4 and 5, misdemeanor intimidation of a victim, are immediately relevant.” (133:6; App. 122). The court asked the state how the evidence would come in if defense counsel “didn’t raise an inference as to motivation.” (133:7; App. 123). The state argued that it anticipated that the defense would challenge the delayed reporting of the alleged sexual assaults, and evidence of intimidation would be relevant. (*Id.*). In addition, the last sexual assault allegedly occurred on the day that Mr. Salinas was arrested on the strangulation charge. (*Id.*). The court then asked defense counsel why that evidence should not come in as other acts. (133:8; App. 124). Counsel replied, “Other acts

⁴ Mr. Salinas’ new attorney was not the one who argued against joinder.

⁵ The Honorable Mark Warpinski had recused himself from the proceedings, because he had imposed Mr. Salinas’ probation and conditions in 09-CF-1267. The case was then transferred to the Honorable Marc Hammer.

to what? How does – how does intimidating a witness relate to whether or not a sexual assault occurred?” (*Id.*). The court then advised defense counsel:

That doesn't necessarily mean once you pled it that she [the assistant district attorney] can't talk about it. She may be able to talk about it depending upon your cross. Even if you stay away from it on cross, depending upon how the evidence is presented, I would-- and I'm telling you today I anticipate she's going to request an other acts evidence ruling and this may fall into the admission of other acts when I run that three prong analysis in my brain. I can give the curative instruction so they don't convict in theory or base a conviction on other acts, but, boy, I think it goes to plan, scheme, intent basis. I think it's relevant. It meets both prongs of the relevance standard.

Is it prejudicial? Sure, it is. But is it overly prejudicial? I'm not prepared to conclude at this point in time it is. She hasn't filed a motion. She hasn't even asked about it. I put those words in her mouth, but I don't want you to be caught off guard. Wait a minute, Judge. I wasn't prepared for that. I entered a plea in the belief this would be excised from the trial. Don't assume that.

And to the extent that you were relying on that, then don't plead him, and she'll try those aspects too.

What I don't want is for you to enter a plea with a belief you got some type of commitment from the DA's Office or you're able to forecast what I'm going to do because that would be wrong.

She's ready to try the case. It sounds like she's ready to try all counts, so you can do with that what you want, and if you want to plea him, I'll take it on Tuesday. I don't know I'll take them -- well, if you want to plead, I'd like to try to take them as quickly as possible.

(133:8-10; App. 124-126).

The trial

Mr. Salinas was tried over two days, March 6 and 7, 2012. (134; 135). Mr. Salinas elected not to enter pleas to any of the joined counts. (134:6).

In the state's opening, it described in detail the events underlying 09-CF-1267, the conviction for which Mr. Salinas was alleged to have tried to influence the statements of M.S. and V.G. at sentencing.

You'll also hear from [M.S.] today. And where this story begins in terms of [M.S.], it really begins October 26, 2009, although it dates back further than that but that is the date that [M.S.] will tell you she came home from work. The defendant was angry, indicated he had hit [V.G.], that he was mad at her, wanted her to send her away. [M.G.] disagreed with this. They got into an argument. That is the day, ladies and gentlemen, that the defendant strangled [M.S.], that he did that in front of [V.G.], that in the kitchen she was struggling to get away from him, that she yelled to [V.G.] get out, call the police, that she was able to get away from the defendant, that she ran out herself, and when she turned around, what did she see? More violence and intimidation. She saw the defendant standing with his 4-year-old son, [A.], to one side and a knife to the other telling [A.], "Tell your mother to come back inside."

That is a day of horror but that is also a day that stopped what was happening to [V.G.]. That is the day that family got help. That is the day that [V.G.] stopped being assaulted from the defendant. And we also know that day is the last day he assaulted her.

(134:55-56).

Defense counsel's opening statement also addressed 09-CF-1267.

Mr. Salinas is not particularly a savory character. You're going to find that out. He was convicted of a crime. He had an argument with [V.G.] and [M.S.]. He was arrested and he ended up pleading no contest to that.

But that has nothing to do with what we're here in court today. Just because he might be a bad guy is really irrelevant.

....

Now, Mr. Salinas was convicted of that incident that the State was describing hitting [V.G.] and hitting [M.S.] and all sorts of stuff.

None of these [sexual assault] accusations came up until shortly before Mr. Salinas was to be let out of jail. The intimidation that the State is referring to is actually based on phone conversations that were recorded and that's the evidence is going to be presented on intimidation, not on intimidation about a sexual assault, but intimidation based on the prior conviction and trying to induce [V.G.] and [M.S.] to say something positive in court about Mr. Salinas.

(134:60-61).

The state's first witness was V.G. (134:63-121). She testified regarding the sexual assault allegations, adding detail to the allegations in the criminal complaint. (*Id.* at 68-87). V.G. testified that Mr. Salinas sexually assaulted her "more than like 40 or 50 times" over the two and a half years charged in the first count in the amended information. (*Id.* at 82-83). She said that he hit her on a number of those occasions, primarily during the latter year and a half of that time. (134:76-78).

V.G. then testified about the events underlying the second and third sexual-assault counts, charged as occurring on October 26, 2009. (134:83-87). Then, the state asked V.G. what she had observed happening between M.S. and Mr. Salinas that day, i.e., the incident for which Mr. Salinas had been convicted and sentenced in 09-CF-1267. (134:87-91).

Q: Okay. Did you get into the argument or see it then?

A: I heard it. I sat in my room and just listened for seemed like a long time.

Q: Now, at some point in time did you come out and see what was happening?

A: Yes. I heard him throw something or something being thrown in the living room and then I heard them both get up into the kitchen, and I saw the defendant and Mr. Salinas had both his hands around my mother's throat choking in the kitchen against the calendar against the door in the kitchen.

Q: You're now [in the] kitchen or are you in a different room?

A: In the kitchen. I'm just barely in the kitchen.

Q: And where are the defendant's hands?

A: Both his hands were on her throat, and they were right next to the door because I think she was about to leave.

Q: Okay. Where was your mom positioned? Is she standing away?

A: She was standing up against -- he had her against the calendar, which is against the door, so the

door was right -- she was next to the door just up against the wall.

Q: Did you say a calendar?

A: Yeah, there was a calendar behind her on the wall.

Q: Could she get away from him at that point?

A: No, she couldn't get away because he was strangling her, and I was trying to get him to stop and he wouldn't.

Q: What were you saying?

A: I told him to let go of her because he was hurting her, and he said, he said, "What? Are you going to make me?"

Q: Did he stop when you asked him to?

A: No, he didn't stop, and my mother told -- yelled at me to leave the house and go. And from there I don't know what happened because I had -- I was running down toward the school because I was going to go to the police center, but I changed direction and went across the street to my friend's house to have her mom give me the phone to call the police.

Q: Did you call the police?

A: Yes, I did.

Q: And did the police come on this occasion?

A: Yes, they did.

(134:88-89).

V.G. then testified that Mr. Salinas had spoken with her once on the phone from jail, and had called M.S.

repeatedly, trying to get V.G. to come to his sentencing (in 09-CF-1267) and say that Mr. Salinas had not struck V.G., and that V.G. and her brothers⁶ wanted Mr. Salinas to come home. (134:91-93). V.G. did attend the sentencing hearing, and told the court that “my family had gone through a lot for the time he had been gone and me and my brothers missed him and wanted him home.” (134:94).

On re-direct, the state returned to the strangulation incident, over defense counsel’s relevance objection. (134:114-115).

Q: The attorney asked you questions about the defendant hitting your mother. You saw far more than him hitting your mother on that October date; is that correct?

A: Yes.

Defense counsel: Objection, Your Honor. It's irrelevant.

The court: Overruled.

Q: In fact, you describe that he was, in fact, choking her when you were in the home and you saw that?

A: Yes, I saw that.

Q: And, in fact, he was convicted of strangulation as a result of that; is that correct?

A: Yes, that's true.

(134:114-115).

⁶ M.S. has two sons in addition to the son she has with Mr. Salinas. They also resided in the home. (134:66-67, 94).

Defense counsel cross-examined V.G. again, stating that he was “confused” on “one point.” (113:119). He asked V.G. to give a chronological account of October 26, 2009, the date of the last alleged assault and the strangulation incident. (*Id.*). V.G. gave her account of the day, from the time her mother left for work – 2:00 to 2:30 a.m. – through the argument between Mr. Salinas and M.S. at approximately 8:30 a.m. (134:119-120). V.G. remembered where she went after the alleged assault: first to her brother’s room and then to her own, where she slept until being awakened by the argument at about 8:30. (*Id.*). This time, V.G. did not mention observing strangulation, but said that she heard the sound of an object being thrown, and saw her mother pinned against the wall by Mr. Salinas. (*Id.* at 120). Defense counsel said that her statements provided clarification, and then asked where in the house the sexual assault occurred. (*Id.*). V.G. could not recall where the assault happened, because it occurred so long ago and “so often.” (134:120-121).

The state’s next witness was M.S., who described in detail the argument and the violence for which Mr. Salinas had been convicted in 09-CF-1267. (134:137-144). Defense counsel objected to the line of questioning, arguing that Mr. Salinas had already pled to the allegations: “Let’s move on. This is unfairly prejudicial. [The state]’s just bringing this up to try and say later on look how bad Luis Salinas is. He must have done it.” (*Id.* at 138). Counsel also said, “Not every gory detail is important for this.” (134:138-139). The court overruled the defense objection, finding the details relevant to the intimidation charges. (*Id.* at 139).

During her testimony, in response to the state’s questioning, M.S. provided a great deal of detail:

[Mr. Salinas] grabbed something made out of glass like a candle and then he hit my head with it.

(134:137-138).

Yes, [the object caused pain] because he hit me hard.

(134:138).

He stood up. He grabbed the computer chair and he said you have to decide. You are going to send [V.G.] to Mexico or you want to stay with your son, otherwise I'm going to kill you.

(134:139).

Yes, he ran after me [to the kitchen] and he tried to grab one of the knives, but he didn't grab it.

....

He grabbed my neck and he started to strangle me and then [V.G.] came out of the room when she heard we were fighting.

(134:140).

[Mr. Salinas choked M.S. with] both hands on my neck.

....

I ran to the door. I tried to close the door, but he stopped me right before that I could open the door.

....

...I just wanted us to leave the house. We were really afraid of him.

....

...His hair was loose so I grabbed -- I grabbed him from the hair and then I escaped.

(139:141).

[After M.S. and V.G. left the house], Luis was in the door, and he woke up the boy, and he asked the boy to call me.

....

[Mr. Salinas] was asking him, "Tell your mom to come back home. Ask her to come inside."

....

Yes, he had a knife [in his hand], but he was not pointing that knife to the boy.

....

He was asking me to come back inside the house and to ask [V.G.] to hang up the [neighbor's] phone, otherwise he was going to kill the boy and he was going to kill himself.

(134:143).

M.S. then recounted the jail phone calls she began receiving from Mr. Salinas, pressuring her to change her statements to police. (134:146-154).

Yeah, he said change the part where you said that I strangled you and also change the part where I said that I was going to kill you.

(134:147).

M.S. testified that Mr. Salinas wanted V.G. to change V.G.'s statement that he had struck her in the face. (134:148). M.S. also said that Mr. Salinas made threats:

He was saying all the time that he was going to take the boy away from me and that something bad was going to happen to us if I didn't do what he wanted me to do.

(134:148).

That he was going to kill us. He was going to kill me and my children.

(134:149).

He always used to threaten me about taking the boy away from me.

(134:150).

Yes, at the end [of the series of calls] he said that he was going to kill himself, that he didn't want to do anything without us.

(134:141).

M.S. concluded her direct testimony about the intimidation charges by saying that “he pressure[d] me to pressure [V.G.] so she could go to the courthouse and make him look good. But she did go because I was pressuring her.” (134:153).

On cross-examination, M.S. said that she did not communicate any telephone threats to V.G. (134:159). M.S. agreed that Mr. Salinas had told M.S. to offer V.G. “a phone or a phone card” to get V.G. to make a statement at sentencing. (134:159-160).

Later in the state’s case, an interpreter who had listened to several of the jail phone calls read excerpts from her translation.

“I thank you so much for having my son, Maria. But you really piss me off. You don't know what I'm able to do. You don't know what I have done or what I could do. You are treating me like a piece of shit. No, my darling, you don't know who I am. That is why you want to send

me to prison and you want me to go to hell. Fourteen years and six years for this and that and you think you're playing with a piece of shit. I told you long time ago don't call the cops on me because we're going – because they are going to take me seriously. And, look, you called the cops and all because of [V.G.]. I don't blame her or you either because – ”

(134:191).

“I'm telling you, man, I can never talk to you because, look, you better start thinking that one day I'm coming out. Daughter of your fucking mother, because you're making me tired of always trying to kiss your ass. You better straighten your stinking, your fucking stinky ass. I'm so fucking sick of it. And then they don't want me to kick your ass, man. If you hate me so much, why don't you let me fuck myself up? You never have the mouth when I was outside. I know you're fucking mouthy. I'm tired of your shit. If I get out, if I get out, you are going to be sorry, my darling. You better answer me right now and tell me what is it that you want to do. I don't want to be mean to you because you're the mother of my son.”

(134:191-192).

The primary witness for the defense was Mr. Salinas. He denied ever having sexual contact with V.G. (134:234). Mr. Salinas acknowledged that he had entered pleas and had been sentenced and served jail time for hitting V.G. and M.S. on October 26, 2009. (134:235). He also agreed that he “didn't treat [V.G.] and [M.S.] all that well at times.” (*Id.*). Mr. Salinas first learned of the sexual assault allegations on May 13 (2010). (134:237). According to him, he and M.S. would discuss V.G.'s upbringing, but M.S. did not relay any concern about Mr. Salinas' treatment of V.G. (134:238).

On October 26, 2009, Mr. Salinas was very ill, with the flu. (134:240). He said that as M.S. was preparing to go to work, V.G. was taking too long to get ready to accompany M.S., and M.S. left without V.G. (*Id.*). This led to an argument between Mr. Salinas and V.G., and Mr. Salinas “backhand[ed]” V.G. (*Id.*). He said that he did so because during the argument, V.G. had said that if Mr. Salinas’ son had not been born, V.G. would not have to follow Mr. Salinas’ rules and discipline. (*Id.*). Mr. Salinas believed that V.G. was “wishing bad” on his son, i.e. that he had never been born. (*Id.*). Mr. Salinas admitted that he “lost it” then, because he was sick, and sick of V.G. (134:241).

When M.S. returned from work, Mr. Salinas said that he was “really tired” of V.G., and if M.S. did not do something about the situation, Mr. Salinas would leave M.S. and take his son with him. (134:241). That was the “bad thing” that was going to happen: that he would take their son with him. (134:242). Mr. Salinas said that the object that he threw was a Vicks inhaler. (134:241). Shortly thereafter, “everything turned into chaos[.]” (134:242).

Mr. Salinas testified that he never threatened V.G. to change her statement before sentencing. (134:244). He said that M.S. introduced the idea of buying V.G. a phone card to come to court. (*Id.*). At the conclusion of his direct examination, Mr. Salinas said that “he didn’t do it and that me and [V.G.] never got along.” (134:245).

On cross-examination, Mr. Salinas conceded that he had “smack[ed] [V.G.] in the mouth” when V.G. would yell at M.S. (134:246). He also said that in the seven and a half to eight years that he had lived with M.S., he had hit her “[t]wo or three times.” (134:247). He had taken their son out of the

house for a week and a half, but M.S. visited their son during that period. (134:250-251).

Mr. Salinas agreed that he had made the jail phone calls, and that he had said the things that were read to the jury, though there was additional conversation, not just the angry remarks. (134:252-253). He also said that one series of calls was made because their son was supposed to be taken to Children's Hospital in Milwaukee County. (134:255).

Mr. Salinas denied each of the sexual assault allegations made by V.G. (134:256-258). Defense counsel asked for a directed verdict, and the oral motion was denied. (134:262).

Evidence closed, the trial concluded the following day. (134:265; 135). The state moved to amend the information with respect to the intimidation charges to conform to the evidence. (135:266). Over a defense objection, the court permitted the state to expand the charging period from April 15-19, 2010, to April 15-May 11, 2010. (135:267; 77; App. 127-128).

In closing, the state recounted the testimonial evidence, and returned again to the facts of 09-CF-1267.

[V.G.] waits and she goes out and she sees the defendant choking her mother and she's yelling. Her mother is yelling "get out, get out." She's able to go to the front door. Her mother is able to get away from the defendant and go out the side.

And, ladies and gentlemen, I would submit at this point the defendant is very concerned. To this point he's been able to keep them from calling the police. He's been able to intimidate them, use threats, use violence to make sure the police don't get involved. But this time they're out of the house. And what does he do in a last [d]itch

effort and desperation? He takes a knife and he takes his little boy, the little boy he claims to love more than anything. He has a knife in one hand and he's telling [M.S.] get back in the house. He's telling the little boy, "Tell your mother to get back in the house or I'm going to kill myself and I'm going to kill the boy."

(135:302-303).

The state also reiterated some Mr. Salinas' remarks to M.S. from the recorded jail calls.

And, ladies and gentlemen, you heard some of those phone calls. "[M.S.], I thank so you much for having my son but really you piss me off. And you don't know what I'm able to do. You don't know what I have done or what I could do and you are treating me like a piece of shit."

In another conversation, "I'm telling you, man, I cannot ever talk to you because, look, you better start thinking that one day I'm getting out, daughter of your fucking mother, because you are making me tired of always trying to kiss your ass. You better straighten your fucking, stinky ass."

And then, finally, "I'm tired of your shit. If I get out, you're going to be sorry, my darling. You better answer me right now and tell me what is it you want to do?"

There can be no doubt that he used threats and intimidation. He did this throughout the relationship and he did this in the time period leading up to his sentencing.

(135:304).

...Maria often used the term "he forced me." And I asked her a couple of times: "What does 'force' mean to you?" She said, "He would threaten to kill me. He would

threaten to have me deported. He threatened to take my children away."

(135:305-306).

Defense counsel noted the state's reliance on the strangulation case's facts with respect to the intimidation charges.

And I want to just before I go into it any further there's some main things I hope you take with you. The very vivid recollection of what has been gone over time and again during this trial, something that is on trial, a battery and a strangulation of [M.S.]. Mr. Salinas has pled guilty to that and he was sent to jail for that, okay? That sort of memory that [M.S.] and [V.G.] repeated over and over was very vivid. But that's not what we're here to decide today.

(135:309).

I want to start with intimidation of the victim charge. Again, most of the testimony was regarding things that Mr. Salinas was already punished for. He paid his penance to society. And it was just used to kind of bolster what the real issue with the intimidation of the victim charge is about, which is whether while he was in jail he tried to call them and tell them to change his statement. That's the only thing that intimidation of a victim allegation is about, not what happened at that house. The fact you know it happened, he pled guilty.

(135:309-310).

The jury deliberated for a little over two and a half hours and returned guilty verdicts on all five counts. (135:335, 347-348). On May 14, 2012, Mr. Salinas was sentenced to an aggregate 70 years of imprisonment,

including 40 years of initial confinement. (136:18-19; 91; 92; App. 129-132).

This appeal follows.

ARGUMENT

The Circuit Court Erred When It Joined Two Sets of Charges for Trial, Where A) One Set of Three Charges (10-CF-542) Alleged Multiple Sexual Assaults of V.G. by Luis Salinas; B) the Other Set of Charges (10-CM-1571) Alleged Victim Intimidation of V.G. and Her Mother, M.S., by Mr. Salinas, With Whom They Both Lived; C) the Alleged Intimidation of V.G. and M.S. Predated V.G.'S Accusations of Sexual Assault; D) the Alleged Intimidation Related to Sentencing in a *Separate* Domestic Abuse Case (09-CF-1267); And E) 09-CF-1267 Included Allegations That a Knife-Wielding Mr. Salinas Had Threatened to Kill M.S. and Their Young Son, Who Was Standing Next to Mr. Salinas At The Time.

A. Standard of review and summary of argument.

Whether the initial joinder of offenses is proper is a question of law that this court reviews without deference to the trial court, though the statute is construed broadly in favor of initial joinder. *State v. Locke*, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). If the offenses do not meet the criteria for joinder, it is presumed that the defendant will be prejudiced by a joint trial. *State v. Leach*, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). The presumption can be rebutted, and misjoinder found harmless, on appeal. *Id.*

Under Wis. Stat. § 971.12(1), “Two or more crimes may be charged in the same complaint, information or

indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.”

By moving to join 10-CM-1571 and 10-CF-542, the state was effectively moving to join 09-CF-1267 as well. Though that case was long closed, in order to find that M.S. and V.G. were intimidated victims, the jury first had to find that M.S. and V.G. were victims. Thus, the jury had to find that M.S. and V.G. had been strangled and battered, respectively, in 09-CF-1267. So, not only did the jury hear the disturbing jail calls and threats to M.S., the jury also heard the details of the violence in 09-CF-1267, including the horrifying accusation that Mr. Salinas, holding a knife, threatened to kill his and M.S.’s young son.

This extremely prejudicial information – Mr. Salinas’ treatment of M.S., including threats to kill her and their son – was irrelevant to the sexual assault allegations made by V.G. And the prejudicial effect was not negated by overwhelming evidence supporting the sexual assault charges. There was no physical evidence, and no third-party witnesses to any assaults. V.G. testified that she was sexually assaulted; Mr. Salinas denied the accusations. A jury trying to decide who is telling the truth is not likely to credit a defendant who was said to be willing to kill his own child. That is why the improper joinder of 10-CF-542 and 10-CM-1571, which necessarily included 09-CF-1267, was not just presumptively but demonstrably prejudicial.

Some of the counts in the three cases would or could have been properly joined, e.g., the two misdemeanor counts of victim intimidation. The jail phone calls comprised general

threats to M.S. and resulted in M.S. providing a phone card to V.G. after V.G. made a favorable statement at Mr. Salinas' sentencing in 09-CF-1267. Those allegations involve a number of transactions constituting a common scheme or plan. The evidence for both counts is inextricably intertwined, so it would be proper for a jury to decide both counts at a single trial. In addition, had the complaint in 10-CM-1571 charged that the phone calls were made prior to conviction in 09-CF-1267, then the intimidation charges would have been properly joined with the underlying 09-CF-1267 charges. *See State v. Bettinger*, 100 Wis. 2d 691, 698, 303 N.W.2d 585 (1981) (evidence of criminal acts of an accused which are intended to avoid punishment are admissible to prove consciousness of guilt of the principal charge).

However, the intimidation charges were not properly joined with the sexual assault charges in this case, and the joinder harmed the defense substantially. The jury not only heard the threatening jail calls; it also heard the details of the violence against M.S. which led to Mr. Salinas' convictions in 09-CF-1267. In addition to the physical violence, M.S. described *Mr. Salinas carrying a knife and threatening to kill his very young son*.

The timelines of the three cases at issue overlap, with some complexity, and the same three individuals are involved in each. But that does not mean that the evidence supporting the intimidation charges overlaps significantly with the evidence supporting the sexual assault charges. Indeed, the linkage between the two sets of allegations is minimal: V.G. and Mr. Salinas agree that he struck V.G. early in the morning on October 26, 2009. (134:86, 240). Later that day, that strike led to an argument between Mr. Salinas and M.S. The argument escalated, and Mr. Salinas was charged with several counts of domestic violence. (134:88-89, 136-144,

241-242). Eventually, V.G. said that Mr. Salinas had hit her because she had tried to resist his sexual advances. (1:2; App. 102). That is the sole fact that connects one of the sexual assault charges to the domestic violence allegations in 09-CF-1267, which in turn is connected to the intimidation charges. However, that minimal, indirect connection does not satisfy the statutory criteria for joinder.

The phone calls made by Mr. Salinas from April 15, 2010, through May 11, 2010, regarding 09-CF-1267, and the sexual assault allegations, were not “of the same or similar character, based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan,” as required by Wis. Stat. § 971.12(1). Therefore, they should not have been joined.

- B. The intimidation charges and the sexual assault charges were not “of the same or similar character, based on the same act or transaction.”

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 phone calls and the most recent alleged sexual assault were about six months apart, which is a relatively short period of time. (77; App. 127-128). However, phone calls threatening or otherwise cajoling M.S., resulting in V.G. giving a positive statement at sentencing and receiving a phone card, are not the same type of offense as sexual assault. Further, they are not based on the same act or transaction. There was no allegation that the recorded calls referenced any sexual assaults. Though Mr. Salinas said insulting and threatening things to M.S. in the recorded call excerpts read to the jury, none of those comments was

directed at V.G. In one excerpt read to the jury, Mr. Salinas even said that he did not “blame” V.G. or M.S. (134:191).

The jury found Mr. Salinas guilty on all counts, including one count of sexual assault by use or threat of force. But the evidence supporting a finding of the use or threat of force did not come from the phone calls; it came from V.G.’s testimony: Mr. Salinas hit her, as even he conceded. (134:86, 240).

C. The two sets of charges were not based “on 2 or more acts or transactions connected together.”

There was no connection between the jail phone calls and the sexual assault allegations. The phone calls concerned sentencing in 09-CF-1267. (143:2-6; App. 105-109). The acts underlying 09-CF-1267 occurred after the most recent alleged sexual assault. (1:2; 143:4-5; App. 102, 107-108). 09-CF-1267 had concluded before the sexual assault allegations were made. (1; 143:5; App. 101-103, 108). The phone calls were not discovered until the state was investigating the sex charges. (143:2; App. 105).

D. The intimidation arising from 09-CF-1267, charged in 10-CM-1571, and the sexual assault allegations in 10-CF-542, did not constitute “parts of a common scheme or plan.”

Mr. Salinas was not charged with victim intimidation related to the sexual assault allegations. And, Mr. Salinas’ specific, lethal threats to M.S. were of an entirely different character than any attempts to manipulate V.G. to make a statement at sentencing in 09-CF-1267. V.G. did not allege that Mr. Salinas had threatened to kill her. M.S. testified that Mr. Salinas had made homicidal and suicidal threats to M.S., once while standing next to their son and holding a knife.

There were no recorded jail calls in which Mr. Salinas was berating or threatening V.G. as he had M.S. Indeed, M.S. testified that she did not relay Mr. Salinas' telephone threats to V.G. (134:159). The homicidal threats to M.S. were horrifying, but they were not among the accusations in the sexual assault complaint, and were therefore not part of a common scheme or plan across the joined cases.

Part of the inducement for V.G. to say something good about Mr. Salinas at sentencing was apparently the receipt of a phone card. (134:159-160). This sort of buying influence was not alleged as a modus operandi in the sexual assault case, i.e., it was not a scheme or plan employed in both the intimidation and sexual assault cases. V.G. did not tell police or the jury that Mr. Salinas had ever offered gifts to ensure V.G.'s silence with respect to the sexual assault allegations.

E. The prejudice due to the joinder of the sexual assault and intimidation charges is self-evident.

Any jury hearing that a defendant threatened to kill his six-year-old son would rationally conclude that the defendant was a bad person with a character for unthinkable violence. The state recounted the knife incident in both its opening statement and closing argument. The state also read the threatening excerpts from the jail calls in closing, arguing that "There can be no doubt that [Mr. Salinas] used threats and intimidation. He did this throughout the relationship and he did this in the time period leading up to his sentencing." (134:304).

The jury asked to read the phone call transcripts during deliberation (135:344), and the transcripts were provided (135:346). The phone calls were clearly important to the jurors. They were also unrelated to the sexual assault allegations. That is why Mr. Salinas' counsel argued against

joinder (121:2-3; App. 113-114), argued that the intimidation allegations should not be admitted as other acts (133:8; App. 124), and objected to inflammatory details related to 09-CF-1267 and intimidation when they were sought from the state's witnesses (134:114-115, 138-139, 148-149, 156-157, 254). The trial court was initially skeptical about the earlier joinder ruling made by a different judge. (133:6-7; App. 122-123). That skepticism was well-founded.

The two counts of intimidation could be properly tried together. The intimidation counts could also have been joined with the charges in 09-CF-1267, had the phone calls been sought before the 09-CF-1267 convictions. But the intimidation counts were not properly joined with the sexual assault allegations, which were not made until after 09-CF-1267 had concluded. The most salient connection between the horrific intimidation allegations and the sexual assault allegations was that the former provided evidence that Mr. Salinas was a bad person, with a penchant for violence. For this reason, the misjoinder was not harmless, and Mr. Salinas should be granted new, separate trials: one for the sexual assault counts, and one for the intimidation counts related to 09-CF-1267.

CONCLUSION

For the reasons set forth above, Luis Salinas respectfully requests that this court vacate his judgments of conviction and remand the case to the circuit court for separate trials: one for the two misdemeanor intimidation counts, and one for the three sexual assault counts.

Dated this 10th day of June, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,495 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 10th day of June, 2014.

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APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 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 of 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 10th day of June, 2014.

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