STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP2899-CR
Case No. 2014AP2900-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC CHRISTOPHER BELL,

Defendant-Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS R. CIMPL AND THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

In these consolidated appeals, defendant-appellant Eric Christopher Bell has appealed from judgments convicting him in two Milwaukee County cases that were joined for trial of multiple sex crimes against five children.[1]

Case no. 2011CF810. In the criminal complaint filed in Milwaukee County case no. 2011CF810, Bell, who was thirty-nine years old, was charged with two counts of second-degree sexual assault of a child under the age of sixteen (2899:2:1).[2] The victims of the alleged sexual assaults were thirteen-year-old L.B. and thirteen-year-old S.L. (2899:2:1-2).

L.B. The complaint alleged that on January 19, 2011, Bell drove L.B. to his residence at 8623 West Fond du Lac Avenue (*id.*). Once there, L.B. was pressured by a number of people who were present to have sex with Bell (*id.*). L.B. did not want to, but was "very frightened of what would happen to her if she did not agree" (*id.*).

Bell "sent for [L.B.] to come to his bedroom," and "[o]nce inside, Bell told her to remove her pants" (*id.*). After she complied, Bell told her to lie on the bed (2899:2:1-2). Bell then lay top of her and put his penis in her vagina, causing her extreme pain (2899:2:2). She told Bell that it hurt really badly, but he told her that he "couldn't stop

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[1]The Honorable Dennis R. Cimpl presided at the hearing on the State's joinder motion. The Honorable Rebecca F. Dallet presided at Bell's trial and sentencing.

[2]The State will cite to the record in case no. 2011CF810, appeal no. 2014AP2899-CR, as "2899" and to the record in case no. 2011CF1332, appeal no. 2014AP2900CR, as "2900."

until he nutted" (*id.*). After Bell ejaculated and got off of her, L.B. was bleeding profusely from her vagina (*id.*). She subsequently identified Bell from a photo array (*id.*).

S.L. The criminal complaint alleged that S.L. had been pressured to join the Vice Lords gang by some kids at school and that she agreed to join (*id.*). A friend told her that she needed to be "fucked in" with the "Chief" (*id.*).

On February 4, 2011, a friend took her to the Fond du Lac Avenue residence (*id.*). She was introduced to Bell, who was identified as the Chief (*id.*). S.L. new that his real name was Eric Bell because he told her to look him up on Facebook (*id.*).

Bell took S.L. into a bedroom and told her that her choice was either to have sexual intercourse with him for twenty minutes or to have sex with four different men, including him, for five minutes each (*id.*). S.L. "cho[]se" to have sex just with Bell (*id.*).

Bell told her to remove her clothes and lie on the bed (*id.*). He then got on top of her and put his penis into her vagina (*id.*). He also fondled and licked her breasts and gave her a hickey (*id.*). S.L. later identified Bell from a photo array (*id.*).

Case no. 2011CF1332. About five weeks after it filed the criminal complaint in case no. 2011CF810, the State filed a new criminal complaint against Bell in case no. 2011CF1332 (2899:2:2; 2900:2:4). Bell was charged in the new case with eight sex crime counts against his daughters M.G.B., T.S.B., and M.B. (2900:2:1-3).

M.G.B. The complaint alleged three counts with respect to M.G.B. (called "MB1" in Bell's

brief): sexual assault of a child under thirteen years of age between August 1, 2005, and June 30, 2006 (Count 1); repeated sexual assault of the same child between July 1, 2006, and September 19, 2009 (Count 2); and incest with a child in August, 2010 (Count 3) (2900:2:1).

M.G.B. reported that Bell began sexually molesting her when she was twelve years old and the family lived on North 29th Street (2900:2:3). The first time it happened, she was at home in her bedroom (*id.*). Bell started touching her vagina over her clothes and then told her to remove her shorts (*id.*). When she told him "no," he removed them (*id.*).

Bell pulled his pants down and got on top of her (*id.*). She tried to push him off, but he moved her hands away and told her, "Just do it; every female in my family went through it" (*id.*). He put on a condom and inserted his penis into her vagina (*id.*). M.G.B. was hurt and she cried (*id.*). Afterward, Bell told her that everything was O.K. (*id.*).

The second time Bell assaulted M.G.B. also was at the 29th Street home (*id.*). Bell began by putting his hand inside her sweatpants and fondling her vagina (*id.*). He pulled her sweatpants down and told her to lie on the floor (*id.*). After she did, Bell lay on top of her and put his penis in her vagina (*id.*).

M.G.B. reported that Bell had penis-to-vagina sexual intercourse with her between forty and fifty times, both at the N. 29th Street home and continuing after they moved to the Fond du Lac Avenue residence (*id.*). The last time was in August, 2010, at their Fond du Lac Avenue home (*id.*).

T.S.B. The criminal complaint alleged three counts involving T.S.B.: sexual assault of a child under thirteen years of age in June, 2006 (Count 4); repeated sexual assault of the same child between July 1, 2006, and April 23, 2010 (Count 5); and incest with a child in September, 2010 (Count 6) (2900:2:1-2).

T.S.B. reported that Bell's sexual abuse began when she was nine years old and they were living in Illinois (2900:2:3). According to T.S.B., they moved to the 29th Street address in June, 2006 (*id.*). The first day they were at the new home, Bell came into her bedroom, put a towel on the floor, and told T.S.B. to lie on it (*id.*). Bell got on top of her and had penis-to-vagina sexual intercourse (*id.*).

According to T.S.B., Bell had penis-to-vagina sex with her more than thirty times in the 29th Street house, always when her mother was at work or asleep (*id.*). The last occasion was in September, 2010, at the Fond du Lac Avenue residence (*id.*). In that incident, she was asleep when Bell climbed on top of her, putting his penis into her vagina (*id.*).

M.B. The criminal complaint alleged two counts involving M.B. (called "MB2" in Bell's brief): repeated sexual assault of the same child between June 13, 2005, and January 31, 2010 (Count 7) and second-degree sexual assault of a child under the age of sixteen in spring of 2010 (Count 8) (2900:2:2).

M.B. reported that between her ninth birthday and into early January, 2010, Bell engaged in numerous acts of penis-to-vagina intercourse with her, both at the 29th Street and Fond du Lac Avenue residences (2900:2:3). Bell

first started touching her vagina under her clothes, telling her not to say anything because he could get into trouble (*id.*). Later, when she was still nine years old, she was home from school because of her allergies (*id.*). Bell came into her bedroom, put a blindfold on her, and told her to walk into the living room, which she did (*id.*) Bell came up behind her and touched her vagina under her clothes, again telling her not to tell anyone (*id.*). He then removed the blindfold, pulled her pants and panties down, and had penis-to-vagina intercourse with her (*id.*).

M.B. said that this sexual abuse happened often (*id.*). In spring of 2010, after she got in trouble at school, Bell told her that he was going to handle it, not her mother (*id.*). He pulled down her pants and had penis-to-vagina intercourse with her (*id.*).

M.B. became pregnant and had an abortion in December, 2009, or January, 2010 (*id.*). Bell was the only person who had put his penis into her vagina and had done so between ten and twenty times before the abortion (*id.*).

Joinder motion. About three weeks after filing the second complaint, the State filed a motion to join the two cases for trial (2899:7:1-5; 2900:6:1-5). The State asserted that joinder was proper under Wis. Stat. §§ 971.12(1) and (4) because the charged crimes were "of the same or similar character" and exhibited a similar modus operandi (2900:6:2-3). The State noted that the charges were similar in nature because they involved child sexual assaults involving "a child over whom the defendant has some level of authority, by virtue of being their father, or 'the Chief', the only adult in his house" (2900:6:3). The State also noted that "with both the victims in

case ending 810, as well as with [T.S.B.]" in case 1332, "the defendant had the victims lay down on a towel that he placed on the floor prior to assaulting them" (2900:2:2). The State pointed out that Bell "made verbal comments to all five victim[s] that made each of them believe that they had no choice in the matter of being required to have sex with him" (*id.*) The State's motion also observed that the victims were "extremely close in age" and that "[m]any of the charges actually occurred in the exact same location" (2900:6:4).

The State further noted that "for the victims in case ending 810, the other victims were present at the time of the assaults" and that three of the victims attend the same school and "all three know the girl who brought the two victims over from school" (*id.*). The State argued that "[t]he time periods are overlapping, and clearly demonstrate a continuing course of conduct wherein the defendant uses female children within a certain age range to whom he has access to further his sexual gratification by engaging in sexual intercourse with them" (*id.*).

The State argued that in addition to establishing a continuing course of conduct and modus operandi, "the acts are also indicative of his motive and intent in each case," which are permissible purposes for admissibility under Wis. Stat. § 904.04 (*id.*). The State also noted that "there is a cross-over of witnesses" and that "[p]ermitting joinder would result in the State not having to call the defendant's three daughters as fact witnesses or as 'other acts' witnesses in the case ending 810" (*id.*). The State argued that two trials would be "extremely traumatizing for these girls" and would "waste judicial time and resources," noting that "the investigating officers are the same from one case to the next" (*id.*).

In his written opposition to the joinder motion, Bell argued that there was a danger of unfair prejudice if the cases were joined (2899:8:1; 2900:7:1). Bell argued that he "anticipate[d] that the State would call separate sets of witnesses" in the two cases, that the count involving S.L. alleged that the sexual assault occurred during a gang initiation while the counts in the second case involve three different children and two counts of incest with children, and that "[t]he locations alleged in the two complaints vary between 3360 North 29th Street, and 8623 West Fond Du Lac Avenue" (2900:7:2). Bell also argued that "the other alleged acts would have an unfairly prejudicial effect when the jury considers the charges separately during deliberation" (2900:7:3).

At a hearing on the State's motion, the trial court ordered that the cases be joined for trial (2900:46:9; A-Ap. 108). The court noted that all of the alleged assaults took place at Bell's home, that all of the victims were close in age, and that each of the cases involved penis-to-vagina intercourse (2900:46:8; A-Ap. 107). It also noted that one of Bell's daughters, a victim in the second case, was a classmate of the two girls in the 810 case and that his daughters were fact witnesses in that case (*id.*).

The court found that the daughters' testimony was offered "to show the same plan of the defendant, to put everything in context" and that their testimony was "certainly relevant" in the 810 case (*id.*). The court said that if it did not join the cases, "arguably his daughters are going to have to testify in two cases" and that one reason for joining the cases was to avoid that trauma (2900:46:8-9; A-Ap. 107-08).

The court said that "[w]hat it really comes down to is the prejudicial element" (2900:46:9; A-Ap. 108). The other-acts evidence would be prejudicial, the court agreed, but not unfairly prejudicial (*id.*). The court said that it would address prejudice by instructing the jury that it must consider each of the cases and all of the counts separately (*id.*).

Following a jury trial, Bell was convicted on all ten counts (2899:11:1, 12:1, 18:1; 2900:15:1, 16:1, 17:1, 18:1, 19:1, 20:1, 21:1, 22:1, 30:1).

ARGUMENT

The only issue that Bell raises on appeal is whether the trial court erred when it ordered the two cases joined for trial. Because the two cases were properly joined under Wis. Stat. § 971.12 and Bell was not prejudiced by the joinder, this court should affirm the judgments of conviction.

I. GOVERNING LAW AND STANDARD OF REVIEW.

Under Wis. Stat. § 971.12(4), charges in two or more complaints may be joined for trial if the charged crimes could have been joined in a single complaint.

> **(4)** TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes . . . could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

Wis. Stat. § 971.12(4) (2011-12).[3] The standard for joinder of charges in a single complaint is found in Wis. Stat. § 971.12(1):

> **(1)** JOINDER OF CRIMES. 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 . . . 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.

Wis. Stat. § 971.12(1).

Crimes are of the "same or similar character" when they are the same types of offenses occurring over a relatively short period of time and the evidence of each overlaps. *State v. Hamm*, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Crimes are "connected together or constitut[e] parts of a common scheme or plan" when they "have a common factor or factors of substantial factual importance, *e.g.,* time, place or *modus operandi.*" *Francis v. State*, 86 Wis. 2d 554, 560, 273 N.W.2d 310 (1979).

"Whether crimes are properly joined in a complaint is a question of law." *State v. Bellows,* 218 Wis. 2d 614, 622, 582 N.W.2d 53 (Ct. App. 1998). "The joinder statute is to be broadly construed in favor of initial joinder." *Id.*; *see also Francis*, 86 Wis. 2d at 559 ("This court has historically favored the joinder of charges in a single information.").

[3]All statutory references are to the 2011-12 version of the statutes.

"Under Wisconsin law, the proper joinder of criminal offenses is presumptively non-prejudicial." *State v. Prescott*, 2012 WI App 136, ¶13, 345 Wis. 2d 313, 825 N.W.2d 515. "In order to rebut that presumption, the defendant must show substantial prejudice to his defense; some prejudice is insufficient." *Id.*

"[I]f 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 state may rebut the presumption on appeal by demonstrating the defendant has not been prejudiced by a joint trial." *Id*.

II. THE TWO CASES WERE PROPERLY JOINED.

In case no. 2011CF810, Bell was charged with two counts of second-degree sexual assault of a child for having sexual intercourse with L.B. (Count 1) and S.L. (Count 2) when they were thirteen years old (2899:2:1-2). In case no. 2011CF1332, Bell was charged with having sexual intercourse with M.G.B. when she was eleven or twelve years old (Count 1), repeated acts of sexual intercourse with M.G.B. when she was between twelve and fifteen years old (Count 2), sexual intercourse with M.G.B. when she was sixteen years old (Count 3), sexual intercourse with T.S.B. when she was twelve years old (Count 4), repeated acts of sexual intercourse with T.S.B. when she was between twelve and fifteen years old (Count 5), sexual intercourse with T.S.B. when she was sixteen years old (Count 6), repeated acts of sexual intercourse with M.B. when she was between nine and thirteen years old (Count 7), and sexual

intercourse with M.B. when she was fourteen years old (Count 8) (2900:2:1-3).

The following factors support the conclusion that joinder of the two cases against Bell was proper.

Similarity of the acts. Bell argues that "[w]hile there were charges of second degree sexual assault in both of Bell's cases, that is not enough to justify joinder" because joinder may not be based solely on "violations of the same statute." Bell's brief at 9. But there were more similarities between the two cases than simply the statutes violated.

▸ All of the counts in both cases alleged that Bell had penis-to-vagina sexual intercourse with the victims (2899:2:1-2; 2900:2:1-3).

▸ The victims were girls of a similar age. In case no. 2011CF810, both of the girls were thirteen years old (2899:2:1-2). In case no. 2011CF1332, Bell was charged with having sexual intercourse with M.G.B. when she was between the ages of eleven or twelve and sixteen (Count 1), with T.S.B. between the ages of twelve and sixteen, and with M.B. between the ages of nine and fourteen (2900:2:1-3).

▸ There were similarities in the manner in which Bell had sexual intercourse with the victims. In case no. 2011CF810, L.B. and S.L., testified that Bell had them lie on a towel before he had penis-to-vagina intercourse with them (2900:66:97-98; 67:72-74). In case no. 2011CF1332, T.S.B. told a police officer that Bell had her lie on

a towel before having penis-to-vagina sexual intercourse (2900:68:36).[4]

All of the victims reported that Bell used a condom (51:34 (M.B.); 66:41 (M.G.B.); 66:98 (L.B.); 67:67 (S.L.); 68:36 (T.S.B.)). That similarity was significant because police found unopened condom packages in Bell's jacket (53:39-40) and the woman with whom Bell and his daughters were living (and who is M.B. and M.G.B.'s mother), testified that she and Bell did not use condoms (66:49-52, 69).

► The sexual assaults occurred in situations in which Bell was in a position of power in which he was able to exert psychological control over the victims. In case no. 2011CF810, Bell was the "Chief" with whom the girls had sex as part of their gang initiation (2899:2; 2900:67:54-57). In case no. 2011CF1332, Bell told M.G.B. that she should submit to sex by telling her, "Just do it; every female in my family went through it" (2900:2:3).

Same location. One of the common factors that makes joinder of separate charges appropriate is that they are "closely related in terms of . . . place." *State v. Hall*, 103 Wis. 2d 125, 139, 307 N.W.2d 289 (1981). In both of these cases, all of the counts alleged that Bell sexually assaulted the children in his home (2899:2:1-2; 2900:2:1-3).

[4]T.S.B.'s statements to the officer were prior inconsistent statements introduced after she testified that everything she told the officer was untrue and that she did not remember telling the officer about the towel (2900:52:87, 101).

Closeness in time. In case no. 2011CF810, Bell was charged with having sexual intercourse with L.B. and S.L. on January 19, 2011, and February 4, 2011, respectively (2899:2:1). In case no. 2011CF1332, Bell was charged with last having sexual intercourse with M.G.B. in August, 2010, with T.S.B. in September, 2010, and with M.B. in the spring of 2010 (2900:2:1-2). The time between the last charged act of sexual intercourse in case no. 2011CF1332 and the first charged act of sexual intercourse in case no. 2011CF810 thus was about four months.

In *State v. Locke*, 177 Wis. 2d 590, 502 N.W.2d 891 (Ct. App. 1993), the court held that charges that the defendant sexually assault one child in May, 1989, and another child in May, 1991, occurred over a "relatively short period of time." *Id*. at 595-96. In *Hamm*, the court concluded that the "relatively short period of time" factor was satisfied when fifteen to eighteen months separated the charged sexual assaults. *See Hamm*, 146 Wis. 2d at 138-40. *Locke* and *Hamm* support the conclusion that joinder was appropriate here because there was a "relatively short period of time" between the offenses in the two cases.

Linked investigations. This court held in *State v. Linton*, 2010 WI App 129, 329 Wis. 2d 687, 791 N.W.2d 222, that one reason joinder was proper in that case was that the investigation of one of the cases led the police to identify the defendant as the perpetrator in the other case. *See id*., ¶17. That happened here as well. In the course of their investigation of the assault on S.L., Milwaukee police officers spoke with Bell's daughters (2900:68:9-10). During those conversations, M.G.B., M.B., and T.S.B. disclosed

that Bell had sexually assaulted them (2900:68:16-18, 45).

Bell attempts to distinguish this case from *Linton* because "[i]n *Linton*, identity was an issue. In Bell's cases, it was not." Bell's brief at 13. But in closing argument, defense counsel suggested that someone other than Bell had sex with S.L. during the gathering at Bell's home at which S.L. said he sexually assaulted her:

> Even by the state's testimony, even by their version, my client doesn't go into the room and smoke with them. He doesn't hang out with them. I submit to you Mr. Microwave, Mr. Corn, Mr. whoever these people were, were either just horny high school kids having sex, horny high school kids following around, smoking marijuana together.

(56:63.)

Bell's arguments against joinder emphasize the differences between the two cases, focusing on the fact that the charges in case 2011CF1332 involve multiple sexual assaults of his children while those in case 2011CF810 involve one-time sexual assaults of victims unrelated to Bell as part of a gang initiation. *See* Bell's brief at 10. If the joinder statute were narrowly construed against joinder, those differences would have greater significance. But because "[t]he joinder statute is to be broadly construed in favor of initial joinder," *Bellows,* 218 Wis. 2d at 622, the similarities between the conduct charged in the two cases outweigh the differences and should lead this court to conclude that the trial court properly joined the cases for trial.

III. BELL WAS NOT PREJUDICED BY THE JOINDER.

Bell argues that even if the cases were properly joined under Wis. Stat. § 971.12, he was "substantially prejudiced" by the joinder. Bell's brief at 15. This court should reject that claim because he has not shown that the trial court erroneously exercised its discretion when it found that Bell would not be unfairly prejudiced by joining the cases (2900:46:9; A-Ap. 108). *See Locke,* 177 Wis. 2d at 597 (whether joinder is likely to result in prejudice to the defendant is left to the discretion of the trial court, and the court of appeals will find an erroneous exercise of discretion only if the defendant can establish that failure to sever the counts caused substantial prejudice).

When evidence on the charges would be admissible in separate trials, the risk of prejudice will not be significant. *See Hall*, 103 Wis. 2d at 141-42. The test for prejudicial joinder thus parallels the analysis of the admissibility of other-acts evidence. *See Locke*, 177 Wis. 2d at 597. Bell argues that he was prejudiced because the criteria for admitting other-acts evidence established in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), were not met. *See* Bell's brief at 16-17.

In *Sullivan*, the supreme court established a three-step analysis for the admissibility of other-acts evidence:

> 1) Is the other-acts evidence offered for an acceptable purpose under Wis. Stat. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident?

2) Is the other-acts evidence relevant under Wis. Stat. § 904.01, that is, does it relate to a fact or issue of consequence to the determination of the action and does it have probative value?

3) Is the probative value of the other-acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence under Wis. Stat. § 904.03?

See Sullivan, 216 Wis. 2d at 772-73.

Sullivan provides "the general framework that governs the admissibility of other crimes evidence in all Wisconsin cases." *State v. Davidson*, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606. "However, alongside this general framework, there also exists in Wisconsin law the longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" *Id*. "[I]n sexual assault cases, especially those involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial." *Id*., ¶51. "The effect of the rule is to permit the more liberal admission of other crimes evidence in sex crime cases in which the victim is a child." *Id*.

Bell acknowledges the greater latitude rule, but only to dismiss its significance. *See* Bell's brief at 16-17. This court, of course, is not free to disregard the decisions of the supreme court establishing and interpreting the greater latitude rule when applying the *Sullivan* analysis. *See Cook v. Cook,* 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

First Sullivan prong: acceptable purpose. "Th[e] first step in the *Sullivan* analysis is not demanding." *State v. Marinez*, 2011 WI 12, ¶25, 331 Wis. 2d 568, 797 N.W.2d 399. "Wisconsin Stat. § 904.04(2)(a) contains an illustrative, and not exhaustive, list of some of the permissible purposes for which other-acts evidence is admissible." *Id*., ¶18. "The purposes for which other-acts evidence may be admitted are 'almost infinite' with the prohibition against drawing the propensity inference being the main limiting factor." *Id*., ¶25. "As long as the State and circuit court have articulated at least *one* permissible purpose for which the other-acts evidence was offered and accepted, the first prong of the *Sullivan* analysis is met." *Id*.

Bell's argument on the first *Sullivan* prong is interspersed with his argument under the second prong. He argues:

> The state had the burden to show a proper purpose for the evidence and that it was relevant. State argued in motion that purpose was to show modus operandi, motive and intent.((2900-6: 4). As pointed out above the modus operandi was not the same in each case.
>
> To be relevant, the evidence must have been relevant to something at issue. Here, Bell's motive and intent were not at issue. There is no suggestion that Bell

> mistakenly sexually assaulted these young ladies. So, his intent was not at issue. *See Sullivan*, 216 Wis.2d at 785.
>
> Further, all, but one of the charges, involved sexual intercourse, so Bell's motive, i.e. sexual gratification, was not at issue. The evidence did nothing but suggest that Bell had a general propensity for sexually assaulting young women. That was an impermissible purpose.

Bell's brief at 17.

Bell's argument mixes the analyses under the first and second *Sullivan* prongs. Under the first prong, all that is necessary is that a permissible purpose be articulated. Motive is one such permissible purpose. *See State v. Hunt*, 2003 WI 81, ¶60, 263 Wis. 2d 1, 666 N.W.2d 771 ("When a defendant's motive for an alleged sexual assault is an element of the charged crime, we have held that other crimes evidence may be offered for the purpose of establishing opportunity and motive."). Motive is a permissible purpose in child sexual assault cases, including cases charging sexual intercourse, because "sexual assault, involving either sexual contact or sexual intercourse, requires an intentional or volitional act by the perpetrator." *Id*. Accordingly, other-acts evidence may be "admitted to prove motive because purpose is an element of sexual assault, and motive and opportunity are relevant to purpose." *Id*.; *see also State v. Hurley*, 2015 WI 35, ¶73, ___ Wis. 2d ___, 861 N.W.2d 174.

Hunt confirms that motive is a proper purpose for admitting other-acts evidence relating to the sexual assault of another child, including cases charging sexual intercourse. Bell's

arguments go more toward the relevance prong, which the State will address next.

Second Sullivan prong: relevance. The second prong of *Sullivan* "is significantly more demanding than the first prong but still does not present a high hurdle for the proponent of the other-acts evidence" because of "'[t]he expansive definition of relevancy in Wis. Stat. § 904.01.'" *Marinez*, 331 Wis. 2d 568, ¶33 (quoted source omitted). Wisconsin Stat. § 904.01 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *See Hunt*, 263 Wis. 2d 1, ¶63.

Bell argues that the evidence was not relevant to prove motive and intent. That is so, he contends, because "[t]here was no suggestion that [he] mistakenly sexually assaulted these young ladies," "[s]o his intent was not at issue." Bell's brief at 17. Because all but one of the charges involved sexual intercourse, he argues, his "motive, i.e. sexual gratification, was not at issue." *Id*.

Hunt refutes Bell's argument that motive is not a relevant issue when the charge is sexual intercourse with a child rather than sexual contact. *See Hunt*, 263 Wis. 2d 1, ¶60 ("There is no doubt that sexual assault, involving either sexual contact or sexual intercourse, requires an intentional or volitional act by the perpetrator."). And the supreme court's decision in *Davidson*, 236 Wis. 2d 537, establishes that evidence relevant to motive is admissible in a child sexual assault case even if the defendant does not dispute motive.

At Davidson's trial for sexually assaulting a thirteen-year-old girl, Tina H., the trial court admitted evidence that he had sexually assaulted a six-year-old girl, Cindy P., nine years earlier. *See id*. at ¶¶6, 10, 61. The court explained why that other-acts evidence was relevant:

> As already discussed, the defendant's motive for touching Tina H. was an element of the charged crime, and the Cindy P. assault related to that consequential fact. Under our prior cases, the fact that the defendant denied sexually assaulting Tina H. does not change this conclusion. "The state must prove all the elements of a crime beyond a reasonable doubt, even if the defendant does not dispute all of the elements . . . . *Evidence relevant to motive is therefore admissible, whether or not defendant disputes motive*." It was reasonable to anticipate that jurors would have difficulty believing that the defendant could have any motive to sexually assault his young niece. This provides a reasonable basis for the trial court's implicit conclusion that evidence of the Cindy P. assault related to the defendant's motive, a fact of consequence to the determination of the action.

Id., ¶65 (emphasis added; citations omitted).

The *Davidson* court rejected the defendant's argument that even under the greater latitude rule, the earlier assault was not relevant because the only similarity between the two events was the involvement of minor children. *Id*., ¶¶67-68. The court acknowledged that "there were differences between the Cindy P. and Tina H. assaults. The Cindy P. assault took place 10 years before the Tina H. assault, the victims were not the same age, the assaults took place in different places, and only the Tina H. assault involved touching of the victim's breasts." *Id*., ¶60. Nevertheless, the

court concluded, there were sufficient similarities between the assaults to make evidence of the earlier assault relevant. The court wrote:

> To begin with, we note the obvious similarity that in both incidents, the defendant was sexually attracted to a child and acted on that sexual attraction by touching the child between her legs. Furthermore, both victims were assaulted when they were particularly vulnerable; Cindy P. was assaulted while she was alone at the drinking fountain, and Tina H. was assaulted while she was sleeping, after her uncle repeatedly gave her wine. Finally, both assaults occurred in locations in which there was a substantial risk of discovery. These similarities rendered evidence of the Cindy P. assault highly probative of the defendant's motive to assault Tina H. and of the defendant's opportunity and plan to commit the assault in the camper while his family slept nearby.

Id., ¶68.

The court noted that it had reached similar conclusions with respect to the admission of other-acts evidence in two other child sexual assault cases, *State v. Plymesser*, 172 Wis. 2d 583, 493 N.W.2d 367 (1992), and *State v. Friedrich*, 135 Wis. 2d 1, 398 N.W.2d 763 (1987). *See Davidson*, 236 Wis. 2d 537, ¶¶69-71. In *Plymesser*, the *Davidson* court noted, evidence that the defendant had sexually assaulted a seven-year-old girl twelve years previously was relevant to establish the defendant's motive for the charged crime and to corroborate the victim's testimony. *See id.*, ¶70. And in *Friedrich*, the court observed, evidence that a defendant accused of sexually assaulting his fourteen-year-old niece had previously assaulted two other girls five and seven years earlier was relevant because it tended to establish

the existence of a scheme or plan, which related to the defendant's intent to commit the charged crime. *See id*., ¶71.

The *Davidson* court said that *Plymesser* and *Friedrich* "demonstrate that defendant's past offense need not be identical to the charged offense in order to be probative. Remoteness in time and differences in age are considerations, but they are not determinative." *Id*., ¶72. Although there were differences between the Cindy P. and Tina H. assaults, the court said, "the assaults shared many common features–both involved particularly vulnerable victims, took place in unlikely locations, and involved touching between the legs." *Id*. The court concluded that "[b]ecause of these similarities, and in view of the greater latitude rule as established in this court's precedents, the trial court could reasonably have concluded that the Cindy P. assault was probative of the defendant's motive, opportunity, and plan or scheme in the Tina H. assault." *Id*.

Under the reasoning of *Davidson*, *Plymesser*, and *Friedrich*, the evidence in the case involving Bell's daughters was relevant to the case involving the two girls who were unrelated to him (and vice versa) because there were sufficient similarities between the acts. As discussed above, the charges in both cases involved acts of penis-to-vagina sexual intercourse in Bell's home with girls of similar ages over whom he was able to exert control and influence, whether as a father or as "Chief" of a gang, to achieve his goal. *See supra*, pp. 12-14. Although there were differences between the cases, other-acts evidence "need not be identical to the charged offense in order to be probative," especially when the greater latitude rule applies. *Id*. The relevance prong of *Sullivan* was satisfied in this case.

Third Sullivan prong: balancing test. With regard to the third prong of the *Sullivan* analysis, Bell bears the burden of establishing that the evidence's probative value was substantially outweighed by the danger of unfair prejudice. *See Marinez*, 331 Wis. 2d 568, ¶41. "'Unfair prejudice' does not mean damage to a party's cause since such damage will always result from the introduction of evidence contrary to the party's contentions." *State v. Doss*, 2008 WI 93, ¶78, 312 Wis. 2d 570, 754 N.W.2d 150 (quoted source and some quotation marks omitted). "'Rather, unfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.'" *Id.*

"Because the statute provides for exclusion only if the evidence's probative value is *substantially outweighed* by the danger of unfair prejudice, [t]he bias, then, is squarely on the side of admissibility." *Marinez*, 331 Wis. 2d 568, ¶41 (emphasis and brackets in original; quotation marks and quoted source omitted). "'Close cases should be resolved in favor of admission.'" *Id.*

Bell offers three reasons why he believes that he was prejudiced. *See* Bell's brief at 18-19. It is not clear whether he is making those arguments under the third prong of *Sullivan* or as separate claims of prejudice. In either event, none of his arguments has merit.

1. Bell contends that he was prejudiced because the evidence against him "was not overwhelming." Bell's brief at 19. But he supports

that assertion by citing a few snippets of evidence from a trial in which there was four days of testimony, without any attempt to discuss all of the evidence presented by the State. *See id.* at 19. (The only witness called by the defense was Bell himself, who denied that he had any sexual activity with any of the victims (53:79-83).) This court does not consider undeveloped arguments. *See State v. O'Connell,* 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993).

2. Bell argues that he was prejudiced because "the legal allegations were similar and evidence as to each alleged victim was interspersed. Evidence as to 1332 was interspersed with evidence as to 810." Bell's brief at 20. "Thus," he argues, "the jury could have been confused as to what allegedly occurred in each case." *Id*.

Again, that argument is undeveloped and conclusory. An argument that the jury "could have been confused" falls far short of demonstrating substantial prejudice.

3. The danger of prejudice when trying multiple charges together "can be overcome by the giving of a proper cautionary instruction." *Peters v. State*, 70 Wis. 2d 22, 31, 233 N.W.2d 420 (1975). Bell contends that the jury instruction given in this case was inadequate under *Peters*.

The court gave the jury the following instruction:

> It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the Information. Each count charges a separate crime, and you must

> consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.

(2900:56:92-93.)

Bell argues that this cautionary instruction was insufficient to prevent prejudice because "[w]hile . . . the jury was told to consider each count separately and that their verdict for one count should not affect their verdict on any other count (2900:56:92-93), they were not told unequivocally that they could not use the evidence relating to one charge against Bell to find him guilty of another charge." Bell's brief at 20. There are two flaws in that argument.

First, the instruction the court gave in this case was added by the Wisconsin Jury Instruction Committee in response to *Peters*. *See* Wis JI-Criminal 484 n.8 (2012). It is apparent that the Jury Instruction Committee believed that the instruction addressed the *Peters* court's concerns.

Second, this court has held that this instruction is sufficient to presumptively cure any prejudice a defendant may have suffered from joinder.

> "The danger of prejudice in the trial together of two . . . charges can be overcome by the giving of a proper cautionary instruction." The jury was instructed that each count charged a separate crime and must be considered separately, and that defendant's guilt or innocence as found with respect to one crime must not affect the verdict on the other count. This instruction presumptively cured any prejudice which defendant may have suffered from joinder of the two counts.

State v. Hoffman, 106 Wis. 2d 185, 213, 316 N.W.2d 143 (Ct. App. 1982) (quoting *Peters*, 70 Wis. 2d at 31).

The instruction that the court gave the jury in this case – that each count charges a separate crime, that it must consider each one separately, and that its verdict for the crime charged in one count must not affect its verdict on any other count – "presumptively cured any prejudice" that Bell may have suffered from joinder of the two cases. *Hoffman*, 106 Wis. 2d at 213. An appellate court will "presume that the jury follows the instructions given to it," *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989), and Bell offers no reason to believe that the jury here did otherwise.

Bell has not shown, therefore, that he was prejudiced by the joinder of the two cases. Indeed, even if the court were to agree with Bell that the cases did not meet the statutory criteria for joinder, the above discussion shows that the State can rebut the attendant presumption of prejudice by demonstrating that Bell was not prejudiced by a joint trial. *See Leach*, 124 Wis. 2d at 669.

Lastly, the State notes that in his prejudice argument, Bell asserts that the "[f]ailure to exclude unduly prejudicial sexual propensity [evidence] in the case . . . violate[d] Bell's right to due process." Bell's brief at 19. There are multiple problems with that argument.

First, Bell did not raise it below. *See State v. Gove*, 148 Wis .2d 936, 941, 437 N.W.2d 218 (1989) ("even the claim of a constitutional right will be deemed waived unless timely raised in the trial court"). Bell's argument against consolidation was based on the statutory criteria for joinder; he did

not argue that joinder would violate due process (2900:7:1-3). His written opposition to the State's joinder motion did invoke "the fifth, sixth[,] eighth and fourteenth Amendments to the United States Constitution; and article, [sic] sections six, seven and eight of the Wisconsin Constitution" (2900:7:1), but that broad statement encompasses far too much constitutional territory to alert the trial court to a due process objection. *See State v. Marshall*, 113 Wis. 2d 643, 653, 335 N.W.2d 612 (1983) (constitutional grounds for objections must be made known to the circuit court); *State v. Salter*, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984) (a party must raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling). And Bell's argument at the hearing on the joinder motion made no reference to any constitutional concern (2900:46:7).

Second, Bell's newly raised due process argument is undeveloped, consisting of just two sentences in his appellate brief. *See* Bell's brief at 19. This court will not develop an appellant's argument for him, *see State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987), or address issues on appeal that are inadequately briefed, *see State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994). Those principles applies with particular force when the claim is constitutional. *See Cemetery Services v. Department of Regulation and Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998).

Third, Bell does not explain what, if anything, framing the issue in due process terms adds to his argument under the joinder statute. It is not apparent to the State that it does.

CONCLUSION

For the reasons stated above, the court should affirm the judgments of conviction.

Dated this 19th day of May, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,207 words.

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

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

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

Dated this 19th day of May, 2015.

_____
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