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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP2328-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAUN M. SANDERS,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

The State reframes the issues as follows:

1. Was counsel ineffective for failing to seek pretrial dismissal of a count of repeated sexual assault on jurisdictional grounds, where its charging period

included seven months during which the now-adult defendant, Shaun Sanders, was nine and therefore would not have then been subject to delinquency proceedings?

The circuit court concluded that counsel was not ineffective because there was no jurisdictional issue to challenge.

2. Was counsel ineffective for failing to object to the standard jury instructions for incest, where those instructions did not inform the jury that it needed to agree on which specific sex act that Sanders committed within the continuous course of conduct alleged?

The circuit court concluded that because the jury instructions were proper, counsel was not ineffective for failing to object to them.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. It believes that the parties' briefs adequately set forth the relevant law and facts. The State disagrees that publication is warranted, because well-established case law governs the questions presented here.

SUPPLEMENTAL STATEMENT OF THE CASE

1. *The charges and pretrial motions.*

The State charged Shaun Sanders with four criminal counts: two counts of repeated sexual assault, one count of incest, and one count of child enticement. (1:1-2.) The counts were based

on allegations by H.S., Sanders' younger sister by almost two-and-a-half years, that Sanders repeatedly sexually assaulted her over a ten-year period between 2003 and 2012. (1.)

Police learned of the allegations in 2013, when H.S. was sixteen years old. (1:2.) H.S. told police that beginning around when she was around six years old, Sanders began asking H.S. to lift her shirt so that he could "peek" at her breasts, and that Sanders would expect her to come to his room late at night so that he could touch or suck on her nipples. (1:3.) H.S. said that that activity continued for years and later led to Sanders' forcing her to perform oral sex on him when H.S. was between around twelve and fifteen. (1:3.) H.S. estimated that Sanders had her expose her breasts to him over 200 times between 2003 and 2012 and had her perform oral sex on him at least twelve times between 2008 and 2012. (1:3.)

Shortly after learning of H.S.'s claims, the State charged Sanders in October 2013, when Sanders was nineteen years old. (1.). In count one, the State alleged that Sanders repeatedly sexually assaulted H.S. between September 26, 2003 and June 5, 2006, when H.S. was between seven and nine. (7.) Sanders, who was born in May 1994, was nine years old for the first seven months of the charging period in count one. (7.) In contrast, the charging period alleged in counts two (repeated sexual assault), three (incest), and four (child enticement) was from

September 26, 2008 to September 25, 2012, when H.S. was between twelve and fifteen years old, and Sanders was between fourteen and eighteen years old. (7.)

According to the complaint, police interviewed Sanders at some point in 2013 after H.S. reported the assaults. (1:3.) During the police interview, Sanders largely corroborated H.S.'s account and admitted to the "peeks," oral sex, and related activity. (1:3.)

Before trial, Sanders' counsel filed a motion to suppress Sanders' statements and admissions to police, arguing that they were products of police coercion. (5.) The circuit court agreed, and initially suppressed all of Sanders' statements. (53:19.)[1] The court then clarified that at the beginning of the interview, before the questioning became coercive, Sanders voluntarily admitted that when he and H.S. were children in 2003 or so, he had asked H.S. to lift her shirt for so-called peeks at her breasts over a one-month period. (53:22.) Accordingly, the court permitted testimony from the interviewing officer "that Mr. Sanders admitted to peeks and a description of those peeks[.]" (53:22.)

[1] The Honorable Jennifer R. Dorow presided over the pretrial and trial proceedings.

2. ***The trial and verdict.***

At trial, H.S. testified that when she was six or seven, Sanders began requiring peeks from her, which meant she had to lift her shirt so that Sanders could suck, fondle, and kiss her breasts. (54:123.) She testified that the peeks always involved touching, and that after Sanders touched her, he'd try to kiss her or make out. (54:124.)

She testified that when she was twelve or thirteen, Sanders began demanding that she give him oral sex, which occurred at least ten times until December 2012. (54:125-26.) H.S. said that often Sanders would demand that she go to his room at a certain point after their parents had gone to bed, where he'd have her give him peeks, perform oral sex, or watch him masturbate. (54:127-19.) She estimated that since the first "peek" occurred when she was six or seven, they occurred over 200 times through December 2012. (54:126.)

According to H.S., in December 2012, H.S. was communicating over Skype with her then-boyfriend, Robert Nuti, when Sanders entered her room and said "peek." (54:123.) H.S. ended the call, complied with Sanders' demand, and got back on line with Nuti, who began asking H.S. questions about what had happened. (54:134.) H.S. avoided Nuti's questions during the call, but the next day she told Nuti what a "peek" meant. (55:7-8.) Nuti testified consistently with

H.S.'s account of the Skype call and acknowledged that he had heard Sanders say "peek" to H.S. (55:7.) Eventually, Nuti reported his concerns to school officials, which led to the police investigation. (55:8.)

Officer Jay Weber testified that when he interviewed Sanders in 2013, Sanders admitted that roughly ten years earlier for about a month, he had asked H.S. to lift her shirt to expose her breasts, and that he called this behavior "peeks." (54:171-72.)

At the close of the State's case, Sanders sought to dismiss count one, arguing that the State failed to demonstrate that Sanders had sexual intent behind the "peeks" allegedly committed beginning when he was eight or nine years old. (55:23-24.) The court denied the motion on those grounds (55:94), but stated that the claim raised a different potential issue: did the State have jurisdiction to prosecute Sanders for conduct that he committed before age ten, i.e., before even juvenile court could exercise jurisdiction over him in delinquency proceedings? (55:85-88.) Ultimately, because the issue came up in the middle of trial, the jury had heard evidence of Sanders' conduct before age ten, and there was no clear way to remedy any potential problem, the court declined to dismiss or amend the charging period in count one and stated that it would, if necessary, address the jurisdictional

issue post-verdict if Sanders was convicted on count one. (55:95.)

For Sanders' defense, Sanders' and H.S.'s parents testified. They stated that they observed only typical brother–sister behavior between Sanders and H.S., that they had never seen or heard them moving between their bedrooms at night, and that they would have noticed such activity if it had happened. (55:34-35, 49, 58-59.) Sanders also testified and confirmed that he told Officer Weber about the peeks. (55:76.) But he explained that the peeks occurred over only a month when he was eight or nine years old and that they were simply driven by childhood curiosity. (55:80.) Sanders otherwise denied H.S.'s allegations. (55:77, 79.)

The jury acquitted Sanders on count one, i.e., the count with the earlier time period, but found him guilty of counts two through four, all of which involved the later charging period. (55:141-43.) The court sentenced him to probation with stayed sentences. (31.)

3. ***Postconviction proceedings.***

Sanders filed a postconviction motion alleging that trial counsel was ineffective for (1) failing to file a pretrial motion to dismiss count one because the court lacked jurisdiction to try Sanders for conduct he committed before age ten, (2) failing to file a motion in limine seeking to prevent the State from

introducing evidence of Sanders' limited admission to the "peeks" or other claims that Sanders had sexual contact with H.S. before he turned ten; and (3) failing to object to allegedly duplicitous jury instructions and verdict forms on the incest charge. (38:12-18.)[2]

The circuit court held a *Machner* hearing on the motion, and denied Sanders relief on all of his claims. (46; 58.)[3] This appeal follows.

On appeal, Sanders raises three issues. The first two are related: first, does the court have jurisdiction to try someone for acts allegedly committed before that person turned ten, i.e., the youngest age in which juvenile courts have jurisdiction in delinquency proceedings?, and second, was counsel ineffective for failing to seek pretrial dismissal of count one and failing to seek exclusion of evidence of Sanders' conduct before he turned ten? Because the answer to the second question hinges largely on the first, the State answers them together in its brief.

As for the third issue, Sanders claims that counsel was ineffective for failing to object to what he claims were duplicitous jury instructions as to count three, incest.

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[2] Sanders also challenged the charging periods on all four counts on due process grounds (38:2-12), but does not raise that claim on appeal.

[3] The Honorable Lee S. Dreyfus, Jr., presided over the postconviction proceedings.

For the reasons below, Sanders is not entitled to relief.

ARGUMENT

I. Counsel was not ineffective for failing to seek pretrial dismissal of count one on jurisdictional grounds because there is no jurisdictional bar to prosecuting someone based on conduct committed before age ten.

A. To succeed on his claim, Sanders must demonstrate that his counsel's performance was deficient and that that deficiency was prejudicial.

To establish ineffective assistance of counsel, a defendant must prove that the representation was (1) deficient and (2) prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficient representation, a defendant must highlight specific acts or omissions that are "outside the wide range of professionally competent assistance." *Id.* at 690. A lawyer's strategic decisions "are virtually invulnerable to second-guessing." *State v. Westmoreland*, 2008 WI App 15, ¶ 20, 307 Wis. 2d 429, 744 N.W.2d 919. Further, counsel cannot be deemed to have performed deficiently for failing to raise meritless arguments. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

To prove prejudice, a defendant must demonstrate that there is a reasonable possibility that, but for counsel's deficient performance, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Id.* Courts need not address both prongs of the *Strickland* test if the defendant fails to make a sufficient showing on one. *See id.* at 697.

This court's review of an ineffective assistance of counsel claim presents a mixed question of fact and law. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). This court will not disturb a circuit court's findings of fact unless they are clearly erroneous, but reviews the circuit court's legal conclusions as to deficiency and prejudice for errors of law. *Id.* at 127-28.

B. Counsel was not deficient because there is no legal basis to conclude that the circuit court lacked jurisdiction to try Sanders based on acts he committed before age ten.

Sanders argues that the State was barred from prosecuting him based on—and from using evidence of—criminal acts that H.S. alleged that Sanders had committed before he turned ten. For support, Sanders invokes Wis. Stat. § 938.12(1), which designates age ten to be the youngest age for juvenile court to invoke jurisdiction in delinquency proceedings. Sanders interprets that limitation in Wis. Stat. § 938.12(1) to mean that a defendant's acts committed before he turned ten are jurisdictionally off-limits for use in a criminal prosecution. (Sanders' Br. 10-13.)

But well-established case law in Wisconsin makes clear that a court's jurisdiction depends on the defendant's age at the time of charging, not at the time of the conduct. *See State v. Annala*, 168 Wis. 2d 453, 484 N.W.2d 138 (1992). So long as relevant statutes of limitation have not run and the State shows that it did not purposely delay charging so as to avoid juvenile court jurisdiction, it may prosecute an adult defendant in adult court for acts committed as a juvenile. *Id.* at 459 (citing *State v. Becker*, 74 Wis. 2d 675, 247 N.W.2d 495 (1976)).

The rationale for designating a particular court's jurisdiction based on the age of the defendant at the time of charging is tied to the rehabilitative and treatment needs of the defendant at the time of charging, not the age of the defendant at the time he or she committed the acts. *Annala*, 168 Wis. 2d at 468-69. It does not mean, as Sanders interprets Wis. Stat. § 938.21(1) (Sanders' Br. 13), that criminal behavior by children under ten cannot as a matter of law prosecuted in adult court. *See id.* ("Children committing delinquent acts remain culpable for their criminal behavior."); *see also State ex rel. Koopman v. Cty. Court Branch No. 1*, 38 Wis. 2d 492, 499, 157 N.W.2d 623 (1968) ("Wisconsin law expresses no age below which a person cannot be held to have committed a crime."). Again, the statutes designating jurisdiction based on age are focused on how to best serve the

defendant's rehabilitative and treatment needs at the time of charging.

Here, Sanders does not—and cannot—argue that the State delayed charging him to avoid juvenile jurisdiction. The State learned of Sanders' conduct when H.S. reported it to police in 2013, when Sanders was eighteen or nineteen years old, and charged him in October of that year. Had the State learned of Sanders' pre-age-ten conduct between when he turned ten and when he turned seventeen, the juvenile court would have had jurisdiction in delinquency proceedings. Wis. Stat. § 938.12(1). And had the State learned of Sanders' conduct while he was still under ten, that conduct would have been actionable in juvenile court. *See* Wis. Stat. § 938.13(12) (providing juvenile court jurisdiction "over [a] juvenile[] alleged to be in need of protection or services" and "[t]he juvenile is under 10 years of age and has committed a delinquent act"). The bottom line is that, under *Annala* and *Becker*, the time of charging controls jurisdiction. Here, there was no jurisdictional issue; any motion by counsel on that basis would have failed.[4]

[4] Sanders also faults counsel for "misinterpret[ing]" the jurisdictional issue as a burden-of-proof issue, when counsel sought to dismiss count one at the close of the State's case by arguing that the State could not prove that Sanders acted with intent when he was younger than ten (Sanders' Br. 14). As explained above, the jurisdictional issue was meritless. While the burden-of-proof issue also was ultimately meritless, it was a reasonable

(continued on next page)

Alternatively, counsel was not ineffective for failing to seek dismissal on jurisdictional grounds because there is no case law or statute expressly barring jurisdiction over defendants if defendants committed the alleged criminal acts before they turned ten. Sanders has not identified any law supporting his argument. And at the *Machner* hearing, counsel stated that he was unaware of any case law or statute saying that adult courts could not have jurisdiction based on acts committed before the defendant turned ten. (57:12, 17, 25.) "Counsel is not required to object and argue a point of law that is unsettled." *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994).

In sum, the circuit court had jurisdiction to try Sanders for his criminal acts, including conduct alleged to have occurred before he turned ten. Sanders' counsel was not deficient or prejudicial for failing to raise a meritless pretrial motion challenging jurisdiction. *Toliver*, 187 Wis. 2d at 360.

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challenge. Intent can be a difficult element to prove when the State prosecutes someone for sexual contact committed while young:

> [T]he law "criminalizes" a child's sexual contact with another child only when the perpetrator possesses the intent to become sexually aroused in a manner that is inconsistent with childhood behavior. In other words, it "criminalizes" children when they behave like adults, not when they behave in a manner normative to their age.

In re Stephen T., 2002 WI App 3, ¶ 20, 250 Wis. 2d 26, 643 N.W.2d 151. Indeed, here, the jury ultimately acquitted Sanders of count one. Hence, to the extent Sanders is faulting counsel for his burden-of-proof motion, counsel reasonably raised the issue to the court.

C. Sanders cannot demonstrate prejudice because the testimony would have been admitted as other-act evidence.

Because jurisdiction here was properly governed by Sanders' age at the time of charging, Sanders' first ineffective assistance claim fails the deficient performance prong, and this court need not consider prejudice. *Strickland*, 466 U.S. at 697. But even assuming that the pretrial jurisdictional challenge had merit, Sanders cannot demonstrate prejudice.

As an initial matter, the jury acquitted Sanders on count one, which was the only count that included the charging period when Sanders was under ten. Hence, Sanders was not prejudiced by any failure to have the charging period in count one amended to when he was ten or older.

Sanders complains that counsel's failure to alert the court to the jurisdictional issue before trial would have supported a motion in limine barring the State from using Sanders' acknowledgement to Officer Weber that, for about a month while Sanders was around nine years old, Sanders engaged in so-called peeks at H.S.'s exposed breasts. (Sanders' Br. 15-18.) Although that admission in and of itself is not damning, it potentially bolstered H.S.'s and Nuti's testimony that Sanders continued to demand peeks and overtly sexual conduct when H.S. was older. It also potentially harmed Sanders' credibility

given his testimony that the peeks had only occurred for a month when he and H.S. were young children.

But in any event, the State would have sought to admit the evidence as other act evidence. To have it admitted, the State would have offered it to demonstrate Sanders' motive, opportunity, and continued pattern of conduct to later demand sexual contact from H.S. through December 2012. *See State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). That evidence was relevant to the conduct alleged in counts two, three, and four because it involved an identical course of conduct, including identical use of the word "peek" to describe the act, to what H.S. claimed had been occurring over the course of nearly ten years. *See id.* And although prejudicial to Sanders, that prejudice did not substantially outweigh its probative value. *Id.* at 772-73; *see* Wis. Stat. § 904.03.[5]

To be sure, because the postconviction court correctly concluded that there was no merit to the jurisdictional challenge (58:6-7), it did not exercise its discretion to determine whether Sanders' statement was admissible other-act evidence. Hence, if this court agrees with Sanders that there was a jurisdictional issue *and* that the law supporting it was

[5] To that end, at the *Machner* hearing, counsel stated that he did not seek suppression of Sanders' statement because the circuit court had already ruled that it was admissible, and because he thought the court would likely allow it to come in as other-act evidence. (57:16-18, 28.)

sufficiently settled so that counsel should have raised the issue pretrial, whether Sanders' counsel performed prejudicially depends on whether Sanders' admission would have still come in as other-act evidence. This court does not exercise discretion in the first instance. *In re Cesar G.*, 2004 WI 61, ¶ 42, 272 Wis. 2d 22, 682 N.W.2d 1. Therefore, if this court reaches this question, it should remand to the circuit court for it to exercise its discretion.[6] *Accord King v. King*, 224 Wis. 2d 235, 254, 590 N.W.2d 480 (1999).

Again, however, Sanders is incorrect that there is a jurisdictional problem under the circumstances with the State having charged Sanders based on (and using evidence of)

[6] Sanders seems to suggest that based on *State v. McGowan*, 2006 WI App 80, ¶ 17, 291 Wis. 2d 212, 715 N.W.2d 631, evidence of Sanders' behavior at age nine would have, as a matter of law, low probative value. (Sanders' Br. 19-20.) If Sanders is making that argument, he is wrong. The holding in *McGowan* is that the other-act evidence—which McGowan allegedly committed when he was ten to a different victim, under different circumstances, and involving different acts—was not sufficiently similar to allegations that McGowan assaulted a different victim in a different way eight years later when he was an adult. *Id.* ¶ 20. In addition to being factually distinguishable from the facts here (where the other act involved the same victim and a similar act with a distinctive word to describe it), nothing in *McGowan* provides that evidence of acts by a young child may never be admissible as other act evidence.

conduct committed when he was under ten. Accordingly, this court should affirm the circuit court.[7]

II. The jury instructions and verdict form on the incest count were complete and proper; hence, counsel was not ineffective for failing to challenge them.

Sanders next argues that counsel was ineffective for failing to object to the jury instructions and verdict form on the incest count because the instructions did not explain that the jury had to unanimously agree on the specific act by Sanders that formed the basis for the guilty verdict. (Sanders' Br. 22-35.) Sanders claims that the jury instructions and verdict form as to the incest count were duplicitous and therefore violated his right to a unanimous verdict. (Sanders' Br. 29-30.) For the reasons below, Sanders is not entitled to relief.

A. Jury unanimity on a particular means of committing a crime is not required when multiple acts are charged as a continuing offense.

Whether counsel was ineffective for failing to object to the jury instructions and verdict form raises the related issues of duplicity and the right to a unanimous verdict.

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[7] In a one sentence argument, Sanders also seeks a new trial in the interest of justice based on the admission of Sanders' statement to Weber (Sanders' Br. 21). That argument is undeveloped and, in any event, meritless for the same reasons that doom his ineffective assistance claim.

Duplicity involves the joining, in a single count, of two or more separate offenses. *State v. Lomagro*, 113 Wis. 2d 582, 586, 335 N.W.2d 583 (1983).

> The purposes of the prohibition against duplicity are: (1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity.

Id. at 586-87 (citations omitted).

As for that fifth purpose, the Wisconsin Constitution's guarantee of the right to trial by jury includes the right to a unanimous verdict with respect to the ultimate issue of guilt. *State v. Johnson*, 2001 WI 52, ¶ 11, 243 Wis. 2d 365, 627 N.W.2d 455.

> To say that the jury must be unanimous, however, does not explain what the jury must be unanimous about. For this we look to the statutory language defining the crime and its elements. "The principal justification for the unanimity requirement is that it ensures that each juror is convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense." Thus, while jury unanimity is required on the essential elements of the offense, when the statute in question establishes different modes or means by which the offense may be committed, unanimity is generally not required on the alternate modes or means of commission.

Id. (citations omitted).

Acts that alone can constitute separately chargeable offenses, but that have been "committed by the same person at substantially the same time and relating to one continued

transaction, may be coupled in one count constituting but one offense without violating the rule against duplicity." *Lomagro*, 113 Wis. 2d at 587 (internal quotation marks and citation omitted). For example, charging a single crime of repeated sexual assault based on an alleged continuous course of conduct does not violate the unanimity requirement. *Johnson*, 243 Wis. 2d 365, ¶ 28.

B. The prosecutor had discretion to premise the incest charge on the continuing course of Sanders' abuse of H.S. between September 2008 and September 2012.

In this appeal, Sanders limits his claims of attorney ineffectiveness to a failure to object to the jury instructions and verdict form. He does not expressly challenge the complaint or amended information. Rather, he seems to proceed on the faulty premise that the State cannot charge a single count of incest based on a continuous course of conduct: "[U]nlike the repeated sexual assault count, the incest count required the jurors to unanimously agree on which ***act*** formed the basis for the sexual contact element." (Sanders' Br. 28.)

Not so. To be sure, Wis. Stat. § 948.025, by its language, requires proof of multiple acts for a jury to find a defendant guilty of that single act of repeated sexual assault. *See Johnson*, 243 Wis. 2d 365, ¶ 21. Incest, by contrast, is not purely a "continuous course of conduct" crime like repeated sexual

assault is. But prosecutors have long had discretion to aggregate conceptually similar acts to serve as the basis for a single crime without violating the rule against duplicity. *Lomagro*, 113 Wis. 2d at 587-88. There is nothing in the law or logic to say that a prosecutor could charge a defendant with repeated sexual assault based on a continuing course of conduct, but could not exercise his or her discretion and charge that defendant with a single count of incest—or any other crime that a single act could otherwise support—based on that same conceptually similar continuing course of conduct.

Here, the prosecutor charged Sanders with incest based on H.S.'s allegations that Sanders regularly touched and licked her breasts and that that act sometimes led to him making H.S. perform oral sex on him between September 2008 and September 2012. (7:2.) That charge involved the same continuing course of conduct and time period as count two, repeated sexual assault, of which the jury also found Sanders guilty. (7:2.) Even though H.S. alleged contacts by Sanders that could have supported hundreds of individual counts of incest, the prosecutor here properly—and without violating the rule prohibiting duplicity—exercised his discretion in joining those conceptually similar acts as the basis for one offense. *See Lomagro*, 113 Wis. 2d at 587 (stating that a prosecutor may join acts that alone constitute separately chargeable offenses "when

committed by the same person at substantially the same time and relating to one continued transaction") (internal quotation marks and citation omitted).

C. Because the prosecutor properly charged Sanders with a single count of incest based on the same continuing course of conduct alleged in count two, the jury did not have to agree on a single act forming the basis for the incest charge.

In short, there was nothing wrong with the jury instructions or verdict form on count three. Here, the court provided the jury with the standard instructions on incest:

> Count 3: Incest with a child, as defined in Section 948.06(1) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with a child he knows is related, either by blood or adoption, and the child is related in a degree of kinship closer than second cousin.
>
> Before you may find the Defendant guilty of this offense, the State must prove by evidence with satisfies you beyond a reasonable doubt that the following four elements were present: One, the Defendant has sexual contact with [H.S.]; two, the Defendant knew that [H.S.] was related to him by blood or adoption; three, [H.S.] was related to the Defendant in a degree of kinship closer than second cousin; and four, [H.S.] was under the age of 18 years at the time of the alleged offense.
>
> . . . .
>
> If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the Defendant guilty.

(55:112-13.) *See* Wis. JI-Criminal 2130 (2008).

The court read the jury the Information and instructed it on the relevant time period during which the sexual contact was alleged:

> The third count of the Information charges that the Defendant, Shaun M. Sanders, between the approximate time period of September 26, 2008, and September 25, 2012, at [Sanders' and H.S.'s home address], did have sexual contact with a child he knows is related by blood or adoption to a degree of kinship closer than second cousin, H.A.S., date of birth, 9/26/1996, contrary to Section 948.06(1) of the Wisconsin Statutes.

(55:104.)

The court also provided the jury with the standard unanimity instructions: "This is a criminal, not a civil case; therefore before the jury may return a verdict . . . the verdict must be reached unanimously. In a criminal case, all twelve jurors must agree in order to arrive at a verdict." (55:133); Wis. JI-Criminal 515 (2012).

Finally, the verdict form for count three read: "We, the jury, find the defendant, Shaun M. Sanders, guilty of Incest, as charged in Count Three of the Information." (23:3.).

To summarize, the jury was advised that Sanders was charged with having committed incest with H.S. between September 26, 2008, and September 25, 2012. It was informed that it had to find beyond a reasonable doubt that Sanders had sexual contact with H.S. during that period, along with the other elements. It was informed that it had to be unanimous on the verdict. And the verdict form directed the jury to the

Information. Again, because the State based the incest charge on a continuing course of conduct, as the prosecutor had discretion to do, any instruction to the jury that it needed to agree on the specific act forming the basis for incest would have been incorrect.

Notably, the court also instructed the jury that on count two, repeated sexual assault, among the other elements it "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." (55:112.) The jury found Sanders guilty of count two. Thus, it unanimously agreed that Sanders committed at least three sexual assaults of H.S. between September 26, 2008 and September, 25, 2012. The jury's finding as to that element is also necessarily a finding that the State established the sexual contact element of the incest charge.

Sanders provides no persuasive arguments to the contrary. He invokes *State v. Marcum*, 166 Wis. 2d 908, 480 N.W.2d 545 (Ct. App. 1992), for the proposition that the jury had to agree on a specific act for the incest count. (Sanders' Br. 28-29.) *Marcum* does not so hold. That case involved multiple charges, each based on a single act of sexual assault, not a single crime based on a course of continuing conduct or alternative means. *See id.* at 912-13, 921-22. What's more, this court in *Marcum*

explained that "if the jury is presented with alternative means of committing one crime, unanimity is not required on the alternative means." *Id.* at 922.

Sanders also complains that both the instructions on the incest count and verdict form failed to designate the time period in which the incestuous act of sexual contact occurred. He claims that that omission could have resulted in the jury finding sexual contact based on the earlier charging period alleged in the first count, of which Sanders was acquitted. (Sanders' Br. 31-32.) But the court read the jury the Information, which provided that the relevant time period was September 26, 2008 to September 25, 2012. (55:104.) The verdict form referred back to the Information. The jurors cannot have reasonably been confused about the time period. And again, the jury had unanimously agreed that Sanders committed at least three sexual acts with H.S. during the relevant period in finding him guilty of count two; that finding necessarily encompasses a finding of the sexual contact element for the incest charge.

Finally, Sanders improperly cites *State v. Clark,* an unpublished per curiam decision for support. (Sanders' Br. 33-34.) *See* Wis. Stat. (Rule) § 809.23(3)(b) ("A per curiam opinion . . . is not an authored opinion for purposes of this subsection."). The State does not address that argument further.

In conclusion, the jury did not need to unanimously agree on a specific act forming the basis of the incest charge. There was no error in the instruction and verdict form for counsel to object to. Accordingly, counsel was not ineffective for failing to voice a meritless objection. Sanders is not entitled to relief on this claim.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this court affirm the judgment of conviction and decision and order of the circuit court.

Dated this 20th day of May, 2016.

Respectfully submitted,

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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 5297 words.

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Sarah L. Burgundy
Assistant Attorney General

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 20th day of May, 2016.

_____

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