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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP002328CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAUN M. SANDERS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE JENNIFER R. DOROW, PRESIDING AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE LEE S. DREYFUS, JR., PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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1. Can the state prosecute Sanders as an adult for offenses allegedly occurring before his tenth birthday?

   Answer by Circuit Court: Yes.

2. Did Sanders' trial counsel commit prejudicially deficient performance by failing to file a pretrial motion challenging the charging period in count one because it encompassed a time period before Sanders' tenth birthday?

   Answer by Circuit Court: No.

3. Did Sanders' trial counsel commit prejudicially deficient performance for failing to object to the duplicitous jury instructions and verdict forms on the incest charge in count three of the information?

   Answer by Circuit Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because the arguments of the parties are adequately presented in the briefs.

The opinion should be published because this case involves issues of first impression.

STATEMENT OF THE CASE

Sanders was charged with four offenses stemming from allegations he had sexual contact with his younger sister[1], H.A.S. (1:1-4). The charging section of the complaint alleged basically two charging periods covering a period of nine years. ***Id***. The first charging period encompassed one count of repeated sexual assault of the same child, contrary to Wis. Stat. §948.025, alleging at least three assaults occurred between the time period of "September 26, 2003 and September 25, 2008." ***Id***. The remainder of the counts alleged offenses occurring during the second charging period between "September 26, 2008, and September 25, 2012." ***Id***. Specifically, Sanders was charged with an additional count of repeated sexual assault of a child (Count Two of the Information), contrary to §948.025, Wis. Stats; Incest with a Child (Count Three of the Information), contrary to §948.06(1), Wis. Stats., and Child Enticement (Count Four of the Information), contrary to §948.07, Wis. Stats. ***Id***.

As probable cause for the charges, the complaint alleged that then sixteen-year-old H.A.S. reported to police in February of 2013 that Sanders

[1] Sanders was approximately two years older than H.A.S.

"touched her sexually when she was seven or eight years old and Sanders would have been nine years old." ***Id.*** H.A.S. alleged that Sanders would "touch her breasts with his hand." ***Id.*** H.A.S. indicated that Sanders also asked for "peeks," which she interpreted as a request by Sanders to lift up her shirt so he could see her breasts, but she indicated there initially was no touching.

The complaint also stated H.A.S. indicated she was expected to go into Sanders' room "every night" to expose her breasts at 11:00 p.m. H.A.S. stated that she was to remove her clothes and lay naked so Sanders "could touch her breasts and suck on her nipples." ***Id.***

H.A.S. also alleged that eventually she began to perform oral sex on Sanders, and that between the ages of twelve and fifteen she performed oral sex on Sanders "at least twelve times." She recalled one specific time where Sanders encouraged her to "keep his penis in her mouth so he could ejaculate in it and on her breasts." H.A.S. indicated during these instances Sanders would ejaculate on her body or on his clothing. ***Id.***

Sanders was later arrested. He was approximately eighteen years old at the time. ***Id.*** Sanders was subsequently questioned by a detective from

the Menomonee Falls Police Department, Jay Weber. Sanders was interrogated by Detective Weber for a period of three and one half hours. (52:17). During that time, Sanders made several inculpatory statements regarding the allegations made by H.A.S.

Prior to trial, trial counsel filed a motion to suppress Sanders' statement to Detective Weber. (5:1). At the conclusion of a hearing on the motion, the court initially suppressed Sanders' entire statement because of the coercive nature of the interrogation. (52: 22). However, the court later allowed a portion of Sanders' statement into evidence because it occurred during the initial questioning with Detective Weber, at a time before the court believed the interrogation became coercive. (52: 22-24).

The portion of Sanders' statement the court allowed into evidence concerned his admission to Officer Weber that, ten years prior, he had engaged in "peeks" with H.A.S. for a period of one month. (54: 171). This conduct allegedly would have occurred when Sanders was under ten years old. ***Id***.

This case ultimately proceeded to a jury trial. (54; 55) H.A.S. testified without objection that Sanders began touching her breasts when he

was as young as eight to nine years old, a full year younger than what was originally alleged in the complaint. (54: 123-26). H.A.S. testified that the touching later progressed to oral sex and ended in approximately December of 2012, when she would have been approximately sixteen years old. (54:126). A boyfriend of H.A.S. at the time overheard Sanders ask H.A.S. for "peeks" during an internet chat session, and she later confided in him about the alleged abuse. (54:150). It was eventually reported to a teacher at Menomonee Falls High School who then in turn contacted the police. (54:166).

After the state rested its case, trial counsel brought a motion to dismiss count one based upon the fact that the state had failed to prove Sanders could form the necessary intent to commit the assaults because of his young age at the time. (55:23). The defense argued that the state had not presented any evidence that Sanders could form the necessary intent to become sexually aroused or gratified even if the conduct did occur. ***Id.*** The state commented that "it [was] a little late in the game" to raise the issue of Sanders' age as it related to the charging period in count one. (55:25). The

State further argued that this issue could have been addressed in a pre-trial motion. ***Id***.

The trial court acknowledged that the issue of evidence having already been received of Sanders being under the age of ten was jurisdictional in nature which could be addressed at any point in time. (55: 88). However, the court was unsure of how to appropriately remedy this jurisdictional dilemma at that point in the trail. ***Id***.

Ultimately, the trial court took its own motion for mistrial under advisement and allowed the trial to proceed, with the understanding that the issue would be revisited post-verdict, if Sanders was ultimately convicted of count one. (55: 95). The defense did not oppose this procedure.

Sanders took the stand in his own defense. (55:72-83). While he acknowledged that he had engaged in a game of "peeks" with H.A.S. when he was approximately eight years old, which resulted in H.A.S. exposing her breasts to him, he denied having any sexual contact with his sister. (55:76).

Sanders was later acquitted of the charge of repeated sexual assault of a child in count one and the court was never asked to revisit the

jurisdictional issue. (55:141). Sanders was convicted of all remaining charges in counts two through four. (55:142).

Sanders subsequently filed a post-conviction motion alleging his trial counsel offered ineffective assistance of counsel for failing to object to the jurisdictional issue concerning the defendant's age at the time of the offenses prior to trial and for further failing to object to allegedly duplicitous jury instructions and verdict forms used on the incest charge in count three of the information. (38: 1-68). A hearing pursuant to ***State v. Machner,*** 92 Wis.2d 797, 285 N.W.2d 905 (1979), was held and after further briefing, the trial court ultimately issued an oral decision on October 1, 2015, denying Sanders' post-conviction motion in its entirety. (58:10-15; 46:1). (App. 101-114). This appeal was then perfected. (48:1-2).

PREFACE TO ARGUMENT

The majority of the ineffective assistance claims raised in this brief hinge on the question of whether the state can prosecute Sanders for offenses that occurred before he was ten years of age. The answer to this potentially affects the outcome on the ineffective assistance claims in the following areas: 1) Failure to file a pretrial motion to dismiss or amend

count one of the criminal complaint; 2) Failure to request an Order in Limine prohibiting the state from introducing evidence of conduct before Sanders' tenth birthday; 3) Failure to object to the testimony of the alleged victim that Sanders had sexual contact with her prior to his tenth birthday or request an Order in Limine prohibiting the same and 4) Failure to request a limiting instruction to cure any unfair prejudice that resulted from the introduction of this evidence.

During the trial, the state originally offered to amend the charging period in count one of the information to commence on May 31, 2004, so it would correspond with Sanders' tenth birthday. (55:91). Thus tacitly conceding that it could not prosecute Sanders for acts allegedly committed prior to that date. The court ultimately rejected this proposal largely because the state had already closed its case by the time the issue was first raised. (55:94).

Instead, the court took the unusual step of taking its own motion for mistrial under advisement pending the outcome of the verdict on count one. (55:95). The defense did not object. The issue was never raised again

during the trial and Sanders was ultimately acquitted on count one. (55:141).

When the issue was raised by Sanders in his post-conviction motion, the state took a different tack and argued that it was *not* prohibited from charging Sanders for offenses that allegedly occurred before his tenth birthday. (43:2). As a result, the state did not believe that trial counsel was ineffective for failing to raise the issue prior to trial.

Since it is not known whether the state will continue to advocate this position on appeal, Sanders believes it is necessary to raise this question as a predicate issue in order to properly evaluate the ineffective assistance claims that will follow.

THE STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

For Sanders to prove his trial attorney provided ineffective assistance at trial, he must first show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). In making this determination, the court must keep in mind that counsel's function is to make the adversarial testing process work in the

particular case. ***State v. Pitsch***, 124 Wis. 2d, 628, 633, 369 N.W.2d 711, 714 (1985).

The test for the prejudice prong is whether trial counsel's errors deprived the defendant of a fair trial, a trial whose result is reliable. ***Id***. at 640-41, 369 N.W.2d at 718. The ultimate focus is on the fundamental fairness of the proceeding whose result is being challenged. ***Id***. at 642, 369 N.W.2d at 719. Of chief concern is whether there was a breakdown in the adversarial process that our system counts on to produce just results. ***Id***. This is not an outcome determinative standard. ***Id***. Even if there was sufficient evidence to sustain the conviction, when a defendant's constitutional rights are violated because of counsel's deficient performance, the adversarial process breaks down and our confidence in the outcome is undermined. ***Id***. at 645-46, 369 N.W.2d at 720.

A. THE STATE DOES NOT HAVE JURISDICTION TO PROSECUTE SANDERS FOR CRIMINAL OFFENSES ALLEGEDLY OCCURRING BEFORE HIS TENTH BIRTHDAY.

Section 938.12(1), Wis. Stats., allows for the prosecution of juveniles for violations of state or federal laws once they have attained the age of ten years of age or older. Presumably, by setting a distinct age limit

(ten years) in the first place, the legislature did not intend the provisions of the justice code to apply to children who have not attained that age *regardless* of when the prosecution was commenced, otherwise it would have included language in the justice code specifically excepting it. Therefore, Sanders maintains that acts committed by children under the age of ten are simply not violations of state or federal law.

This interpretation is consistent with the language found at Section 938.02(3m), Wis. Stats., which defines a "Delinquent" as a "juvenile who is *10 years of age or older* who has violated any state or federal criminal law." (Emphasis added). Once again, had the legislature intended to give the state authority to prosecute children for violations of state or federal laws prior to the age of 10 under certain limited circumstances, it could have inserted qualifying language into the statute itself.

This interpretation is also consistent with the age that Sec. 938.183, Wis. Stats., confers original adult court jurisdiction for juveniles charged with first and second degree intentional homicide. *See* Sec. 938.183(1)(am), Wis. Stats. Similarly, if the legislature had intended to give the state

authority to prosecute adults for acts committed before their tenth birthday, it would have expressly stated so within the statute itself.

The state's argument on this issue during the post-conviction proceedings was primarily based on the holding in ***State v. Annala***, 168 Wis.2d 453, 484 N.W.2d 138 (1992). For the reasons that will follow, Sanders believes this reliance was misplaced.

Annala dealt with a scenario where a then twenty year old defendant was charged as an adult for an offense that allegedly occurred while he was fifteen years old. The sole issue in ***Annala*** was whether juvenile court still had jurisdiction to hear the case since the crime was committed while the defendant was a juvenile. The Wisconsin Supreme Court held that it is the defendant's age at the time of the *charging* that controls which court will have jurisdiction to hear the case, subject to any claims by the defense that the State intentionally delayed the prosecution in order to charge the defendant as an adult. ***Id.***, See also ***State vs. Becker***, 74 Wis.2d 675, 247 N.W.2d 495 (1976).

At the time the defendant in ***Annala*** was charged, juvenile court jurisdiction for a delinquency (i.e. a violation of a state or federal criminal

law) began at age twelve. The court was not asked to consider the question of whether the adult court would retain jurisdiction to hear an offense occurring *before* Annala's twelfth birthday.

Sanders concedes that absent a claim under ***Becker*** for intentional prosecutorial delay, which is not being raised in this case, the State could arguably prosecute an individual in adult court for state or federal crimes occurring on or after the individual's tenth birthday (assuming the statute of limitations had not already run). That is the same age that juvenile court jurisdiction for an alleged violation of a state or federal criminal law would have commenced in a delinquency proceeding under Sec. 938.12(1), Wis. Stats.

It is a well-accepted rule of statutory construction that when there are several statutes relating to the same subject matter they should be read together and harmonized, if possible. See ***Edelman v. State***, 62 Wis.2d 613, 215 N.W.2d 386 (1974). The only logical and rational construction of the jurisdictional and definitional statutes referenced above is that persons who commit acts under the age of 10 are not old enough *by law* to invoke the provisions of the Juvenile Justice Code *or* the Wisconsin Criminal Code

B. TRIAL COUNSEL COMMITTED PREJUDICIALLY DEFICIENT PERFORMANCE DUE TO HIS FAILURE TO CHALLENGE COUNT ONE OF THE INFORMATION ON JURISDICTIONAL GROUNDS PRIOR TO TRIAL.

As previously stated, the charging period in count one alleged that Sanders committed at least three acts of sexual contact with H.A.S. "between September 26, 2003, and September 25, 2008." (1:1-4). Sanders, who was born on May 31, 1994, would have been as young as nine years old at the time the offenses allegedly occurred. Thus, the defense was put on notice from the very outset of the proceedings that the state was attempting to prosecute Sanders' for various offenses prior to his tenth birthday.

The problem with trial counsel's approach to this issue was that he misinterpreted this as a burden of proof issue (See ***In the Interest of Stephen T***, 2002 WI App 3, 250 Wis.2d 26) as opposed to a *jurisdictional* one. It was not until the trial court that correctly framed the issue as one involving its jurisdiction to try Sanders for a portion of the charging period alleged in count one that the gravity of the error became apparent.

At the ***Machner*** hearing, trial counsel testified that he did not believe a pretrial motion "would do any good" because the evidence would

have come in as other acts evidence anyway, or the court would have amended the complaint to change the charging period to conform to the law. (57:15).

Sanders maintains that this error had a domino like effect and prejudiced the defense in several respects. First, had trial counsel brought a motion to dismiss or strike that portion of the complaint that pre-dated Sanders' tenth birthday *prior* to trial, as opposed to the close of the state's case, the unsuppressed portion of Sanders statement to Detective Weber, which concerned acts *prior* to his tenth birthday, would not have been admissible and trial counsel would have had the basis to request an order *in limine* prohibiting the introduction of this proffered evidence.

The testimony of Detective Weber was prejudicial because the state was able to establish that Sanders admittedly engaged in "peeks" with H.A.S. (54:171). The state was further able to introduce evidence through Detective Weber that Sanders admitted the word "peeks" had sexual overtones with his sister. (54:171-72). This is especially significant because it arguably corroborated H.A.S.' testimony that the use of the word "peeks"

was the equivalent of a code word used by Sanders to initiate sexual contact with her during the charging periods alleged in counts two through four.

Furthermore, the admission of Sanders' statement through Detective Weber basically forced Sanders to take the stand and explain the earlier contact he had with his sister before he was ten years of age. Sanders may not have felt compelled to take the stand and testify if this evidence had been properly excluded on jurisdictional grounds in the first place.

Furthermore, had trial counsel properly framed the issue as one involving the court's jurisdiction to try Sanders' for a portion of the acts alleged in count one, the defense would have had the basis to request an order *in limine* prohibiting H.A.S. from testifying about any acts that may have occurred prior to Sanders' tenth birthday.

As it was, the jury heard evidence through H.A.S. that Sanders allegedly began to touch H.A.S. sexually when he was as young as eight or nine years old:

STATE: If you can recall, how old were you—About how old were you the first time that ["peeks"] occurred?

H.A.S.: Six or seven.

...

STATE: What do you remember about what took place back when you were six or seven with the word "peek?"

H.A.S.: All I know is that eventually, it just became something that I did.

STATE: Did the peeks always involve touching?

H.A.S.: Yes.

(54: 123-24).

Again, this was a full year younger than what was originally alleged in the complaint. Trial counsel admitted at the ***Machner*** hearing that his defense of Sanders was largely rooted in credibility, that is, H.A.S. was simply not a credible witness. (57:20, 35-36). Trial counsel conceded that the above evidence hurt Sanders' defense because it made H.A.S. more believable than it would have had the evidence not been introduced (57:35-37).

The fact that Sanders was ultimately acquitted of count one does not lessen the gravity of trial counsel's error. As previously argued in Sanders' original post-conviction motion, the standard of ineffective assistance of counsel is not an outcome determinative standard. (38:2); See also ***State v. Pitsch***, 124 Wis2d, 628, 633, 369, N.W.2d711, 714 (1985). The improper

admission of the evidence of conduct pre-dating Sanders' tenth birthday on count one materially impacted his defense on the remaining counts.

The evidence concerning Sanders contact with H.A.S. prior to his tenth birthday would not have been admissible other-acts evidence under Sec. 904.04(2), Wis. Stats. Other-acts evidence is not admissible "to prove the character of a person in order to show that the person acted in conformity therewith" or to show that the defendant has a propensity to commit crimes. See ***State v. Sullivan***, 216 Wis2d 768, 772, 576 N.W.2d 30 (1998). Other acts evidence introduced for a different purpose is admissible so long as the evidence is relevant to a permissible purpose and its probative value is not substantially outweighed by the danger of unfair prejudice. ***Id.***

Here, the State would have offered the acts that allegedly occurred prior to Sanders' tenth birthday in order to show that Sanders is a bad person with a propensity to sexually assault children. The only useful purpose of introducing this conduct would be to show that Sanders also assaulted H.A.S. after his tenth birthday in conformity with his criminal character and propensity to sexually assault children.

If the State's other-acts evidence is relevant to show more than the defendant's criminal character or propensity to sexually assault children (and it should not), its probative value is substantially outweighed by the danger of unfair prejudice. See *Sec. 904.03, Wis. Stats*. Evidence that the defendant committed repeated acts of incest against his sister is likely to arouse the jury's sense of horror and provoke its instincts to punish. The error is magnified here because Sanders was not able to ask for a limiting instruction to cure the unfair prejudice that resulted from the introduction of this evidence because trial counsel did not properly frame the issue in the first place. Furthermore, even if he had, it is still doubtful that it would have made a difference. The damage would already have been done.

Jurisdictional issues aside, the relevancy of a defendant's age at the time of the alleged assaults has been addressed in the context of "other acts" evidence used to show the motive or intent of a defendant to assault a victim at a later point in time. Specifically, in ***State v. McGowan***, 2006 WI App 80, ¶17, 291 Wis.2d 212, 715 N.W. 631, the state introduced evidence of an earlier assault allegedly committed by McGowan when he would

have been ten years old, to provide evidence of motive or intent to assault a different female cousin eight years later.

The court in ***McGowan*** found the testimony of the earlier assault was improperly admitted. The court reasoned, "Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult." ***Id.***, ¶20 (quoting ***State v. Barreau***, 2002, WI App. 198, ¶38, 257 Wis.2d 203, 651 N.W.2d 12).

Ordinarily, the court must give great deference to counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options." ***Strickland v. Washington***, 466 U.S. 688 (1984). However, "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." ***Strickland***, 466 U.S. at 690.

In this case, present counsel cannot envision a scenario where it would have made strategic sense to wait until the close of the State's case

to challenge the jurisdiction of the court over acts allegedly committed by Sanders before his tenth birthday. Again, there was a very real danger this evidence would make the jury more likely to believe that Sanders' later alleged sexual contact with H.A.S. in the second charging period was more probable than not, (i.e. propensity evidence). The only reasonable conclusion that can be drawn from this is that trial counsel either was not aware of the law as it relates to the court's jurisdiction in the matter and/or he did not adequately investigate the facts of this case until it was too late to correct it. Either way, trial counsel's performance was the result of oversight, rather than reasoned defense strategy and the deficiency prong has thus been met. See ***State v. Moffett***, 147 Wis.2d 343, 433 N.W.2d 572, 576 (1989).

Alternatively, Sanders asks this court to find the admission of this evidence (acts prior to Sanders tenth birthday) plain error, thereby requiring a new trial in the interest of justice. See ***State v Sonnenburg***, 117 Wis. 2d 159, 177, 344 N.W. 2d 95 (1984).

C. SANDERS' TRIAL COUNSEL COMMITTED PREJUDICIALLY DEFICIENT PERFORMANCE FOR FAILING TO OBEJCT TO THE DUPLICITOUS JURY INSTRUCTIONS AND VERDICT FORMS ON THE CHARGE OF INCEST IN COUNT THREE OF THE INFORMATION.

Sanders' right to a jury trial includes the right to a unanimous jury verdict as to **each** offense. Wis. Const., Art. I §7; ***State v. Lomagro***, 113 Wis. 2d 582. 590, 335 N.W.2d 583 (1983). "Duplicity" is the charging of several crimes in a single count. ***Lomagro***, 1213 Wis. 2d at 586. As a general rule, if the jury is presented with evidence of more than one criminal act and each such act might establish a single offense, then the jury must unanimously agree as to which particular act constitutes the offense in order to return a conviction. ***Lomagro***, 113 Wis. 2d at 592. However, an exception to this rule occurs when the several criminal acts were conceptually similar in nature; committed during a single, continuous criminal episode; and are charged as a single offense. ***Lomagro***, 113 Wis. 2d at 592-93 (multiple acts of sexual intercourse committed during a two-hour continuing episode); ***State v. Giwosky***, 109 Wis. 2d 446, 456-58, 326 N.W.2d 232 (1982) (multiple acts of battery committed during a two-minute fight).

Accordingly, subject to the single-continuing-offense exception, if evidence of more than one criminal act is presented with respect to any one charge, then the jury instructions and verdict forms must require the jury to unanimously agree upon which *specific act* formed the basis for each relevant guilty verdict. ***State v. Marcum***, 166 Wis. 2d 908, 918-19, 480 N.W.2d 545 (Ct. App. 1992). Whether the jury instructions fully and correctly informed the jury of the law that applies to the facts of record is a question of law that is reviewed de novo. ***State v. Ferguson***, 2009 WI 50 ¶9, 317 Wis. 2d 586, 767 N.W.2d 187.

To demonstrate ineffective assistance of counsel, a defendant must show both deficient performance and prejudice. ***Marcum***, 166 Wis. 2d at 916-17. An unreasonable failure by counsel to object to duplicitous jury instructions and verdict forms is a deficient professional performance which is prejudicial to the defendant's substantial rights. ***Id.*** at 924-25.

In applying these legal standards to the instant action, a further review of the facts is instructive. As previously indicated, Sanders was charged with two counts of repeated sexual assault of a child (counts one

and two) and one count of incest (count three). All of the offenses allegedly involved Sanders and his sister, H.A.S.

The information alleged that Sanders committed at "least three" sexual assaults of H.A.S. during two separate time periods, between "September 26, 2003 and September 25, 2008," (herein after "time period one") and between "September 26, 2008, and September 26, 2012", (hereinafter "time period two").

At trial, H.A.S. testified that Sanders had touched her breasts from the time she was six or seven years of age until she was sixteen years old. (54:123-126). By comparison, Sanders would have been between the ages of eight to nine years old through age eighteen during this time period.

H.A.S. testified that the touching occurred "over 200 times." (54:126). Aside from hand to breast contact, H.A.S. also alleged mouth to breast contact. (54:123). H.A.S. also testified that on one occasion Sanders took her in the closet in her bedroom and showed her the proper way to give a blow job. (54:125). H.A.S. testified that she did not remember any other details about the mouth to penis contact other than it occurred "around" ten times starting when she was twelve or thirteen years old.

(54:125). Both the "peeks," which H.A.S. stated involved hand to breast touching, (54:124), and the mouth to penis contact always occurred behind closed doors. (54:128). H.A.S. testified the last "peek" and the oral sex stopped after Sanders returned from boot camp in December of 2012 (54:130).

The court twice instructed the jury (once for each charging period) as follows with respect to the offenses charged in counts one and two, repeated sexual assault of a child:

> 1. The defendant committed at least three sexual assaults of H.A.S.
>
> In this case, the defendant is alleged to have committed sexual assault of a child by violating section 948.02(2) of the Criminal Code of Wisconsin.
>
> Section 948.02(2) requires the State to prove that:
>
> a. The defendant has had sexual contact with H.A.S.
> b. H.A.S. was under the age of 16 years at the time of the alleged sexual contact.
> i. Knowledge of H.A.S.'s age is not required and mistake regarding H.A.S.'s age is not a defense.
> ii. Consent to sexual contact is not a defense.

2. At least three sexual assaults took place within a specified period of time. The specified period of time is from [September 26, 2003 through September 25, 2008 and September 26, 2008, through September 25, 2012.] Before you may find the defendant guilty you must unanimously agree that at least three sexual assaults occurred between [September 26, 2008, and September 25, 2012], **but you need not agree on which acts constitute the required three**.

   If you are satisfied beyond a reasonable doubt that the defendant committed three violations of Section 948.02(2) of the Criminal Code of Wisconsin within specified period of time, you should find the defendant guilty.

   If you are not so satisfied, you must find the defendant not guilty.
   (emphasis added)(21:1-30)

The court gave the following instruction to the jury on the incest count in count three:

Statutory Definition of the Crime

Incest with a child, as defined in §948.06(1) of the Criminal Code in Wisconsin, is committed by one who has sexual contact with a child he knows is related, either by blood or adoptions, and the child is related in a degree of kinship closer than second cousin.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the state must prove by evidence which satisfies you beyond a reasonable doubt that the following for elements were present.

Elements of a Crime That the State Must Prove

1. **The defendant had sexual contact with H.A.S.**
2. The defendant knew that H.A.S. was related to him by blood or adoption.
3. H.A.S. was related to the defendant in a degree of kinship closer than second cousin.
4. H.A.S. was under the age of 18 at the time of the alleged offense.
    a. Knowledge of H.A.S.' age is not required and mistake regarding H.A.S.' age is not a defense.
    b. Consent to sexual contact is not a defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied, you must find the defendant not guilty.

(emphasis added)(21:1-30)

The court also submitted a written version of the instructions to the jury. Following closing arguments, the court gave the standard jury unanimity instruction, WIS JI – Criminal 515 (2012), which provided in relevant part: "This is a criminal case, not a civil case. Before the jury may return a verdict, which may be legally accepted, the verdict must be reached unanimously. In a criminal case all twelve jurors must agree in order to arrive at a verdict." ***Id.***

The jury returned a verdict finding Sanders not guilty of "Repeated Sexual Assault of a Child", as charged in count one of the Information, but guilty of the same offense in count two as well as the incest and child enticement counts alleged during the same charging period in counts three and four respectively (55:141-42; 23:1-4).

Sanders maintains he was deprived of his right to a unanimous verdict on the incest count (count three) because of trial counsel's failure to object to the duplicitous jury instructions and verdict forms. As will be thoroughly discussed below, unlike the repeated sexual assault count, the incest count required the jurors to unanimously agree on which ***act*** formed the basis of the sexual contact element. See ***Marcum, supra***. In this case,

the court gave the standard instruction on unanimity which only told the jurors they must all agree before they could arrive at a verdict. It did not tell them they had to be unanimous about the specific *act* that formed the basis for each count. Therefore, from the jury's verdict of guilty on count two all that is known is that twelve jurors agreed that Sanders committed at least three acts of sexual assault of a child, where each act consisted of sexual contact contrary to Sec. 948.02(1) or (2) Wis. Stats. However, the verdict form does not reveal whether all twelve jurors agreed Sanders committed the same act when they found him guilty of the incest count. At this point it is impossible to know whether the jury unanimously agreed on which specific act formed the basis of the sexual contact element.

The jury instructions on the incest count did not specify *which* act of sexual contact they had to agree on (such as hand-to-breast contact, for example) to form the basis for their verdict on this charge. The instruction simply stated that they had to agree that "[Sanders] had sexual contact with H.A.S." Moreover, there was no language within the instruction itself telling the jurors they must be unanimous about the specific act that formed the basis for this count. Such language should have been included in the

jury instruction because there was evidence, namely through H.A.S., that Sanders committed multiple types of acts at non-particularized intervals, each of which could have arguably constituted an act of sexual contact.

The verdict form on the incest charge in count three was equally non-specific. It simply stated "We, the jury find the [defendant] guilty of Incest, as charged in Count Three of the Information." (23:1-8). In this case, both the instruction and the verdict form failed to properly focus the jury on which act occurred in which slice of time. There is no record of trial counsel objecting to either the non-specific instructions on the incest count or the generic verdict form.

From the state of the record, we do not know which of the alleged acts led to Sanders conviction on count two. Nor do we know which acts the jury acquitted him of in count one. The jury instructions as a whole omitted any requirement that they had to be unanimous with regard to a single incident with respect to the incest count.

The non-specific jury instruction, when applied to an unspecific verdict, as in this case, left the door open to the possibility of a fragmented or patchwork verdict on count three. For instance, there was nothing to

prevent three jurors from thinking there was hand-to-penis contact, three thinking mouth-to-penis contact and three thinking mouth-to-breast and three thinking hand-to-penis contact when they agreed to find him guilty of incest.

This instruction on the incest count was also particularly unhelpful in light of the preceding instruction, stated twice, that the jurors "need not agree on which acts constituted the required three" sexual assaults on the repeated sexual assault count. (See ***State v. Hubbard***, 2008 WI 92, ¶27, 313 Wis. 2d 1, 752 N.W.2d 839; Jury instructions are not to be judged in artificial isolation, but instead are to be viewed as a whole and in context).

Significantly, both the instructions on the incest count and the verdict form also completely failed to specify which *time* slice the act of sexual contact occurred in. This was a critical error because some jurors may have believed the relevant time period went back to the *first* charging period in the complaint in count one, and it is possible the same acts that Sanders was acquitted of in that count could have been used to *convict* him of incest in count three. The jury was never told they could not do this. This

scenario is nearly identical to ***Marcum, supra***. and the court in that case ultimately reversed Marcum's convictions for the same reasons.

As stated in ***Marcum, supra***, this is not only a Sixth Amendment unanimity problem but also a Fifth Amendment due process problem. See ***Marcum*** at 923. The court in ***Marcum,*** citing the United States Supreme Court in ***Schad v. Arizona***, 111 S.Ct. 2491 (1991), held there is nothing more fundamental to the adversarial process than notice of the conduct for which one is convicted of criminal wrongdoing.

The verdict on count three in the present case was so generic that any combination of jury findings could have sufficed for conviction. Because trial counsel did not object to the instructions or the verdict counsel's performance was deficient.

In this case, it was also prejudicial because not only is Sanders prejudiced by not knowing what act he stands convicted of, he is also prejudiced by the very real possibility of his guilt having been found based on facts there were part of a volitional act for which the jury also found him not guilty. *See Marcum*, *supra*.

A similar conclusion was also recently reached in the unpublished decision of ***State v. Clark***, 349 Wis. 2d 790, 2013 WI App 105, 837 N.W.2d 179, 2013 Wisc. App. Lexis 627 (Wis. Ct. App. 2013), a case that is factually analogous to this one. Although it cannot be cited as precedential authority, Sanders believes it has persuasive authority because of the close factual connections to this case. (App. 116-131).

Like Sanders, the defendant in ***Clark*** was also charged with at least one count of repeated sexual assault of a child. ***Id***. at ¶2. At the close of evidence, the court granted the State's request to submit a lesser included offense of a single count of first-degree sexual assault of a child. ***Id***. at ¶7. The defendant in ***Clark*** was ultimately acquitted on the repeated sexual assault offense, but found guilty of the singular offense of sexual assault of a child under the age of 13. ***Id***. at ¶10. The court applied the ***Marcum*** test and found that the defendant was deprived of his right to a unanimous guilty verdict on the lesser included offense. ***Id***. at ¶17. The court concluded that taken together, the non-specific jury instructions and the generalized verdicts did not establish whether all twelve jurors agreed that Clark committed the same *act*. See ***State v. Clark*** at ¶¶19-22.

The jury instructions in ***Clark*** on the singular offense, like the incest charge in count three for Sanders, did not specifically require the jury to unanimously agree as to which particular act *or* charging period constituted the offense in order to return a conviction. The court in ***Clark*** found the general unanimity instruction in WIS JI – Criminal 517 (2010) was unhelpful in light of the preceding instruction, stated twice, that the jurors "need not agree on which acts constituted the required three" sexual assaults on the greater offense, repeated sexual assault of a child. ***Id***. at ¶19.

With respect to the incest count in the present case, the jurors might have believed they only had to agree that the same *type* of act occurred, regardless of whether they agreed it was the same act and that it also occurred on the same date. This again could have effectively led to a "patchwork verdict," where different jurors believed that different acts occurred at different times within the same charging period or worse, that the acts occurred during an earlier time period that Sanders had already been found not guilty of in count one.

As a result, taken as a whole, the jury instructions failed to assure jury unanimity. Since Sanders' counsel failed to object to the improper jury

instructions, Sanders received ineffective assistance of counsel. See ***State v. Marcum***, 166 Wis.2d 908, 918-919, 480 N.W.2d 545 (Ct. App. 1992). Sanders does not believe a reversal and new trial on count three would be appropriate, as it is unknown which specific acts were included in the not guilty verdict in count one. As a result, a new trial cannot be ordered because Sanders might be retried for acts in which the jury has already adjudged him not guilty. ***Id.*** at 925. Accordingly, Sanders asks this court to enter a judgment of dismissal with prejudice on count three.

CONCLUSION

As a result of the cumulative effect of trial counsel's errors in his representation of Sanders, a new trial is requested on counts two and four. See ***State v. Zimmerman***, 2003 WI App 196, PP34, 47-49, 266 Wis. 2d 1003, 669 N.W.2d 762. Sanders also asks this court to dismiss count three with prejudice. Alternatively, Sanders ask this court to apply the "plain error" doctrine and order a new trial in the interest of justice. See ***State v. Sonnenburg, supra***.

Dated this 4th day of March, 2016.

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 this document is 7,226 words.

Dated this 4th day of March, 2016.

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Craig M. Kuhary

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 4th day of March, 2016.

Walden & Schuster, S.C.

By: _____

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with §809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) ta copy of any unpublished opinion cited under §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.

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 4th day of March, 2016.

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