STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP002328-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SHAUN M. SANDERS,

Defendant-Appellant.

REPLY BRIEF OF 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

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ARGUMENT

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

There is one issue that both the defense and the State agree on: Several of Sander's claims of ineffective assistance of counsel are linked to whether the adult court retains jurisdiction over him for crimes he allegedly committed prior to his tenth birthday. If this court finds that there effectively is no minimum age for which an individual can be prosecuted for crimes in the State of Wisconsin, Sanders agrees with the State that his ineffective assistance claims must fail along with his challenge to the circuit court's jurisdiction to hear count one of the criminal complaint.

As expected, the State, in its Brief at pp. 11-13, once again places heavy reliance on *State v. Annala*, 168 Wis.2d 453, 484 N.W.2d 138 (1992). *Annala* basically affirms the fact that the age of the defendant at the time of charging controls whether the juvenile court or the adult court will have jurisdiction to hear a case that allegedly occurred while the defendant was a juvenile. Additionally, *Annala* stands for the proposition that this jurisdiction extends to offenses that occur before the age at which the individual could have been waived into adult court as a juvenile absent manipulative intent or

intentional delay by the prosecution. Sanders does not challenge either one of these holdings.

What the *Annala* court did *not* decide is whether an adult could be prosecuted for a crime occurring *before* the age at which an individual can even commit a "crime" or a "delinquency" under the Wisconsin Statutes. The defendant in *Annala* was fifteen at the time of his offense, younger than the age he could have potentially been waived into adult court (16 years of age at the time) but significantly, *older* than the age a juvenile could have been prosecuted for a delinquency (12 years of age) at the time. Therefore, the court in *Annala* was *not* asked to address the issue raised in this appeal which concerns whether acts committed before the age of ten can later be prosecuted as crimes in adult court.

As previously argued, the plain meaning of Sections 938.12(1), 938.02, and 938.183, Wis. Stats., all allow 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 had not attained that age regardless of *when*

the prosecution was commenced, otherwise it would have included language in either the juvenile justice or criminal codes specifically excepting it.

Therefore, Sanders maintains that the legislature has clearly and unequivocally stated that children under the age of ten are simply not capable of forming the necessary intent, or *actus reus*, to commit violations of state or federal law. The legislature, by delineating that minimum age as ten, has expressly determined the limits of juvenile *and* adult court jurisdiction. Logically, this makes sense as it would be inhumane to punish those who have not even remotely begun to develop mentally, intellectually or physically. The fact that the individual may be a fully formed adult by the time of prosecution does not take away from the fact they were not so at the time of the commission of the offense.

Conversely, it is hard to justify from a logical standpoint the State's contention that crimes committed by children under the age of 10 can later be prosecuted in adult court with criminal sanctions as long as the statute of limitations has not run. Under the state's draconian reading of *Annala*, there is no minimum age for criminal responsibility in adult court, and the state could theoretically prosecute individuals for crimes dating back to infancy as long as no prosecutorial delay occurred and the statute of limitations had not

already run. Again, this is logically inconsistent with the language in Chapter 938 because it would allow the State to criminally prosecute an adult for a crime they would not have been able issue under either the juvenile or the criminal justice codes had that person still been a juvenile at the time of prosecution.

The State's reliance on *State ex rel. Koopman v. Cty Court Branch No. 1*, 38 Wis. 2d 492, 499, 157 N.W.2d 623 (1968) for this proposition is also misplaced for the same reasons as its reliance on *Annala* was on this issue. The legislature, by establishing a minimum age of concurrent adult court jurisdiction at ten for certain crimes in Chapter 938 (First Degree Intentional Homicide, for example) and the minimum age of ten for juvenile/adult court prosecution for violations of all other state and federal crimes supersedes any language in *Koopman* from over forty years ago that may suggest otherwise.

As previously argued, 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. SANDERS STATEMENT TO DETECTIVE WEBER WOULD NOT HAVE BEEN ADMISSIBLE AS OTHER ACTS EVIDENCE.

The State argues in its Brief at p.14 that even if the pretrial jurisdictional challenge has merit, Sanders cannot meet the prejudice prong of the *Strickland* analysis because the evidence would have been admitted nevertheless as "other acts" evidence under Sec. 904.03, Wis. Stats.[1] The State concedes that Sanders acknowledgement to Detective Weber that he caused H.S. to expose her breasts to him was harmful to his case because "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." *Id*.

The State further argues that it would have sought to admit the evidence to show Sanders' "motive, opportunity, and continued pattern of conduct." *Id.* at 15. The State offers no analysis in its brief as to *why* it believes Sanders acknowledgment to Weber that he caused H.S. to expose her breasts to him when he was nine is admissible as proof of "motive" or

[1] See Strickland v. Washington, 466 U.S. 668 (1984).

"opportunity" on counts two through four. Under the *Sullivan* analysis, the State, being the beneficiary of the proffered other acts evidence, faces the initial burden of explaining a permissible purpose under Sec. 904.04(2), Wis. Stats. *See State v. Sullivan,* 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998).

This prong cannot been met even if the State had attempted to explain its rationale because the character or nature of the proffered acts (exposure) is at its essence different from the acts allegedly committed by Sanders in the remaining counts (sexual contact and sexual intercourse). Therefore, the acts acknowledged by Sanders are not similar enough in character to the acts alleged by H.S. to be considered relevant for the purposes of "motive" or "opportunity."

For this reason, the State's final assertion that Sanders acknowledgement to Weber is also admissible to show a "continued pattern of conduct" is dangerously nebulous and suggests that the proffered evidence demonstrates that Sanders has a propensity to engage in lustful conduct with H.S. *See* State's Brief at p. 15. The State offers no supporting case law or argument to explain how this "continued pattern of conduct" fits within any of the statutory exceptions to propensity evidence found in Sec. 904.04(2), Wis. Stats.

As to the second prong of the *Sullivan* analysis, the relevancy of the proffered exposure evidence to a fact at issue, the State does not explain how Sanders conduct when he was either an eight or nine year old nine year old is relevant to show opportunity, motive or to assault H.S. when he was older, up to ten years older, by the end of the second charging period in the complaint. Once again, the State, being the beneficiary of the proffered evidence, has not met their initial burden on this point.

The State, in a footnote, dismisses the holding of *State v. McGowan*, 2006 WI App 80, ¶17, 291 Wis. 2d 212, 715 N.W.2d 631, largely because of its belief that Sanders suggested in his brief that his conduct, *as a matter of law*, would have had low probative value. *See* State's Brief at p. 16. Sanders never made such an assertion. Instead, Sanders simply cites *McGowan* for the proposition that when evaluating the relevancy prong in a *Sullivan* analysis, the court can consider the fact that behavior that occurs when a defendant is younger is generally less probative than behavior that occurs while a defendant is older, due to changes in character that most individuals experience between childhood and adulthood. *Id.*

Although there are factual differences between this case and *McGowan*, especially in the sense that the parties are the same, there was no

admission by Sanders to Weber that he assaulted H.S. in the same way as was alleged in the complaint. In others words, just because Sanders acknowledged he caused H.S. to expose her breasts by using the word "peeks" at age eight or nine, does not mean that he sexually assaulted her years later or when he was older. This is the one significant similarity between *McGowan* and this case: the proffered acts (exposure) are different in nature from the charged offenses (sexual assault).

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 was substantially outweighed by the danger of unfair prejudice. *See* Sec. 904.03, Wis. Stats. Evidence that the defendant caused H.S. to engage in repeated acts of exposure is likely to arouse the jury's sense of horror and provoke its instincts to punish. The error is magnified in this case because Sanders counsel never asked the court for a limiting instruction to cure any unfair prejudice that resulted from the introduction of this evidence because trial counsel did not properly frame the issue in the first place.

C. EVEN IF THIS COURT AGREES WITH THE STATE THAT IT COULD CHARGE INCEST IN COUNT THREE AS A CONTINUOUS OFFENSE, JURY UNANIMITY WAS

STILL VIOLATED BY THE NON-SPECIFIC JURY INSTRUCTIONS AND VERDICTS.

In this case, the State charged Sanders with conceptually similar conduct (sexual contact with H.S.) in two broad time slices: 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"). Sanders was charged with a separate count of repeated sexual assault of a child for each time period (counts one and two of the information). Each time period alleged dozens, if not more, instances of sexual contact between Sanders and H.S.

Sanders was also charged with Incest of H.S. Significantly, unlike the first two counts involving repeated sexual assault of a child, Sanders was not charged with a separate offense of Incest for each of the two time periods. Instead, count three of the information, which alleged the incest count, covered time period two only.

The jury was ultimately instructed separately on the repeated sexual assault counts (one and two) that they did not have to agree on which acts of sexual contact constitute the required three, as is proper under *State v. Johnson*, 2001 WI 52, 243 N.W.2d 365, 375, 627 N.W.2d 455, 459. The

instructions for counts one and two specifically delineated each of the two time periods referenced above.

However, unlike the repeated sexual assault instructions, the instructions on the incest charge did *not* specifically reference which of the two charging periods it was focusing the jury's attention to. Likewise, the verdicts for the incest charge were equally non-specific regarding the time period involved.

The problem here is that the jury ultimately acquitted Sanders on count one, which addressed time period one, but convicted Sanders of count two, which addressed time period two. Because neither the jury instructions nor the verdicts on the incest count explicitly narrowed the time period (unlike counts one and two), there is the very real possibility that some jurors may have chosen acts from time period one, the count Sanders was acquitted of, to form the basis of his *conviction* on count three.

As stated in Sanders Brief-in-Chief at p.32, this is not only a Sixth Amendment unanimity problem but also a Fifth Amendment due process problem. *See State v. Marcum*, 166 Wis.2d 908, 480 N.W.2d 583 (1983). 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. *Id.*[2]

The State counters that the jury did not have to unanimously agree on a single act forming the basis for the incest charge because the prosecutor charged Sanders as a continuing course of conduct. See State's Brief, at p.21-23. This may or may not have been true but it largely misses the point because it does not address the problem created by the non-specific instructions and verdicts as well as the generic unanimity instruction, which also failed to focus the jury on the specific time period they had to be unanimous on.

The State contends that the court's reading of the Information, which did reference time period two, properly focused the jury on the proper time period. See State's Brief at p.24. This is wishful thinking since the proper time period was missing in the instructions, verdict forms and the unanimity instruction that all went back with the jury when they went to deliberate on the incest count. (*See State v. Hubbard,* 2008 WI 92, 313 Wis.2d 1, 752

[2] The State also alleges that Sanders improperly cited *State v. Clark,* an unpublished per curium decision, as persuasive authority offering additional support for this argument. To counsel's chagrin, the State's interpretation of Wis. Stat. (Rule) 809.23(3)(b),is correct. Therefore, counsel apologizes to the court and counsel for this misapplication of an unpublished authority. Sanders asks the court to strike any reference to *Clark* in its Brief.

N.W.2d 839; Jury instructions are not be judged in artificial isolation, but instead are to be viewed as a whole and in context).

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 _____ day of June, 2016.

Respectfully submitted,

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CERTIFICATION

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Dated this ____ day of June, 2016.

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Craig M. Kuhary, State Bar No. 1013040

CERTIFICATION OF FILING BY PROCESS SERVER

I certify that on June 14, 2016, this brief was delivered to a process server for same day delivery to the Clerk of the Court of Appeals. I further certify that the brief was correctly addressed.

Dated this ____ day of June, 2016.

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Craig M. Kuhary, State Bar No. 1013040