STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2014AP002968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAFAEL D. HONIG,

Defendant-Appellant.

On a Notice of Appeal from a Judgment of Conviction
and Order Denying Postconviction Relief,
Entered in the Milwaukee County Circuit Court,
the Honorable Ellen R. Brostrom Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Mr. Honig's 6-year-old granddaughter reported that Mr. Honig sexually abused her and her 4-year-old sister. The first person she told was Mr. Honig's son-in-law Raymond. Mr. Honig and Raymond had a very contentious relationship. Raymond bragged to an acquaintance, George Colon, that he knew how to "get rid" of people he disliked, and one way was to accuse a person of molesting children.

1. Was trial counsel ineffective for failing to call George Colon as a witness at trial?

   The circuit court answered no.

2. Was trial counsel ineffective for failing to object to other acts evidence that one of the alleged victims said Mr. Honig also touched other children?

   The circuit court answered no.

3. Was trial counsel ineffective for failing to introduce a prior inconsistent statement of one of the alleged victims that differed significantly from her testimony at trial?

   The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is likely not warranted. The issues presented apply well-established law to the facts of the case. Oral argument is not requested, but would be welcomed if ordered.

STATEMENT OF THE CASE AND FACTS

In June 2011, Mr. Honig moved from Puerto Rico to Milwaukee to be with his adult daughters, Ziomara and Judith. (52:48). A year later, Ziomara's 6-year-old daughter Y.H. told her uncle, Raymond (Judith's husband), that her grandpa touched her vagina, and did the same to her 4-year-old sister Y.C. (52:114-15). Raymond was alone with Y.H. when she allegedly made the disclosure. (52: 123).

The State charged Mr. Honig with Count 1, first degree sexual assault of a child, intercourse with a child under 12, contrary to Wis. Stat. § 948.02(1)(b) and Count 2, first degree sexual assault of a child, contact with a child under 13, contrary to Wis. Stat. § 948.02(1)(e).[1] (2). Mr. Honig entered not guilty pleas and the case was tried to a jury.

Before trial, Y.H. and Y.C. participated in video-recorded forensic interviews at the Child Protection Center. The circuit court ruled that 6-year-old Y.H's interview was admissible in the State's case-in-chief under Wis. Stat. § 908.08.[2] (49:2-3). The prosecutor acknowledged that 4-year-old Y.C.'s interview was not. Y.C. did not demonstrate an ability to tell the difference between a truth and a lie, nor did she promise to tell the truth. (49:13-14).

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[1] All citations to statutes are to the 2011-2012 Wisconsin Statutes.

[2] Section 908.08 states: "The court may admit into evidence the audiovisual recording of a child witness's statement under certain circumstances, including a showing that the statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth."

Defense counsel informed the court of a potential defense witness named George Colon who would testify to what counsel characterized as "other acts." (49:6). George told counsel that Y.H. and Y.C.'s uncle Raymond told him he knew ways to get rid of people and one way was to accuse someone of molesting children. (49: 6-7). Defense counsel indicated that he thought the evidence was relevant but probably inadmissible. (49:8). The court told counsel he could ask Raymond if he said those things to George, but if Raymond said "no" then counsel would not be allowed to impeach him with extrinsic evidence.[3] (49:9-11). Defense counsel did not ask Raymond about the statement, nor did he seek to introduce George as a witness at trial.

The witnesses at trial were Police Officer Shannon Orvis, the girls' uncle Raymond Cruz, Y.H., Y.C., the girls' mother Ziomara, a nurse practitioner at the Child Protection Center, and Mr. Honig. Both parties told the jury that the case came down to witness credibility. There was no other evidence of the alleged crimes.

In his opening statement, defense counsel told the jury that the case was about Mr. Honig's son-in-law Raymond, being "biased" and having bad feelings toward Mr. Honig. (51:27). Counsel directed the jury to the fact that Raymond was alone when Y.H. allegedly told him about the abuse. There were no other witnesses to the alleged disclosure. (52:123)

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[3] The circuit court was mistaken. Extrinsic evidence of a prior inconsistent statement of a witness is admissible if the witness had an opportunity to explain or deny the statement. § 906.13(2)(a)1. "Extrinsic evidence is testimony obtained by calling additional witnesses as opposed to evidence obtained by the cross-examination of a witness." ***State v. Sonnenberg,*** 117 Wis. 2d 159, 344 N.W.2d 95 (1984).

Ziomara testified that Mr. Honig came to live with her in the summer of 2011. (52:48). At the time, her sister Judith and brother-in-law Raymond also lived there, in addition to Ziomara's roommate Genesis. (52:53-54). Shortly after Mr. Honig moved in, Judith and her family moved out. (52:121). At some point, Mr. Honig moved out of Ziomara's home and went to stay with Judith and Raymond for a short while before getting his own apartment. (52:60,63). Later, Raymond left his wife, moved back in with Ziomara, and began dating her roommate, Genesis. (52:54). He was living there when Y.H. made the alleged disclosure. (52:54).

Raymond testified that Y.H. told him about the sexual abuse while he was outside of Ziomara's house repairing the porch. (52:114). Y.H. came outside and sat down on the step. Raymond testified that she looked sad, so he asked her what was wrong and she said that grandpa touched her "cookie," which Raymond knew to be a nickname for vagina. (52:116).

Raymond acknowledged that he had a heated argument with Mr. Honig a few weeks prior to Y.H.'s alleged disclosure. He admitted to sending Mr. Honig threatening text messages. (52:118-119). However, he said that the argument, which was about ownership of a truck, had blown over quickly. "I was mad for a day." (52:118). Defense counsel asked him if he resented Mr. Honig because when Mr. Honig moved in with Ziomara, Raymond and his family had to move out to make room. Raymond denied being upset about moving. (52:121). Raymond acknowledged two criminal convictions, the fact that he was presently in jail, and that he had an alias of Adrian Gonzales. (52:113).

Ziomara testified that she was at the store when Raymond called her and told her what Y.H. said. (52:50). She called the police. Nurse practitioner Judy Walczak conducted

physical exams of the girls. She did not note any injuries or abnormalities. (52:88-89). Officer Shannon Orvis conducted forensic interviews of the girls at the Child Protection Center. He testified about his training on the "step-wise" protocol, used to interview children in a non-leading, non-suggestive manner. (51:30-33). He testified that Y.H. seemed to understand the difference between the truth and a lie, was able to correct an incorrect statement, and said "I don't know" when she did not know the answer to a question. However, Y.C. was not capable of the same. *Id.* at (51:41-42). "Her ability to understand for example the concept of truth and lie was very, very limited…" (51:42).

The State played the video-taped interview of Y.H. to the jury.[4] (20:00-29:00). In the video, Y.H. told a story about an incident at the hotel Mr. Honig worked at. She said it happened "seven weeks" ago. (20:00). She said she was standing with her mom when her grandpa "snatched" her. She was holding her mom's hand when her grandpa took her fingers off one by one and took her away into a room where he touched her private with his hand and mouth. She said it happened in room number 143. (25:00). Y.H. said her mom started screaming her name and trying to get into the room, but the door was locked. (23:00). She said her mom scratched at the door until her fake fingernails fell off. (28:00). Her mom told her uncle and they called the cops.

Y.H. also talked about another time it happened at her old house and said "bugs and types of animals started coming through the walls." (29:30). Y.H. said that Mr. Honig also touched her cousins. She said, "he always like touches little girls -- in the privates." (20:00). The interviewer asked which

[4] The substantive portion of the interview begins at approximately 20 minutes and continues until approximately 31 minutes.

girls, and she replied, "like me, my sister, and my um my cousin, and my um my other cousin." Additionally, she said that Mr. Honig touched her "little cousin" by "putting his mouth on her private" while they were at the hotel. (22:00).

After showing the video, the State called Y.H. to testify. Y.H. testified that her grandpa put his finger in her private and mouth on her private more than once. (52:16-17). It happened at her old house, at a hotel, a park, and in a car. She said he told her not to tell her mommy or he would spank her. (52: 20). She testified that he did the same thing to her sister. (52:23-24). Y.H. also testified that her mom walked in on him doing this and "got shocked." (52:24). Y.H. said the first person she told was her mom. (52:26). A few questions later she said the first person she told was her uncle Raymond. (52:30). Defense counsel asked Y.H. if Raymond ever told her to lie and she said "no." (52:38). He asked if Raymond ever told her to say that her grandpa did bad things to her. Y.H. said "I don't remember." (52:38-39). He asked if she talked to Raymond a lot, and she said "yes." (52:39).

Ziomara testified that Y.H.'s story about being "snatched" away from her at the hotel was not true. (52:57). She explained that Mr. Honig did not live at the hotel, he just worked there. (52:57). Y.H. had never been past the hotel lobby. (52:64). She denied ever walking in on anything inappropriate at the house. (52:58). Ziomara testified that Y.H. had been having nightmares. (52:58). Defense counsel asked Ziomara whether there was any bad blood between her father and her brother-in-law Raymond. She said it was none of her business. (52:59).

The State also called 4-year-old Y.C. as a witness. Y.C. was not asked to complete an oath or promise to tell the truth. The prosecutor proceeded to ask series of leading

questions. Defense counsel did not object. Using a doll, the prosecutor went through each part of the body, asking if Mr. Honig did something to that part. When she put her finger on the doll's vaginal area, Y.C. said "yes." (52:73-74). When the prosecutor asked how it felt, she said it hurt. (74). When asked how many times it happened, she said one time. (52:77). Defense counsel asked Y.C. if she spent a lot of time with her uncle Raymond. (80). He asked if Raymond ever told her to say anything about her grandpa. When Y.C. did not respond, counsel said, "if you answer 'yes' or 'no,' I won't ask you anymore questions. Okay?" She said "no." (81).

Mr. Honig testified and denied the allegations. (53:19-20). He testified about his contentious relationship with Raymond. The problems started when Raymond left his daughter, Judith, and started dating Ziomara's roommate, Genesis. (53:14). Mr. Honig also argued with Raymond about ownership of a truck. Judith bought the truck, and after Raymond left her, she needed money, so Mr. Honig agreed to buy the truck from her. Raymond was angry and said the truck belonged to him. (53:15). Mr. Honig also gave Judith money to pay the bills, which also angered Raymond. (53:15). Contrary to what Raymond said, Mr. Honig denied that their fights blew over quickly. (53:18). Raymond threatened him in person and by text message. (53:15).

The jury found Mr. Honig guilty of both charges. The circuit court sentenced him to 25 years of initial confinement and 6-and-a-half years of extended supervision (the mandatory minimum under Wis. Stat. § 948.02(1)(b)) on each count, concurrent. (20). Mr. Honig filed a notice of intent to pursue postconviction relief. (19). Undersigned counsel was appointed and filed a motion for a new trial based on ineffective assistance of counsel. (34). The circuit court

ordered briefing. (35). The State filed a response, followed by Mr. Honig's reply. (36, 37). On November 17, 2014, the circuit court held a ***Machner***[5] hearing on the motion, and at its conclusion, denied all claims. (56; App. 103-151). A written order was entered on December 4, 2014. (59:App. 152). This appeal follows.

ARGUMENT

I. Mr. Honig is Entitled to a New Trial Because He was Deprived of his Constitutional Right to Effective Assistance of Counsel.

Mr. Honig's trial counsel committed multiple serious and inexcusable errors at trial that undermine confidence in the outcome of this case. Counsel was aware of a material defense witness and inexplicably failed to call him as a witness at trial. In addition, counsel allowed the State to admit prejudicial other acts evidence that Mr. Honig assaulted other children. Finally, counsel failed to present one of the alleged victim's prior statement to police that differed in important ways from her testimony at trial.

A. Standard of review and legal principles.

A defendant has a constitutional right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 259, 273, 558 N.W.2d 379 (1997).

To establish a claim of ineffective assistance of counsel, a defendant must show (1) deficient performance,

[5] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance is shown where counsel's representation fell below an objective standard of reasonableness. ***Id.*** at 688. Conduct that is part of a "reasonable trial strategy" is not considered deficient. ***State v. Domke***, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 365. In an ineffective assistance of counsel claim, the circuit court must hold a hearing to allow trial counsel the opportunity to explain or deny the allegations. ***Machner***, 92 Wis. 2d 797.

Prejudice is proven where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Id.*** at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. ***Id.*** Reviewing courts should evaluate multiple allegations of deficient performance for their "cumulative effect." ***State v. Thiel***, 2003 WI 111, ¶63, 264 Wis. 2d 571, 665 N.W.2d 305. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985).

The trial court's findings of historical fact are accepted unless clearly erroneous; however, whether the attorney's conduct was deficient and prejudicial are questions of law that this Court reviews de novo. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

B. Counsel was ineffective for failing to call a potential defense witness, whose testimony would have closed important gaps in the theory of defense.

Counsel was aware that an acquaintance of Mr. Honig and Raymond, George Colon, was available to present highly material facts favorable to the defense. However, despite

George's willingness to testify, counsel inexplicably failed to subpoena him or call him as a witness at trial.

At the November 17, 2014, ***Machner*** hearing, the circuit court heard testimony on the subject. (56). George Colon testified that he was Mr. Honig's coworker at a hotel, and met Raymond through Mr. Honig. (56:18; App. 120). George testified about a conversation he had with Raymond in August of 2012 (just weeks before the allegations against Mr. Honig came to light). (56:18; App. 120). Raymond came to George's house to do some carpentry work. (56:19; App. 121). George made lunch on the backyard grill, and the two men began conversing. (56:19-20; App. 121-22). George testified that:

> [Raymond] brought up how he was so proud about when he lived in New York and stuff about getting rid of people that he disliked and things that they did, and he brought up about how to get rid of a person, a drug dealer. He also brought up about using children to make accusations against adults, especially people that have some type of conviction.

(56:20; App. 122).

When asked what "getting rid of" someone meant, George said "call the police on them." (56:20; App. 122). George said Raymond talked about how to "get children and counsel them and to charge someone with molestation." (56:20; App. 122).

George also testified that he was aware that Raymond had a very negative opinion of Mr. Honig. (56:20). Raymond and Mr. Honig were fighting over who owned a truck. In addition, Raymond told George that "I didn't know Ralph[6]

[6] "Ralph" is a nickname for Rafael. (56:19).

like I should." (56:21; App. 123). After this conversation, George told Mr. Honig he should move out Raymond's house. (56:21; App. 123). Mr. Honig was arrested a couple weeks later, on September 1, 2012. (56:22; App. 124).

George testified that he spoke to Mr. Honig's trial attorney on the phone and went to his office twice. (56:22-23; App. 124-25). They discussed the possibility of George being a witness at trial. (56:23; App. 125). George agreed to be a witness and went to every court date. (56:23; App. 125). On the first day of trial, November 14, 2012, counsel told George he would need to wait in the hallway. (56:24; App. 126). Later, he came out and told George to leave. (56:24; App. 126). George came back to the courthouse the next day. (56:24; App. 126). Counsel told him he was not needed, so George went home. (56:25; App. 127).

Defense counsel also testified at the ***Machner*** hearing. He agreed that part of his trial strategy was to argue that Raymond came up with the allegations. (56:6; App. 108). He was aware that Raymond and Mr. Honig had been fighting about a truck and housing arrangements. (56:7; App.109). He agreed that he met with George and George told him about the conversation he had with Raymond about getting rid of people. (56:7-8; App. 109-10). Counsel testified that he considered calling George as a witness, but acknowledged that he did not subpoena him. (56:8; App. 110). He remembered that George was in the hallway during the first day of trial. (56:8; App. 110). He did not recall if George was present on subsequent days. (56:12; App.114).

Trial counsel testified that he did not recall whether he considered that George's testimony could become admissible as a prior inconsistent statement. (56:10; App. 112). He did not recall why he did not ask Raymond about the statement,

given that the court had ruled that the line of questioning would be allowed. (56:8; App. 110). Counsel testified that "after the first day of trial, it seemed to me that [George] was uncooperative and didn't want to testify. I don't recall that's exactly why I didn't call him or try to call him." (56:12; App. 114). On the other hand, counsel also testified that he thought maybe the defense theory had become more that someone else had abused the girls. (56:9; App. 111). However, he acknowledged that he never told the jury about another possible perpetrator at trial. (56:9; App. 111). Nor did he advance this theory in either opening or closing arguments.

The State agreed it seemed that counsel "forgot" to ask Raymond about the alleged statement. (56:39; App. 141). The State did not argue that counsel had a strategic reason for failing to ask the question.

The circuit court disagreed, finding that counsel *did* have a reason for not calling George as a witness because George did not appear to be cooperative. (56:42; App.144). "It's a trial strategy." (56:43; App.145). The court disagreed with the State that counsel "forgot" to ask Raymond about it. Instead, the court said "presumably if he had already made the decision that George was not likely to be a helpful witness to Mr. Honig after all, then why would he ask the predicate question?" (56:44; App. 146). The circuit court ruled that there was no deficient performance and no prejudice because the issue of "bad blood" between the men was in the record. (56:44; App. 146). Notably, the court did not find that George was not a credible witness. Nor did the court rule that his testimony was irrelevant or inadmissible.

Contrary to the court's ruling, counsel never testified that he decided not to call George because George had been uncooperative. This court should not defer to this finding of

fact.[7] Instead, he suggested he may have thought George was being uncooperative, but immediately followed up with "I don't recall." He gave no reason why he would have thought that George was uncooperative. Even though counsel did not subpoena George, he admitted that George nevertheless came to every court date. Moreover, on the first day of trial, counsel said he was considering calling George as a witness, but thought his testimony was likely inadmissible. (49:6-10). The reason why counsel did not call George as a witness was that he mistakenly believed George's testimony was inadmissible. He did not have a strategic reason for failing to call George as a witness.

Contrary to counsel's mistaken understanding, George's testimony *was* admissible evidence under two different rules of evidence.[8] First, George's testimony was admissible as specific evidence of a witness' character for untruthfulness. Wis. Stat. § 906.08(1) and (2). Specific instances of untruthfulness may be proven by extrinsic evidence unless the issue is collateral. Bias is never collateral and extrinsic evidence may be used. ***State v. Williamson***, 84 Wis. 2d 370, 267 N.W.2d 338 (1978) (abrogated on other grounds by ***Manson v. State***, 101 Wis. 2d 413, 304 N.W.2d 729 (1981); *also see* Blinka, Daniel D., *Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation*,73 MARQ. L. REV. 283, 290 fn. 19 (1989).

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[7] A court's finding of fact will not be sustained on appeal if the finding is clearly erroneous. ***State v. Walli***, 2011 WI App 86, ¶14, 334 Wis. 2d 402, 799 N.W.2d 898.

[8] It is possible that the court would have ruled otherwise; however, this ruling would have been erroneous and it is counsel's duty to object to and/or make an offer of proof in order to preserve meritorious issues for appellate review.

Second, had counsel asked Raymond about his statement to give him a chance to explain or deny it—and had he denied it—George's testimony would have been admissible as a prior inconsistent statement. Wis. Stat. § 906.13.[9] Counsel's failure to call George as a witness at trial amounted to deficient performance. *See* ***Strickland***, 466 U.S. at 688.

Mr. Honig was prejudiced by the omission of this highly material defense witness. George's testimony was crucial to the theory of defense. The jury heard that Raymond was alone with Y.H. when she allegedly disclosed the abuse. The jury knew that Raymond disliked Mr. Honig and had fought with him shortly before the allegations surfaced. However, the jury did not hear any evidence to suggest that Raymond was the type of person who would go so far as to frame someone he disliked with a serious crime. George was the missing piece in the defense theory. He knew Raymond had bragged about his ability to "get rid" of people, and specifically talked about counseling children through an accusation of child molestation. There is a reasonable probability of a different outcome had George been called as a witness at trial. *See* ***Strickland***, 466 U.S. at 694.

C. Counsel was ineffective for failing to object to evidence that one of the alleged victims said that Mr. Honig sexually abused other children.

In Y.H.'s forensic interview, she repeatedly told Officer Orvis that Mr. Honig touched her cousins. Y.H. said "he always like touches little girls - - in the privates." Officer Orvis asked which girls, and she replied, "like me, my

[9] Extrinsic evidence of a prior inconsistent statement of a witness is admissible if the witness had an opportunity to explain or deny the statement. § 906.13(2)(a)1.

sister, and my um my cousin, and my um my other cousin. In addition, she said that one time at the hotel he touched her "little cousin" by "putting his mouth on her private."[10]

At the ***Machner*** hearing counsel testified that he reviewed the recordings of Y.H. and Y.C.'s interviews. He testified that he did not remember that Y.H. mentioned her cousins during the interview and did not consider filing a motion in limine to redact that part of the interview. (56:10, 14; App.112, 116).

The circuit court ruled that "the court would have likely granted" a motion in limine. (56:47; App. 149). This court will not reverse a circuit court's ruling on the admissibility of other acts evidence unless the court erroneously exercised its discretion. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. Nonetheless, the court found that "in the totality of all the evidence and the credibility determination that had to be made, I don't think that it would have resulted in a different outcome." (56:48; App. 150).

Under Wis. Stat. § 904.04(2)(a), evidence of other crimes, wrongs, or acts is not admissible except for specific purposes, none of which have been offered here. Admissibility of other acts evidence is addressed by using three-step analysis: (1) whether other acts evidence relates to fact or proposition that is of consequence to determination of action; (2) whether evidence has probative value; and (3) whether probative value of other acts evidence is substantially outweighed by danger of unfair prejudice, confusion of issues or misleading jury, or by considerations of undue delay, waste of time or needless presentation of

[10] The court mentioned that the video "end time" was 20:02:55. (51:43). Counsel believes the court meant to say the beginning time.

cumulative evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

Counsel performed deficiently by not recognizing that the evidence was inadmissible "other acts evidence," not objecting, not moving for a mistrial, and not asking for a cautionary instruction. The reasons for the rule excluding other acts evidence include:

> (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

Whitty v. State, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967).

Y.H.'s story about her cousins was highly inflammatory and unfairly prejudicial. Unexpectedly hearing that Mr. Honig may have sexually assaulted other children likely surprised and shocked the jury. It also confused the issues. Mr. Honig was on trial for allegedly assaulting Y.H. and Y.C. The jury would have been concerned and alarmed for the cousins and may have detoured during their deliberations to wonder about the cousins and whether Mr. Honig had "gotten away" with other assaults. *See* ***Whitty***, 34 Wis. 2d at 292.

Sometimes, a limiting instruction can allay the harm of other acts evidence. For example, in ***Sullivan***, the circuit court gave a cautionary instruction to the jury, which provided that the other acts evidence was only permissible for limited purposes and should not be used to conclude that the

defendant is a bad person and to find him guilty for that reason. ***Sullivan***, 216 Wis. 2d 768 at 780. Here, there was no cautionary instruction and counsel did not request one.

There is an intolerable risk that the jury misused the highly prejudicial other acts evidence. But for counsel's deficient performance, there is a reasonable probability of a different outcome. *See* ***Strickland***, 466 U.S. at 694.

D. Counsel was ineffective for failing to introduce a prior inconsistent statement of one of the alleged victims that differed significantly from her testimony at trial.

During the video-recorded interview of 4-year-old Y.C., she did not accuse Mr. Honig of doing anything in appropriate to her. She indicated that she was going along with what her sister told her. Her testimony at trial was substantially different. Defense counsel did not seek to introduce the video as a prior inconsistent statement.

At the ***Machner*** hearing counsel testified that he did not consider moving to introduce Y.C.'s video-taped forensic interview as a prior inconsistent statement. (56:11; App. 113). He thought "her testimony was fairly consistent with what she had said in the video."[11] (56:14; App. 116). The circuit court ruled that counsel's determination that Y.C.'s forensic interview was not inconsistent with her trial testimony was a "valid trial strategy." (56:45; App. 147). The court agreed that

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[11] At the ***Machner*** hearing, undersigned counsel moved the video of Y.C.'s interview into evidence as Exhibit A. In addition, the state stipulated to a transcript of a portion of the interview created by undersigned counsel, which was marked as Exhibit B. (57).

"some things that are inconsistent" but "there are some things that are consistent." (56:45; App. 147).

Contrary to the circuit court's ruling, counsel did not offer a strategic reason for not presenting the video. He said he did not even consider moving to introduce it. (56:11; App. 113). In hindsight, he said he believed the testimony was fairly consistent with the video, but the focus is the time of trial. ***Domke***, 337 Wis. 2d at 289 (courts should "evaluate the conduct from counsel's perspective at the time.").

Regardless of trial counsel's impression of the evidence, this Court should independently decide whether the video is inconsistent with Y.C.'s in-court testimony. The ultimate question of deficient performance is a question of law. ***Harvey***, 139 Wis. 2d at 376. It is important to recognize that "flat contradiction is not the only test of inconsistency. Rather, "omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness's trial testimony." ***State v. Richards***, 21 Wis. 2d 622, 631, 124 N.W.2d 684 (1963) (quoting ***Berger v. United States***, 295 U.S. 78, 88 (1935)).

The substantive portion of the interview is as follows, with Y.C. as "Y" and the police officer as "PO." Y.C. refers to her sister as "nene," a Latin American term of endearment. She also mentions her little brother Isaiah:

Y: Someone was doing something to us

PO: Well, tell me about that

Y: Nene said it to tio and then her said it to the cops

PO: Ok, who said what?

Y: Nena said grandpa was touching us

PO: Mmk well, tell me about that. Who is-who is-who is nena

Y: Grandpa.

PO: Ok

Y: The cops was telling us something and I was shy

PO: You were shy? I see. What were the police telling you?

Y: I don't know

PO: Ok. Um, tell me about your grandpa

Y: Grandpa was (pause), grandpa took me to his room and nene he went this, down his my pants then…that's what nene said

PO: Well who is nene?

Y: Nene

PO: Who is nene?

Y: Abuelo sat on the bed… the… a lot of toys

PO: Mhmm

Y: Grandpa pulled down my pants then [pause] he was… I don't know what he was doing to us

PO: Ok, well what did you see? and what did you hear?

Y: Nena was sitting on the bed. Grandpa pulled down his pants then I was standing by um um um nene. He go down my pants, he was doing something to me and I- I was doing something I was- I was - I was doing something I was- I was nene was watching me he went to me then he said then he gave me a kiss.

PO: Ok where did he give you a kiss?

Y: On on my cheek

PO: On your cheek? Ok Did he say anything?

Y: No

…

PO: Ok, ok. Now you said that you were with nene and your grandpa in your grandpa's room and your grandpa took someones pants down

Y: He took nene's pants down

PO: Ok what and and what did he do then?

[Pause]

PO: Ok. What did you see?

Y: I saw somebody I saw somebody pull down the pants, nene

PO: What happened after the pants were down?

Y: The cops came.

PO: The cops came. Where did the cops come to?

Y: My house.

PO: Ok. Ok.

Y: Then we put our clothes on and put our shoes on we were starting to play

…

Y: He didn't do nothing to me

PO: He didn't do anything to you Ok Did he do anything to anybody else?

Y: He just did it to nene. I was, I was in the room sleeping

PO: Ok. Did he do anything to anybody but nene?

Y: I didn't do nothing. I got owies over here

PO: How did you get those?

Y: Isaiah scratched me like this

…

PO: You can use a bandaid…um can you tell me, what does it mean to tell the truth?

Y: Hm?

PO: What does it mean to tell the truth?

[silence]

PO: What does it mean to tell a lie?

[silence]

PO: You don't know? Ok, Can you tell me what color this carpet is?

Y: Um, Blue

PO: Blue Ok If I told said if I told someone else this carpet is pink, am I telling the truth or am I telling a lie?

Y: A lie

PO: Ok, Um

Y: I'm-I'm –I'm getting black

PO: You're getting black ? where? On your hands?

Y: Everywhere. On my legs

PO: Oh I see. Um. [Pause] um, Lets see. If there was a little boy who- who stole my book and I-and I caught up with him and I asked him, hey did you steal my book and he said no, I didn't, is he telling the truth or is he telling a lie

Y: He's telling a lie

PO: Mk, um

Y: What color is this?

PO: This carpet over here? This carpet over here is a whole bunch of colors. I can see a whole bunch of colors on it…

Cross-examination is vital in cases, such as this, where credibility of the witnesses is paramount. "The purpose of confrontation and cross-examination is to test both the witness's memory and credibility in the presence of the fact finder. 'These means of testing accuracy are so important that the absence of proper confrontation at trial calls into question the ultimate integrity of the fact-finding process.'" ***State v. Norman***, 2003 WI 72, 262 Wis.2d 506, 664 N.W.2d 97.

In particular, it is essential to challenge a very-young child's credibility. At common law, children under a certain age were considered incompetent witnesses. Wisconsin law provides that everyone is a competent witness, with very few exceptions. Wis. Stat. § 906.01. As such, "former questions of competency are now credibility issues to be dealt with by the trier of fact." ***State v. Dwyer***, 143 Wis. 22d 448, 462, 422 N.W.2d 121 (Ct. App. 1988). The removal of the competency standard operates "to shift the opponent's emphasis from a voir dire attack on competency to a cross-examination and introduction of refuting evidence as to weight and credibility." ***State v. Hanson***, 149 Wis. 2d 474, 481, 439 N.W.2d 113 (1989).

Had the jury been presented with 4-year-old Y.C.'s video-taped interview, the jury would have seen her in-court testimony in a very different light. First, the jury would have seen that the substance of Y.C.'s story was different. In the video, Y.C. repeatedly indicated that she was going along with what "nene" (her sister) had told her. Unlike at trial, she did not say that her grandpa did anything to her vagina. She did not say that he hurt her. She said he took off her sister's pants, but this alone is not suspicious. Grandparents commonly help their grandchildren dress or undress. Seeing the forensic video would have caused the jury to wonder what happened between the interview and trial to make Y.C.

change her story (which would have bolstered the theory of defense that Raymond coached the girls).

Additionally, the jury would have seen that Y.C.'s demeanor was different in the video than at trial. In the video, Y.C. was talkative and upbeat. In court, she was tentative and quiet, and the State had to prompt her repeatedly to get her to answer questions.

Finally, the jury would have seen how Y.C. responded differently depending on how questions were being asked. The police officer who conducted the forensic interview, Shannon Orvis, testified that he received significant training in how to interview child witnesses to ensure that they are telling the story in their own words and are not being fed the answers. (51:31-35). It is important to ask open-ended questions to begin with instead of questions that call for a "yes" or "no." (51:33). Officer Orvis also testified that it is important to separate a child from family members so they do not feel pressure to answer questions in a particular manner. (56:38). Officer Orvis testified that he had conducted between 60-70 forensic interviews of children. (51:35). When asked open-ended questions by a trained interviewer, away from any relatives whom could influence her, Y.C. did not say her grandpa did anything to upset or hurt her. At trial, Y.C. was very hesitant and the prosecutor asked leading questions. Her mom was in the court room with her. (52:67).

In sum, the forensic video and Y.C.'s in-court testimony were inconsistent and counsel should have presented and made use of these inconsistencies. Counsel's failure to do so undermines confidence in the outcome of the trial. *See* ***Strickland***, 466 U.S. at 694.

E. Cumulative prejudice.

Counsel's deficient performance in this case permeated the entire trial. The theory of defense was that Raymond made up the allegations and coached the girls. However, George's testimony was crucial to educate the jury about Raymond's character. Without his testimony, the jury was left with no reason to believe that Raymond was the type of person to stoop so low. In addition, Y.C.'s prior inconsistent statement was crucial to show that right after Mr. Honig was arrested, Y.C. did not have much to say. It was only months later at trial, after a person would have had time to coach her, that Y.C. indicated she was abused. As for the other acts evidence, it poisoned the case by shocking the jury and distracting from the relevant evidence.

Considering counsel's errors in the aggregate leads to the unavoidable conclusion that Mr. Honig was prejudiced. ***Thiel***, 264 Wis. 2d 571, at ¶59. As such, he was deprived of his constitutional right to effective representation of counsel.

CONCLUSION

For the reasons asserted above, Mr. Honig respectfully asks this Court to reverse the circuit court and remand for a new trial.

Dated this 15th day of April, 2015.

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 6,333 words.

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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 15th day of April, 2015.

Signed:

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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; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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.

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