No. 2015AP2328

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

SHAUN M. SANDERS,
DEFENDANT-APPELLANT-PETITIONER

On Appeal from the Waukesha County Circuit Court, the Honorable Jennifer Dorow and the Honorable Lee S. Dreyfus, Jr., Presiding, Case No. 2013CF1206

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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ISSUE PRESENTED

Does counsel render ineffective assistance by failing to challenge the court of criminal jurisdiction's competency to hear a charge against an adult defendant when that charge relates to the defendant's misconduct as a nine-year-old juvenile, even though such a challenge is foreclosed by Wisconsin law and the court's consideration of the charge did not prejudice the defendant?

Both the circuit court and the Court of Appeals answered "No."

INTRODUCTION

For a decade, Shaun Sanders sexually abused his younger sister, H.S., while they lived together in their family home. This abuse came to light only after H.S. entered high school, when her boyfriend happened to overhear Sanders begin an abusive episode of H.S. The State charged Sanders, then 18 years old, with four sexual-assault-related counts in the adult criminal court. A jury convicted him of three of the four. The charge the jury acquitted Sanders of, count one, related to him abusing H.S. when he was a juvenile under ten years old.

Sanders now argues, via an ineffective-assistance-of-counsel claim, that the adult criminal court lacked competency to adjudicate count one. He thinks his attorney should have moved to dismiss this count, and that this failure prejudiced him (despite the jury's acquittal) because count one uniquely enabled the State to introduce particularly damning evidence.

Yet Sanders is wrong at every step. Only the adult circuit court—not the juvenile courts—had competency to adjudicate count one, given that Sanders is an adult, not a juvenile. The text of the competency-granting statutes and this Court's decision in *State v. Annala*, 168 Wis. 2d 453, 484 N.W.2d 138 (1992), compel this conclusion.

But even putting that aside, there could be no prejudice from counsel's alleged failure. The jury *acquitted* Sanders of count one, and all evidence related to this count was

admissible to prove the other three counts. Finally, the jury would have convicted Sanders on counts two through four even without the evidence related to count one, given that the State introduced powerful testimony from both H.S. and her past boyfriend, which established Sanders' guilt beyond a reasonable doubt.

ORAL ARGUMENT AND PUBLICATION

By granting Sanders' petition for review, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

This is a challenge, through an ineffective-assistance-of-counsel claim, to the competency of an adult criminal court to adjudicate a charge against an adult defendant based on the defendant's misconduct when he was under ten years old.

A. Statutory Background

In order to render a valid judgment, the circuit court must have both subject-matter jurisdiction, which is "the power of a court to decide certain types of actions," and competency, which is "the power of a court to exercise its subject matter jurisdiction in a particular case." *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595, 882 N.W.2d 738 (citations omitted).

Article VII, Section 8 of the Wisconsin Constitution establishes the subject-matter jurisdiction of the circuit court

and reads, "[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state." Wis. Const. art. VII, § 8; *Booth*, 370 Wis. 2d 595, ¶ 7. This Court interprets this provision to grant the circuit courts broad subject-matter jurisdiction that "cannot be curtailed by state statute." *Booth*, 370 Wis. 2d 595, ¶ 7 (citation omitted). Nonetheless, the Legislature may—under the "[e]xcept as otherwise provided by law" clause—"reallocat[e] [ ] jurisdiction from the circuit court to another court," *id.* ¶ 18 n.10 (citation omitted), for example, to "trial courts of general uniform statewide jurisdiction as the legislature may create by law," Wis. Const. art. VII, § 2.

The Legislature establishes circuit-court competency by statute. *In re Termination of Parental Rights to Joshua S.*, 2005 WI 84, ¶ 16, 282 Wis. 2d 150, 698 N.W.2d 631; *Booth*, 370 Wis. 2d 595, ¶ 7. If a circuit court fails to abide by the Legislature's "statutory requirements pertaining to the invocation of [its] [subject-matter] jurisdiction," it may lose competency to adjudicate the particular dispute. *Booth*, 370 Wis. 2d 595, ¶ 7. And since competency is not jurisdictional, a party may forfeit challenges to it. *Id.* ¶ 11. In short, judgments entered by a court without competency are voidable, not void. *See id.* ¶ 13; *id.* ¶¶ 29–31 (Abrahamson, J., dissenting).

Using its competency-defining power, the Legislature has created a multi-part framework for circuit-court adjudications of violations of the criminal law, based on the

age of the defendant involved. *See State v. Schroeder*, 224 Wis. 2d 706, 719–21, 593 N.W.2d 76 (Ct. App. 1999). The statutes establishing the framework refer to each part as an individual "court," but the Legislature has not actually created "different courts with different powers." *Id.* Rather, the statutes' use of "court" refers to "the [single] circuit court adjudicating a case under" the different "statutes [that] govern[ ]" each part of the framework. *Id.* Furthermore, these statutes employ the term "jurisdiction" instead of "competency"—but, as this Court has explained, "the critical focus is not [ ] on the terminology" of the statutes, but "on th[eir] effect." *Miller Brewing Co. v. Labor & Indus. Review Comm'n*, 173 Wis. 2d 700, 705 n.1, 495 N.W.2d 660 (1993); *see also Schroeder*, 224 Wis. 2d at 719 (Legislature's use of "exclusive jurisdiction" refers to "competency," not "subject matter jurisdiction" (citations omitted)).

Chapter 938 of the Wisconsin Statutes, the Juvenile Justice Code, creates the first two "courts" in the framework, both for juveniles. The first court is for juveniles "in need of protection or services." Wis. Stat. § 938.13. Relevant here, this juvenile court has "exclusive original jurisdiction over a juvenile alleged to be in need of protection or services" if "[t]he juvenile is under 10 years of age and has committed a delinquent act." *Id.* § 938.13(12).[1] For background, this court

[1] A "juvenile" is "a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to

also has competency over a juvenile who is "[u]ncontrollable," "habitually truant from school" or "home," "is a school dropout," or is "[n]ot [legally] responsible or competent." *Id.* § 938.13(4), (6), (6m), (7), (14).[2]

Second, the Legislature created a juvenile "court" with "exclusive jurisdiction . . . over any juvenile 10 years of age or older who is alleged to be delinquent." *Id.* § 938.12(1). Additionally, if a delinquency petition "is filed before the juvenile is 17 years of age, but the juvenile becomes 17 years of age before" the petition is fully adjudicated, then the court will "retain[ ] jurisdiction over the case." *Id.* § 938.12(2). There are exceptions to this "exclusive jurisdiction" for juveniles who, among other things, commit particularly serious crimes. *See id.* § 938.12(1); *id.* § 938.183.

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have [committed a crime], 'juvenile' does not include a person who has attained 17 years of age." Wis. Stat. § 938.02(10m). Anyone not a juvenile is an "adult." *See id.* § 938.02(1). The code defines "delinquent" as "a juvenile who is 10 years of age or older who has violated any state or federal criminal law." *Id.* § 938.02(3m).

[2] Previously, the Legislature included these grants of competency in Chapter 48, the Children's Code, along with the competency grants for "*children* alleged to be in need of protection or services." Wis. Stat. § 48.13 (1993–94) (emphasis added). These latter grants of competency—which include, for example, competency over children "who ha[ve] been abandoned"—remain in Chapter 48. *Id.* § 48.13(1)–(13).

Cases under Chapter 48 are generally called "CHIPS" cases, while juveniles-in-need-of-protection-or-services cases under Section 938.12 may be called "JIPS" cases. *See State v. Thomas J.W.*, 213 Wis. 2d 264, 267 n.3, 570 N.W.2d 586 (Ct. App. 1997). The Court of Appeals and Sanders occasionally employ the "CHIPS" shorthand where the "JIPS" label would have been more appropriate. *E.g.* SA16; Opening Br. 11.

Third, the Legislature has created "courts" of criminal jurisdiction, which "have power to hear and determine . . . all [ ] criminal actions and proceedings unless exclusive jurisdiction is given to some other court." Wis. Stat. § 753.03. Thus this court has competency to adjudicate charges against defendants who do no fall within the competency of the two juvenile courts. This of course includes adults, as well as a subset of juveniles over ten years old, as mentioned above. *See id.* § 938.183. This last court goes by many different names: "the court of criminal jurisdiction," "criminal court," "adult court," "adult circuit court," and "adult criminal court." *E.g.*, *Schroeder*, 224 Wis. 2d at 719.

In general, the juvenile courts use different procedures than the adult court. For example, before a district attorney may file a petition charging a juvenile as "delinquent" or "in need or protection or services," an "intake worker shall conduct an intake inquiry." Wis. Stat. § 938.24(1). The intake worker may allow the case to proceed, enter "a deferred prosecution agreement," or close the case. *Id.* § 938.24(3)–(4). The juvenile court "may appoint a guardian ad litem" for the juvenile. *Id.* § 938.235(1). As for trial counsel, a juvenile alleged delinquent "shall be represented by counsel at all stages of the proceedings," *id.* § 938.23(1m)(a), while a juvenile in need of protection or services "may be represented by counsel at the discretion of the court," *id.* § 938.23(1m)(b)1. Further, no juvenile is entitled to trial by jury in the juvenile courts. *Id.* § 938.31.

The juvenile and adult courts also dispose of their cases differently. The court for juveniles in need of protection or services disposes its cases via "order[s]" and enters "dispositions" for the "care and treatment" of the juvenile. Wis. Stat. § 938.345(1). These "dispositions" may not include placement in a juvenile detention facility. *See id.* § 938.345(1)(g). The court for juveniles alleged delinquent disposes of its cases via "adjudicat[ions]" of "delinquen[cy]" and also enters "dispositions" for the juvenile's "care and treatment." *Id.* § 938.34. These dispositions may include not only counseling and supervision, but also "[c]orrectional placement" of the juvenile in a "juvenile correctional facility." *Id.* § 938.34(1)–(2), (4m). Importantly, in both juvenile courts, "[a] judgment in a proceeding . . . is not a conviction of a crime [and] does not impose any civil disabilities ordinarily resulting from the conviction of a crime." *Id.* § 938.35(1).

For its part, the adult court disposes of its cases by entering criminal convictions and may sentence the defendant to any sentence authorized by Chapter 973 of the Wisconsin Statutes, including incarceration. *See, e.g.*, *id.* § 973.01(2)(b).

B. Factual and Procedural Background

1. While a teenager, Sanders lived with his parents, older brother, and younger sister, H.S., in their home in Menomonee Falls. R.55:72–75. Sanders is about a year younger than his brother and roughly two years older than

H.S. R.55:74–75. For about ten years when they lived together, Sanders repeatedly sexually abused H.S.

The abuse began when Sanders was about eight to nine years old, when he made H.S.—who would have been "six or seven years old" at the time—lift her shirt so that he could "suck and fondle and kiss each of [her] breasts." R.54:123–24. This was not an isolated incident. Indeed, Sanders ultimately labeled this attack a "peek," and "whenever he came in[to] [H.S.'s room] and demanded with the word 'peek,' it meant that [H.S.] was supposed to" allow him to engage in the abuse. R.54:123–24. "[E]ventually, [this] just became something that [H.S.] did" and "was expected to do" when Sanders ordered it. R.54:124. "At the very beginning," Sanders forced H.S.'s compliance by threatening "that [her] toys would be taken away" if she did not comply. R.54:129–30. "[L]ater on," he threatened to "tell [their] parents . . . that [the abuse] was [H.S.'s] fault" if she did not cooperate. R.54:129–30.

Sanders' sexual abuse of his sister did not stop with "peeks." When H.S. was about "[t]welve or thirteen," Sanders took H.S. into her "walk-in closet," where they could not be seen, and forced her to perform oral sex on him. R.54:124–26.

In all, Sanders forced H.S. into "peeks" "[o]ver 200 times," R.54:126; SA3–4, including "more than three times" before she turned 13 years old and "more than three times" between her thirteenth and sixteenth birthdays. R.54:132–33. He forced her to perform oral sex "around ten more times" after the initial attack in the walk-in closet. R.54:126. All of

the abuse stopped in December 2012, when H.S. was 16 and Sanders was 18. R.54:126, 130; *see* R.55:73.

Around this same time, H.S. confided in her high-school boyfriend, Robert Nuti, about the years of abuse after he happened to witness the beginnings of an abusive episode. *See* R.54:122–23, 149–50; R.55:7–8. Nuti and H.S. were Skyping one evening when Sanders entered H.S.'s room and "said something [to H.S.] about peeks," which Nuti heard. R.55:7. H.S. quickly "ended the call" with Nuti and then "called [him] back about a minute later." R.55:7. The next day, H.S. "came over to [Nuti's] house" and told him "what a peek meant." R.55:7–8. She then "made [him] promise . . . not to say anything" to anyone about the abuse. R.55:13. Nuti chose to break that promise "some months later" and disclosed the abuse to school officials, *see* R.55:8, 13, who spoke with H.S. and then forwarded the matter to the police, R.54:130–31, 133, 166–67, 170.

The police tasked Officer Jay Weber, a "school liaison officer" with the Menomonee Falls Police Department, to handle the investigation into Sanders' abuse of H.S. R.54:170–71. Officer Weber spoke with Sanders in March 2013, who "indicate[d] . . . that he had been engaged in something called 'peeks' with [H.S.] approximately ten years prior [when Sanders was eight or nine years old] . . . for a period of about a month only." R.54:171–72. Sanders further "indicated [that] these peeks with [H.S.]" involved her

"lift[ing] up her shirt and expos[ing] her breasts to him." R.54:172.

2. In October 2013 the State charged Sanders with four counts of sexual assault in a circuit court of criminal jurisdiction. R.1:1–2. First, it charged Sanders with repeated first-degree sexual assault of the same child, limited to his conduct when H.S. was between seven and nine years old. Wis. Stat. § 948.025(1)(a);[3] SA46. Second, it charged him with repeated sexual assault of the same child, limited to his conduct when H.S. was 12 to 15 years old. Wis. Stat. § 948.025(1)(e);[4] SA47. Third, it charged him with incest with a child limited to this same time period. Wis. Stat. § 948.06(1);[5] SA47. Finally, it charged him with child

[3] "Whoever commits 3 or more violations under s. 948.02(1) [first-degree sexual assault of a child] or (2) [second-degree sexual assault of a child] within a specified period of time involving the same child is guilty of . . . [a] Class A felony if at least 3 of the violations were violations of s. 948.02(1)(am) [sexual contact or intercourse with a child under the age of 13 and causing great bodily harm to the child]." Wis. Stat. § 948.025(1)(a).

[4] "Whoever commits 3 or more violations under s. 948.02(1) or (2) within a specified period of time involving the same child is guilty of . . . [a] Class C felony if at least 3 of the violations were violations of s. 948.02(1) or (2)." Wis. Stat. § 948.025(1)(e).

[5] "Whoever does any of the following is guilty of a Class C felony: [ ] Marries or has sexual intercourse or sexual contact with a child he or she knows is related, either by blood or adoption, and the child is related in a degree of kinship closer than 2nd cousin." Wis. Stat. § 948.06(1).

enticement, again limited to the same period. Wis. Stat. § 948.07(1);[6] SA47.

At trial, H.S., Nuti, and Officer Weber testified, providing the details given above. Sanders also chose to testify. R.55:72. He said that he "told Officer Weber that about ten years [earlier], for roughly about a month"—when he was "around eight or nine"—"[he] did ask [his] sister to lift up her shirt and show her breasts." R.55:76. He admitted that H.S. would do this "because [he] told her to," R.55:82, and that this "was called a peek," which was "just a simple term" that he "put on it." R.55:80, 82. Sanders denied all other allegations against him, however, R:55:76, including the claims that he ever touched H.S. in a sexual way, R.55:78.

After hearing Sanders' testimony, the court questioned whether it had jurisdiction to adjudicate count one since it corresponded to "conduct that occurred prior to Mr. Sanders being 10 years of age." R.55:85. If consideration of this count were improper, the court thought this would have "affect[ed] the testimony and evidence that was presented" in the trial. R.55:95. But, the court decided to let count one proceed to the

[6] "Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony: [ ] Having sexual contact or sexual intercourse with the child in violation of s. 948.02 [sexual assault of a child], 948.085 [sexual assault of a child placed in substitute care], or 948.095 [sexual assault of a child by a school staff person or a person who works or volunteers with children]." Wis. Stat. § 948.07(1).

jury and "address these issues post verdict" if Sanders was convicted. R.55.95.

After a two-day trial, the jury found Sanders not guilty of the first charge and guilty of the three remaining charges. *See* SA49. (Accordingly, the court did not revisit its jurisdictional concerns with count one.) The court then sentenced Sanders to six years of probation; it also imposed—but then immediately stayed—a total of five years of confinement and five years of extended supervision. *See* SA49–50.

In a postconviction motion to the circuit court, Sanders argued that his trial counsel was ineffective for failing to move to dismiss count one before trial on the grounds that the court lacked jurisdiction. R.38:12. He further argued that this error prejudiced him, even though he was acquitted on count one, because the State introduced count-one-specific evidence at trial that could have improperly swayed the jury as to the other counts. R.38:12. The court rejected the motion because "there [was] no legal basis" for it. SA36–37; SA31.

3. Sanders appealed the denial of his postconviction motion to the Court of Appeals, which affirmed. SA1.

The Court of Appeals first recharacterized Sanders' jurisdictional claim as a challenge to the circuit court's competency over count one. SA6. The court explained that Sanders had forfeited raising any competency defects by not contesting it pretrial, SA8; however, the court "nonetheless [ ] address[ed] the competency issue . . . within the rubric of

ineffective assistance of counsel," a claim Sanders had properly raised. SA8 (citing *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999)).

Addressing only the deficient performance prong of ineffective assistance, the court held that Sanders' counsel was not ineffective because "the circuit court was competent to adjudicate count one as an adult criminal action even though Sanders allegedly committed wrongful acts related to that count prior to the age of ten." SA15. Under settled law in Wisconsin, "the competency of a circuit court to address criminal acts of an individual is determined by the individual's age when a legal action is filed and not when he/she committed the acts." SA15. So "if an offender is statutorily chargeable as an adult . . . the adult criminal court has competency to exercise its jurisdiction regardless of the offender's age when he/she committed the criminal conduct." SA16. This comports with "the legislative purpose of . . . ensur[ing] persons who commit criminal acts are treated by our justice system in a manner appropriate to their age when the actions are addressed by the system." SA17. This competency remains "[a]bsent the running of a statute of limitations period or improper delay by law enforcement once aware of allegations." SA15–16 (footnote omitted).

In holding that the circuit court had competency (and thus that Sanders' counsel was not ineffective in failing to argue otherwise pretrial), the court explicitly rejected Sanders' primary argument that children under ten years old

"are not old enough by law to invoke the provisions of the Juvenile Justice Code or the Wisconsin Criminal Code." SA9–10 (emphasis removed).[7]

Judge Reilly concurred, agreeing that "[t]he State may reach down and pull what would have been a delinquency matter and bring it into criminal court so long as the state can show that it was not purposely manipulating the system to avoid juvenile court jurisdiction." SA26–27 (citing *State v. Becker*, 74 Wis. 2d 675, 678, 247 N.W.2d 495 (1976)). Despite this agreement, Judge Reilly wrote separately "to express [his] concern that at some stage a child does not have the capacity to commit a crime," an issue not directly presented here. SA27.

4. Sanders petitioned this Court for review of the Court of Appeals' decision, raising only the ineffective-assistance claim premised on his counsel's failure to challenge the circuit court's competency pretrial. Pet. for Review 2–3, *State v. Sanders*, No. 2015AP2328 (Wis. Apr. 14, 2017). This Court granted the petition. Order, *Sanders*, No. 2015AP2328 (June 12, 2017).

[7] Sanders raised other issues in the Court of Appeals that he has declined to preserve for this Court's consideration. *See* Wis. Stat. § (Rule) 809.62(2)(a); *State v. Weber*, 164 Wis. 2d 788, 789, 476 N.W.2d 867 (1991). These issues were a challenge to "the jury instructions and verdict form related to count three" and an ineffective-assistance of counsel claim based on this alleged error. SA5, 18–25.

STANDARD OF REVIEW

Whether a defendant's counsel performed ineffectively is "a mixed question of law and fact." *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801. This Court reviews a lower court's "findings of fact" under the "clearly erroneous" standard, but reviews the question of "[w]hether counsel's performance was deficient and prejudicial" "de novo." *Id.*

SUMMARY OF ARGUMENT

Sanders' ineffective-assistance-of-counsel claim fails for two independently sufficient reasons: Sanders has failed to show that his counsel performed deficiently and that any alleged deficiency prejudiced him. *See Trawitzki*, 244 Wis. 2d 523, ¶¶ 39–40 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

I. As for deficient performance, Sanders' counsel did not fall below *Strickland*'s reasonable-assistance standard by not challenging the circuit court's competency over count one, since the court unquestionably had competency.

The Legislature has created three "courts" within the circuit court with competency to adjudicate violations of the criminal law: the juvenile court for "juvenile[s] [ ] under 10 years of age" who "commit[ ] a delinquent act," Wis. Stat. § 938.13(12), the juvenile court for "juvenile[s] 10 years of age or older who [are] alleged to be delinquent," *id.* § 938.12(1), and the court of criminal jurisdiction for defendants not

within the competency of either juvenile court, *id.* § 753.03. The age of the defendant at the time the State files charges determines which court has competency over a given charge, as opposed to the defendant's age when he committed the relevant misconduct. This is evident from the statutory text, the statutory structure, the explicit purpose of these statutes, and this Court's caselaw.

The text of Section 938.13(12) and Section 938.12(1) uses the present tense, indicating that the defendant must presently be a juvenile in order to fall within the juvenile court's competency. Further, other portions of the Juvenile Justice Code only logically operate if the age of the defendant at the time of charging determines the appropriate court. Most prominent is Wis. Stat. § 938.12(2), which enables the juvenile court to retain competency over juveniles who turn 18 before a juvenile-delinquency case is resolved: this is a meaningless provision if the defendant's age at the time of his misconduct is operative. Looking to statutory purpose, Wis. Stat. § 938.01(2) states that the Juvenile Justice Code is meant to "prevent further delinquent behavior . . . in the juvenile offender," a purpose that excludes adult offenders from its scope. Finally, in *State v. Annala*, 168 Wis. 2d 453, 484 N.W.2d 138 (1992), this Court reached an identical conclusion when considering an adult defendant charged in adult criminal court for misconduct committed as a 15-year-old. Since no principle distinguishes *Annala* from Sanders' case—an adult defendant charged in adult criminal court for

misconduct he committed when he was under 10 years old—*Annala* forecloses his claim here.

But should this Court wish *sua sponte* to overrule its competency jurisprudence and now hold that the adult criminal court does not have competency under these circumstances, it must still hold that Sanders' counsel was not deficient. Under *Strickland*, counsel's failure to raise novel legal arguments—especially those contrary to longstanding law—is not deficient performance. Since the circuit court's competency over count one was clearly proper under settled law, Sanders' counsel's failure to challenge that competency is not deficient performance, even if the Court now thinks this settled law requires upending.

II. Deficient performance aside, Sanders has failed to show how the court's consideration of count one caused him prejudice. The jury acquitted Sanders of this count, so prejudice could only result if the court's consideration of count one allowed the jury to rely on evidence that would have otherwise been inadmissible. Yet no such evidence exists. The evidence from the count-one time period is directly admissible to prove counts two through four, given that they too required proof of the same "sexual contact" element as count one. Alternatively, this evidence is admissible as "other acts" evidence, since it shows Sanders' "opportunity," "plan," or "absence of mistake." But even without the evidence from the count-one time period, the jury would still have convicted

Sanders on counts two through four given that H.S. and her boyfriend both provided powerful testimony of Sanders' guilt.

ARGUMENT

The Wisconsin Constitution, like the federal Constitution, "afford[s] a criminal defendant the right to counsel," which "includes the right to the effective assistance of counsel." *Trawitzki*, 244 Wis. 2d 523, ¶ 39 (citing Wis. Const. art. I, § 7 and U.S. Const. amend. VI).

To resolve ineffective-assistance-of-counsel claims, this Court uses the two-pronged *Strickland* test, under which the defendant must establish both that his counsel performed deficiently and that this performance caused him prejudice. *Id.* ¶¶ 39–40 (citing *Strickland*, 466 U.S. 668). The Court may affirm under either prong without addressing the other. *See State v. Lemberger*, 2017 WI 39, ¶ 16, 374 Wis. 2d 617, 893 N.W.2d 232; *Erickson*, 227 Wis. 2d at 769 & n.7.

I. Sanders' Counsel Did Not Render Deficient Performance

Under *Strickland*, counsel's performance is not deficient if it is "simply reasonable[ ] under prevailing professional norms." *Lemberger*, 374 Wis. 2d 617, ¶ 17 (quoting *Strickland*, 466 U.S. at 688). This is a "highly deferential" standard, *id.* (citation omitted), and there is "a strong presumption that counsel acted reasonably within [these] norms," *Trawitzki*, 244 Wis. 2d 523, ¶ 40 (citation omitted). Relevant here, counsel does not perform deficiently

by failing to file pretrial motions that are of no help to his client, *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996), or by "fail[ing] to raise a novel argument," *Lemberger*, 374 Wis. 2d 617, ¶ 18 (citations omitted).

Here, Sanders' counsel did not perform deficiently in failing to challenge pretrial the competency of the adult criminal court over count one because the court did have competency since Sanders was an adult when charged. But even if this Court disagrees—thereby reversing its competency jurisprudence and driving it in a new direction—Sanders' counsel would still not have performed deficiently since *Strickland*'s "reasonable assistance" standard does not require raising such novel arguments as a general matter.

A. The Court Of Criminal Jurisdiction Had Competency To Adjudicate Count One, Since Sanders Was An Adult When Charged

1. While the circuit court's subject-matter jurisdiction is established by the Wisconsin Constitution and may not "be curtailed by state statute," *Booth*, 370 Wis. 2d 595, ¶ 7 (citation omitted), the Legislature has the power to define the "competency" of the circuit court "to proceed to judgment in [a] particular case," *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 2, 273 Wis. 2d 76, 681 N.W.2d 190. If a circuit court enters a judgment without competency, that judgment may be voidable. *See Booth*, 370 Wis. 2d 595, ¶ 13; *id.* ¶¶ 29–31 (Abrahamson, J., dissenting).

Using its competency-defining power, the Legislature has created three "courts" within the circuit court to adjudicate violations of the criminal law, each with competency over defendants of different ages. First, there is the juvenile court with "exclusive original jurisdiction over a juvenile alleged to be in need of protection or services" if "[t]he juvenile is under 10 years of age and has committed a delinquent act." Wis. Stat. § 938.13(12). Second, there is the juvenile court with "exclusive jurisdiction . . . over any juvenile 10 years of age or older who is alleged to be delinquent," subject to certain exceptions. *Id.* § 938.12(1). The third is the court of criminal jurisdiction, which has the "power to hear and determine . . . all [ ] criminal actions and proceedings unless exclusive jurisdiction is given to some other court." *Id.* § 753.03. Reading Section 753.03 in conjunction with Sections 938.12 and 938.13 shows that the court of criminal jurisdiction has competency over adults charged with crimes as well as a subset of juvenile offenders. *Id.* § 938.183.

The text of these statutes, the statutory structure and explicit purpose, and this Court's caselaw confirm that, in order to determine which of these three courts has competency to adjudicate a given criminal charge, the age of the defendant at the time the State files the charge is controlling. Accordingly, the age of the defendant at the time he allegedly committed the chargeable actions is irrelevant to determining competency.

a. As for the text, Section 938.13 and Section 938.12 both use the present tense, indicating that the juvenile courts have competency only when the defendant is presently a juvenile, *see City of Madison v. State Dep't of Pub. Welfare*, 262 Wis. 636, 640, 56 N.W.2d 536 (1953) (verb tense in statute is "significant" to its meaning); *Carr v. United States*, 560 U.S. 438, 447–48 (2010) (same). Section 938.13 states, "the court has exclusive original jurisdiction over a juvenile alleged to be in need of protection or services . . . if . . . [t]he juvenile *is* under 10 years of age and has committed a delinquent act." Wis. Stat. § 938.13(12) (emphasis added). Rephrased, if "the juvenile *is* under 10 years of age," is "alleged to be in need of protection or services," and "has committed a delinquent act," then "the court" referenced in Section 938.13 "has exclusive jurisdiction." So if the defendant is *not* a juvenile under 10 years of age—either because he is a juvenile over 10 years of age or because he is an adult—then the court does *not* have jurisdiction.

Similarly, Section 938.12(1) reads "[t]he court has exclusive jurisdiction . . . over any juvenile 10 years of age or older who *is* alleged to be delinquent." *Id.* § 938.12(1) (emphasis added). Thus, in order for the court described in Section 938.12(1) to have exclusive jurisdiction, the State must file an allegation against "any juvenile 10 years of age or older." If the allegation is filed against a younger juvenile or against an adult, then the Section 938.12 court would not have jurisdiction.

This reading is bolstered by Wis. Stat. § 990.001(3), which instructs that "[t]he present tense of a verb [in a Wisconsin statute] includes the future [tense] when applicable." "By implication, then, . . . the present tense generally does not include the past [tense]." *Carr*, 560 U.S. at 448. The Legislature's choice to use present-tense verb phrases—"juvenile *is* under 10"; "juvenile . . . who *is* alleged to be delinquent"—means the juvenile courts have competency over only defendants who are *presently* juveniles.

b. The statutory structure of Chapter 938 supports the interpretation that the age of the defendant at the time of charging determines which court should adjudicate the charge. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Most compelling is Section 938.12(2) of the Wisconsin Statutes, which immediately follows the grant of competency to the juvenile court over "any juvenile 10 years of age or older who is alleged to be delinquent." Wis. Stat. § 938.12(1). Section 938.12(2) reads, "[i]f a petition alleging that a juvenile is delinquent is filed before the juvenile is 17 years of age, but the juvenile becomes 18 years of age before [the petition is adjudicated], the court retains jurisdiction over the case." Wis. Stat. § 938.12(2). In addition to mirroring Section 938.12 and 938.13's present-tense usage and identifying the commencement of the case as the age-determinative moment, this provision ensures that a defendant does not "age out" of the juvenile court midway through a juvenile-delinquency

case. Such a provision would be wholly unnecessary if the defendant's age at the time he allegedly committed the criminal conduct determined which court had competency. *See Kalal*, 271 Wis. 2d 633, ¶ 46.

Other portions of the Juvenile Justice Code are similarly focused on the age of the juvenile at the time the case is adjudicated—and would lead to absurd results if applied to adults charged for crimes committed as juveniles. *See id.* For example, Section 938.183(4)—which relates to juveniles facing criminal punishments—provides for "the amount of support" a "juvenile's parent" must pay to a "child support agency" for the care of a juvenile "placed outside the juvenile's home." Wis. Stat. § 938.183(4). Yet parents are normally liable for child support only until a juvenile turns 18 years old. *Id.* § 767.511(4). Section 938.20 governs the release of a juvenile from custody and provides that "a person taking a juvenile into custody shall make every effort to release the juvenile immediately to the juvenile's parent [or guardian]"—a peculiar directive if applied to adult defendants released from custody. And Section 938.34, which lists the dispositions the juvenile court may order for juveniles adjudged delinquent, includes "[c]ounseling" for "the juvenile or the parent," *id.* § 938.34(1); finding "a volunteer to be a role model for the juvenile," *id.* § 938.34(2g); or designating "[p]lacement" of the juvenile in "[t]he home of a parent or other relative," in "[a] foster home," or in "[a] juvenile detention facility," *id.* § 938.34(3)(a), (c), (f). These too are

strange—and quite burdensome to society—for a court to order for adult defendants.

c. The purpose of Chapter 938, as evident from the text itself, bolsters the time-at-charging interpretation. *Kalal*, 271 Wis. 2d 633, ¶ 46. Section 938.01(2) "declares" that "the intent" of the Juvenile Justice Code includes "prevent[ing] further delinquent behavior through the development of competency in the juvenile offender," Wis. Stat. § 938.01(2)(c), and "divert[ing] juveniles from the juvenile justice system," *id.* § 938.01(2)(e). Adjudicating charges against an adult defendant in juvenile court fails to further either of these purposes since that defendant cannot commit "further *delinquent* behavior" or generate future interaction with the juvenile justice system.

d. This Court's caselaw—in harmony with the statutory text, structure, and purpose—holds that the age of the defendant when the State files a charge determines which court has competency to adjudicate the charge.

In *Annala*, this Court considered (interpreting the predecessor to the Juvenile Justice Code) a 20-year-old defendant convicted in an adult criminal court for a sexual assault he committed when he was 15 years old. 168 Wis. 2d at 458. In rejecting the defendant's claim that only the juvenile court had competency over this charge, this Court stated that "[t]he plain language of the statute unambiguously explains that the exclusive jurisdiction of the juvenile court is of a limited nature and applies only to

allegations against a *child*, not allegations against an adult." *Id.* at 462; *accord State ex rel. Koopman v. Cnty. Ct. Branch No. 1*, 38 Wis. 2d 492, 498, 157 N.W.2d 623 (1968). "The jurisdiction of the juvenile court is determined by the individual's age at the time charged, not the individual's age at the time of the alleged offense." *Annala*, 168 Wis. 2d at 463. Thus, "the juvenile court does not have jurisdiction over allegations against an *adult* defendant, regardless of the defendant's age when the alleged offense occurred." *Id.*; *see also id.* at 471; *id.* at 475 (Abrahamson, J., concurring); *see generally* 2 Wayne R. LaFave, et al., Subst. Crim. L. § 9.6(c) at n.70 and text (2d ed.).

This Court explained that the "rehabilitation treatment programs" available under the Juvenile Justice Code's predecessor bolstered its interpretation. *Annala*, 168 Wis. 2d at 464. The Legislature "designed" these programs "to benefit delinquent children," not to "benefit an adult that has committed a criminal act, regardless of whether the criminal act was committed when the defendant was a child." *Id.*; *see also id.* at 469.

2. Here, the State based count one against Sanders—repeated sexual assault of a child under 13 years old, Wis. Stat. § 948.025(1)(a)—in part on misconduct Sanders committed when he was nine years old, *see* SA46; R.55:72–73. The State filed this count (along with the three other charges) in the court of criminal jurisdiction when Sanders was 19 years old. *See* R.1:1. Because Sanders was an adult when the

State filed the charges, only the court of criminal jurisdiction—not the juvenile courts—had competency to adjudicate count one. Wis. Stat. §§ 753.03; 938.12(1). Therefore, Sanders' counsel's failure to challenge the competency of the court over count one cannot be deficient performance since such a challenge would have been futile. *See Cummings*, 199 Wis. 2d at 747 n.10; *accord Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003).[8]

3. The counterarguments Sanders raises in his Opening Brief are unpersuasive.

First, Sanders argues that Wisconsin law creates a "demarcation point" at ten years of age, where charges from conduct before this point can be considered only by the juvenile courts, not the court of criminal jurisdiction, even if the defendant is an adult. Opening Br. 10–11, 26. Sanders reprints Section 938.12(1) and 938.13(12)—which establish the competency of the juvenile courts—but does not explain how the text of these statutes enables the juvenile courts to adjudicate claims against adult defendants. Opening Br. 10–11. Nor could he, as the statutes limit the juvenile courts'

[8] Sanders has expressly waived any claim that the State intentionally delayed filing the charges against him until he was out of the competency of the juvenile courts. Opening Br. 20. In *State v. Becker,* 74 Wis. 2d 675, 247 N.W.2d 495 (1976), this Court held that such intentional delay would violate the Due Process Clause. *See Annala*, 168 Wis. 2d at 459. Sanders waived the *Becker* claim for good reason: the State indisputably learned of Sanders' repeated sexual abuse only after he turned 18. *Supra* p. 10.

competency to defendants who are *presently* juveniles. *Supra* pp. 22–23.

Sanders also neglects to cite Section 753.03, which grants the court of criminal jurisdiction the competency "to hear and determine . . . *all* [ ] criminal actions and proceedings unless exclusive jurisdiction is given to some other court." Wis. Stat. § 753.03 (emphasis added). This statute certainly draws no "demarcation point" for misconduct an adult defendant commits when under ten years of age.

Sanders further claims that the "substantial differences" between the procedures in the juvenile court and the criminal court imply that the Legislature did not intend for the criminal court to consider charges premised on a defendant's pre-age-ten conduct. Opening Br. 21–23. But the text of the competency-granting statutes plainly allows adult criminal courts to consider charges against an adult defendant premised on his juvenile misconduct. That is sufficient to defeat any vague implication Sanders may find in these laws.

Second, Sanders argues that the Court of Appeals has "effectively open[ed] the door for adult criminal court prosecutions for offenses dating back to infancy," Opening Br. 18, but this concern is misplaced for a variety of reasons.

Although Wisconsin law allows the State to charge an adult in the court of criminal jurisdiction for his misconduct as a juvenile under ten years old, this does not mean the law

is blind to the differences between adults and children. Rather, these differences are simply accounted for in other legal provisions. For example, children and adults differ in their capacity to form the mens rea necessary to prove a crime. *See generally* Wis. Stat. §§ 939.23–.25 (defining criminal intent, criminal recklessness, and criminal negligence). And very young children, unlike adults, may be incapable of ever forming the requisite intent for some crimes. *E.g. In re Stephen T.*, 2002 WI App 3, ¶ 20, 250 Wis. 2d 26, 643 N.W.2d 151 ("[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.").

This difference also limits a prosecutor's ability even to charge an adult for misconduct when he was a child. Prosecutors may only bring charges on "probable cause," and "it is an abuse of discretion to charge when the evidence is clearly insufficient to support a conviction." *Kalal*, 271 Wis. 2d 633, ¶¶ 28, 31 (citation omitted). Further, prosecutors have "no obligation or duty" to prosecute all "violation[s] of the law no matter how trivial," and they may consider "the extent of harm caused by [an] offense," the "threat posed to the public by the suspect," and "the disproportion between the authorized punishment and the particular [ ] offender" when considering whether to bring charges. *Id.* ¶¶ 30, 32. All of this counsels against bringing charges against an adult for

misconduct as a child under ten in all but the most extraordinary cases.

Further, in the rare case where an adult defendant is convicted for a sexual assault he committed as a child, the defendant's age at the time of the offense should factor into sentencing, as it did in Sanders' case. R.56:28–29. Indeed, this Court has held that "a [sentencing] court *must* consider" the "rehabilitative needs of the defendant," along with "the protection of the public," "the gravity of the offense," and "any appropriate mitigating or aggravating factors" when determining a sentence. *State v. Salas Gayton*, 2016 WI 58, ¶ 22, 370 Wis. 2d 264, 882 N.W.2d 459 (emphasis added). When an adult defendant is convicted for an offense he committed as a juvenile under ten years of age, his age at the time of the offense should always influence his "rehabilitative needs" and always be "an appropriate mitigating [ ] factor." Age at the time of the offense would likely play a strong role in assessing "the protection of the public" as well.

Third, Sanders asserts that it is "illogical to punish a fully formed adult for an act he allegedly committed long before he was [an adult]." Opening Br. 24. Judge Reilly's concurrence develops this point more fully. Judge Reilly wrote that "at some stage a child does not have the capacity to commit a crime," SA27, and that punishing "an adult for conduct the person engaged in when they were between the ages of one and nine years old" is at some point irrational, SA28. Judge Reilly noted that the common law avoided many

of these issue through the creation of a presumption that children under seven years old ("the age of reason") were incapable of committing crimes. SA28; LaFave, *supra*, § 9.6. He further questioned whether Section 938.13(12) creates a similar presumption for children under ten years old, but ultimately concluded that precedent foreclosed this argument. SA28.

Judge Reilly was correct that Wisconsin law has not created a presumption of criminal incapacity for juveniles under ten years old. Quite the contrary, "Wisconsin law expresses no age below which a person cannot be held to have committed a crime." *Koopman*, 38 Wis. 2d at 499. If a defendant has satisfied all of the elements of a crime—no matter his age—then the law punishing that defendant is both rational and appropriate. *See* Wis. Stat. § 939.03(1)(a). Indeed, the purpose of the Juvenile Justice Code includes "protect[ing] citizens from juvenile crime" and "hold[ing] each juvenile offender directly accountable for his or her acts," Wis. Stat. § 938.01(2)(a)–(b), just as "society" does "for all individuals," *Annala*, 168 Wis. 2d at 468 n.6. This approach to juvenile criminal conduct avoids the perverse incentive that plagues conclusive presumptions of incapacity; namely, "that failure to punish particularly atrocious acts committed by those between the ages of seven and fourteen would encourage other children to commit them with impunity." LaFave, *supra* § 9.6(a) n.10 and text. This Court addressed this explicitly in *Annala*. There, the majority of the Court

considered a dissenting Justice's interpretation of the Children's Code that would have resulted in "no court ha[ving] jurisdiction over [an] alleged offense" "[o]nce the child turns eighteen." *Annala*, 168 Wis. 2d at 480 (Heffernan, C.J., dissenting). The Court stated that such a "construction of the statutes would provide an incentive for the child that commits a criminal act . . . to attempt to frustrate discovery of the criminal conduct as well as the identity of the offender until the child's eighteenth birthday, thereby avoiding legal accountability." *Id.* at 465. The Court did "not think that the legislature intended to allow a minor . . . who commits a serious felony to cajole or manipulate the victim or conceal the crime . . . until reaching eighteen years of age and thereby conclusively frustrat[e] the State's ability to hold him or her accountable for the wrongdoing." *Id.* at 465–66.

Fourth, Sanders quotes the United States Supreme Court's discussion of *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), in *Miller v. Alabama*, 567 U.S. 460 (2012), and claims that the Court should "re-examine[ ] [its] approach to serious juvenile offenders." Opening Br. 14–16. He does not explain how these decisions affect the interpretation of Section 938.12 or 938.13—and their effect, if any, is not self-evident. These cases interpreted the Eighth Amendment to limit the State's ability to sentence juveniles; they say nothing about a State's power to try an adult for conduct he committed as a juvenile.

See Roper, 543 U.S. at 578; *Graham*, 560 U.S. at 82; *Miller*, 567 U.S. at 489.

B. Sanders' Counsel Was Not Required To Make A Novel Competency Argument

If this Court *sua sponte* uproots its competency jurisprudence and concludes that the court of criminal jurisdiction was without competency to adjudicate count one in this case—contrary to its decades-old precedent—the Court should still hold that Sanders' counsel did not perform deficiently.

Counsel's "failure to raise a novel argument does not render his performance constitutionally ineffective," "[a]s a general matter." *Lemberger*, 374 Wis. 2d 617, ¶ 18 (citations omitted). Holding that the adult criminal court did not have competency over the first count here would require a break from this Court's previous decision in *Annala*. *See Annala*, 168 Wis. 2d at 471. For this reason, it is not deficient performance for Sanders' counsel to have declined to argue for this novel development in the law before the circuit court. *See Lemberger*, 374 Wis. 2d 617, ¶ 18; *see generally* R.57:12.

II. Even If Sanders' Counsel Performed Deficiently, This Did Not Prejudice Sanders

Counsel's deficient performance is prejudicial when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Trawitzki*, 244 Wis. 2d 523, ¶ 40 (citations omitted). That is, counsel's error must create "a probability

sufficient to undermine confidence in the outcome of the case," *Erickson*, 227 Wis. 2d at 768 (citation omitted); "[i]t is not enough" for the error to have "had some conceivable effect on the outcome of the trial," *id.* ¶ 32 (citation omitted).

Count one, repeated first-degree sexual assault of the same child, is the only count premised at all on Sanders' misconduct from when H.S. was between 7 and 9 years old. *Supra* p. 11. (Recall that counts two through four were limited to his misconduct when H.S. was 12 to 15 years old. *Supra* p. 11.) Since the jury acquitted Sanders of count one, SA49, the circuit court's erroneous consideration of this count could prejudice Sanders only if it allowed the jury to rely on evidence that would have otherwise been inadmissible. But such evidence does not exist: all evidence admitted to prove count one was either directly admissible to prove the remaining charges or admissible under Wisconsin's "other acts" rule of evidence. Wis. Stat. § 904.02; *id.* § 904.04(2). In any event, the jury would have still convicted Sanders on all other charges even without the evidence related to count one. Therefore, Sanders' counsel's deficient performance (if any) did not prejudice Sanders.

A. Testimony Related To The Count-One Time Period Is Directly Relevant To Guilt On The Other Counts Because It Establishes The Details Of The Assaults Alleged In Those Counts

The State may introduce "[a]ll relevant evidence" in a criminal trial unless prohibited by a specific rule of evidence.

Wis. Stat. § 904.02. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more [ ] or less probable." *Id.* § 904.01. This is a "broad definition," creating a "low threshold for the introduction of evidence"; "there is a strong presumption that proffered evidence is relevant." *State v. Richardson*, 210 Wis. 2d 694, 707, 563 N.W.2d 899 (1997). Important here, "[e]lements of the charge are certainly facts of consequence to the determination of the action," and thus are relevant. *Id.* at 706

Three trial witnesses offered testimony about Sanders' misconduct during the time period related to count one: H.S., Officer Weber, and Sanders himself.

First, H.S. testified that she was "[s]ix or seven" "the first time that [Sanders' assaults] occurred," which would have made Sanders about eight to nine years old. R.54:123–24; *see* R.55:76. She further testified that "when [she was] six or seven," she "remember[ed]" that a "peek" "just became something that [she] did," "was expected to do," and "always involve[d] touching." R.54:124.

Second, Officer Weber testified that during his interview with Sanders, Sanders "indicate[d] . . . that he had been engaged in something called 'peeks' with [H.S.] approximately ten years prior [when Sanders was eight or nine years old] . . . for a period of about a month only." R.54:171–72. The officer also said that Sanders "indicated

[that] these peeks with [H.S.]" involved her "lift[ing] up her shirt and expos[ing] her breasts to him." R.54:172.

Finally, Sanders testified that "[he] told Officer Weber that about ten years [earlier], for roughly about a month"—when he was "around eight or nine"—"[he] did ask [his] sister to lift up her shirt and show her breasts." R.55:76. He admitted that H.S. would do this "because [he] told her to," R.55:82, and that this "was called a peek," which was "just a simple term" that he "put on it." R.55:80. But he denied that "peeks" included touching H.S. R.55:78.

This testimony is of course directly relevant to prove count one itself, repeated sexual assault of a child. Wis. Stat. § 904.02; *Richardson*, 210 Wis. 2d at 706. Count one required the State to prove, among other elements, that Sanders made "sexual contact" with H.S. when she was under 13 years old. *See* Wis. Stat. § 948.025(1)(a); *id.* § 948.02. The above testimony establishes count one's elements since it proves that Sanders coined the term "peek" and that he repeatedly forced H.S. to engage in "peeks" before she turned 13 years old. Further, the jury could conclude from this testimony that a "peek" always involved illicit sexual contact—that is, the jury could believe H.S.'s testimony that "peeks" involved sexual touching and disbelieve Sanders' claim that they never involved such touching, *see State v. Maday*, 2017 WI 28, ¶ 35, 374 Wis. 2d 164, 892 N.W.2d 611 (jury is "sole judge of credibility").

Yet this testimony is also directly relevant to counts two through four. Count two (another charge of repeated sexual assault of a child), count three (incest with a child), and count four (child enticement) all required the State to prove, similar to count one, that Sanders engaged in "sexual contact" with H.S. *Supra* pp. 11–12. And, as it did with count one, the State sought to prove this "sexual contact" element with evidence of Sanders' "peeks."[9] R.54:132–33 (H.S. testifying that "peeks" occurred "more than three times" between her thirteenth and sixteenth birthdays). The testimony from the count-one period explains that "peeks" are acts of illicit sexual contact—which is to say, the testimony from the count-one time period shows what Sanders did to H.S. *during* the time period underlying counts two through four. Wis. Stat. § 904.01; *Richardson*, 210 Wis. 2d at 706. The count-one-time-period testimony is therefore direct proof of Sanders' guilt for counts two through four. As above, the jury could rely on this testimony to establish that Sanders initiated the "peeks" and that "peeks" were acts of illicit sexual contact—a conclusion which, again, would require the jury to disbelieve that portion of Sanders' testimony to the contrary.

[9] Unlike count one, the State also proved the sexual-contact element of counts two through four through Sanders' forcing H.S. to perform oral sex. *Supra* p. 9.

B. Alternatively, Evidence Related To The Count-One Time Period Is Admissible As "Other Acts" Evidence To Prove The Other Counts

1. Under Wis. Stat. § 904.04(2)(a), "evidence of other crimes, wrongs, or acts" is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Such evidence is not admissible, however, "to prove the character of a person in order to show that the person acted in conformity" with that character. *Id.*; *State v. Hurley*, 2015 WI 35, ¶¶ 55–57, 361 Wis. 2d 529, 861 N.W.2d 174. This Court has distilled this evidentiary rule into a three-part test: other-acts evidence is admissible if it (1) "is offered for a permissible purpose pursuant to Wis. Stat. § 904.04(2)(a)," (2) "is relevant under . . . Wis. Stat. § 904.01," and (3) "its probative value is not substantially outweighed by the risk or danger of unfair prejudice under Wis. Stat. § 904.03." *Hurley*, 361 Wis. 2d 529, ¶ 57. The party introducing the other-acts evidence bears the burden of persuasion on prongs one and two; if that burden is met, the opposing party must then establish that the evidence fails the third prong in order to exclude the evidence. *Id.* ¶ 58.

Further, "[b]ecause this is a child sexual assault case with a young victim," the "greater latitude rule" requires an admission-friendly application of each prong. *Hurley*, 361 Wis. 2d 529, ¶ 59 (citation omitted). Indeed, "[o]ther-acts

evidence is particularly relevant in child sexual assault cases," like Sanders' case. *Id.*[10]

2. Here, the testimony about the count-one time period—which established that Sanders created the term "peek," and that a "peek" involved Sanders engaging in illicit sexual contact with H.S.—would have been admissible as other-acts evidence. Wis. Stat. § 904.04(2)(a). This is especially so after applying the rule with "greater latitude," as must be done here given the State's charging Sanders with multiple charges of sexual assault of a child. SA46–47.

Beginning with the first prong, *Hurley*, 361 Wis. 2d 529, ¶ 57, the testimony from the count-one time period shows Sanders' "opportunity" to abuse H.S., Wis. Stat. § 904.04(2)(a). That is, Sanders had the opportunity to isolate H.S. in their home and sexually abuse her in the past, which means it is more likely that he had the same opportunity to abuse her on other occasions. It also shows the "plan" Sanders' used to abuse H.S.—he would find her alone and

[10] *Hurley* applied the pre-2014 version of Wis. Stat. § 904.04(2) and described the greater-latitude rule as a court-created doctrine. *See* 361 Wis. 2d 529, ¶ 59. In 2014, the Legislature amended this statute to add Section 904.04(2)(b)1., renumber the previous Subsection 904.04(2)(b), and title Section 904.04(2)(b) as "*Greater latitude*." 2013 Wis. Act 362, §§ 21, 22, 38. In *State v. Dorsey*, No. 2015AP648, currently pending before this Court, the State argues that the post-2014 version of Section 904.04(b) expands the admissibility of other-acts evidence beyond the test described in *Hurley*. *See* State's Response Br. 10–11, *Dorsey*, No. 2015AP648 (Wis. June 15, 2017) But, because Sanders' trial occurred before the effective date of the post-2014 version, the State does not rely on those arguments. *Compare* SA49, *with* 2013 Wis. Act 362.

order her to give him a "peek." Finally, it shows the "absence of mistake" on Sanders' part, as Sanders admitted to creating the term "peek" to describe his assaults.

Moving to the second prong, this other-acts evidence is especially relevant to counts two through four, as already described above. *Hurley*, 361 Wis. 2d 529, ¶ 57. In the testimony related to the count-one time period, Sanders admitted to coining the term "peeks" and described (to some degree) what they entailed. The State then proved the "sexual contact" elements in counts two through four with Sanders' "peeks." R.54: 132–33. Therefore, this evidence is "certainly" relevant. *Richardson*, 210 Wis. 2d at 706.

Finally, Sanders would have been unable to show that the third prong—the lack of undue prejudice—was not met. *Hurley*, 361 Wis. 2d 529, ¶ 57. "Prejudice" in this context "is not based on simple harm to the opposing party's case, but rather on whether the evidence tends to influence the outcome of the case by improper means"—for example, by causing the jury "to base its decision on something other than the established propositions in the case." *Id.* ¶¶ 87–88 (citations omitted). Here, the testimony about the count-one time period is far from unfairly prejudicial. It established that Sanders had engaged in sexual contact with H.S. before and that Sanders gave this contact a particular name, "propositions" the State would then use to show that Sanders had the "opportunity" and "plan" to repeat this abuse.

3. Sanders' counterarguments on this score are unpersuasive.

First, he claims that "[t]he only useful purpose" of the testimony from the count-one time period would be "to show that Sanders is a bad person with a propensity to sexually assault children." Opening Br. 33. Yet this Court has explained that "[i]dentifying a proper purpose for other-acts evidence"—that is, one that avoids the forbidden propensity inference—"is not difficult." *Hurley*, 361 Wis. 2d 529, ¶ 62. As explained, the State introduced the testimony from the count-one period for multiple legitimate purposes: to show Sanders' "opportunity," his "plan," and the "absence of mistake or accident" on his part. Wis. Stat. § 904.04(2)(a).

Second, Sanders argues that this evidence would not be relevant to counts two through four because of the years between the count-one time period and the counts-two-through-four time period. Opening Br. 34. Sanders cites *State v. McGowan* for support, but this case harms his position. 2006 WI App 80, 291 Wis. 2d 212, 715 N.W.2d 631. In *McGowan*, the Court of Appeals reversed an adult defendant's convictions for four sexual assaults of an eight-year-old child because the State admitted evidence of the defendant's previous sexual assault of a different five-year-old child when the defendant was himself ten years old. *Id.* ¶¶ 1–2, 9. The Court of Appeals held that this other-acts evidence was irrelevant because it was "eight years before" the assaults at issue and because there were "significant differences in the

nature and quality of the assaults": the victims' significantly different ages; the defendant was a child during the earlier assault, but an adult during the later assaults; and the prior assault was a single incident, as opposed to the multiple assaults at hand. *Id.* ¶ 20.

Sanders' case is consistent with the rule from *McGowan* and, more importantly, this Court's jurisprudence on relevancy. Here, the testimony from the count-one time period described events that occurred only about five years before the events underlying counts two through four, and the connection between these two periods is extremely close. "Remoteness in point of time does not necessarily render evidence irrelevant." *State v. Rosenfeld*, 93 Wis. 2d 325, 332, 286 N.W.2d 596 (1980). Rather, "unless the lapse in time is so great as to negate all rational or logical connection between the fact sought to be proven and the evidence offered to prove it," the evidence should be admitted. *Id.* Indeed, as *McGowan* noted, evidence that is otherwise "too remote" is still relevant if the acts are sufficiently similar. *See Hurley*, 361 Wis. 2d 529, ¶ 80 (citation omitted). Thus this Court in *Hurley* affirmed the relevancy of decades-old sexual-assault evidence because of "the many similarities" between the evidence and the crime alleged. *Id.* ¶ 85 (citing favorably cases allowing 13-year-old evidence and 16-year-old evidence).

Here, as already shown, the "rational or logical connection" between the testimony and the events underlying counts two through four is incredibly close. The State showed

that Sanders' consistently abused H.S. over that decade and always labeled his attacks "peeks." *See Hurley*, 361 Wis. 2d 529, ¶ 80. Thus, unlike *McGowan*, the same defendant and the same nature of abuse is at issue. This is an unbroken chain linking the count-one time period to the time period underlying the other counts.

Third, Sanders claims that, even if the evidence is admissible for a permissible purpose, "its probative value is substantially outweighed by the danger of unfair prejudice." Opening Br. 33. But as already noted, "prejudice" here "is not based on simple harm to the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by improper means." *Hurley*, 361 Wis. 2d 529, ¶¶ 87–88 (citations omitted). The testimony that Sanders finds objectionable is highly probative of the sexual-contact element of counts two through four: it established that Sanders had engaged in sexual contact with H.S. before and that Sanders himself gave this contact the name "peek." It therefore cannot be *unfairly* prejudicial.

C. The Jury Would Have Convicted Sanders Without Evidence From The Count-One Time Period

The State presented powerful evidence of Sanders' guilt for counts two through four, even without the testimony from the count-one time period, thus the trial court's erroneous introduction of this evidence does not create "a probability sufficient to undermine confidence in the outcome of the case."

Erickson, 227 Wis. 2d at 768 (citation omitted). Since "the result of the proceeding would [not] have been different," "but for counsel's unprofessional errors," there is no prejudice here. *Trawitzki*, 244 Wis. 2d 523, ¶ 40 (citations omitted).

For counts two through four, the key question at Sanders' trial was whether he engaged in "sexual contact" with H.S.—an element shared among these three counts (as well as count one). *Supra* pp. 11–12. Like count one, the State proved this element for counts two through four with Sanders' "peeks." Unlike count one, the State also proved this element for counts two through four with Sanders' forcing H.S. to perform oral sex.

Without the testimony related to the count-one time period, the State would still have proven sexual contact for counts two through four under both theories.

First, the testimony from H.S. and her boyfriend, Nuti, overwhelmingly established that Sanders forced H.S. to engage in "peeks," and that "peeks" were code for illicit sexual contact. H.S. testified that when she was "six or seven years old," Sanders forced her to lift her shirt so that he could "suck and fondle and kiss each of [her] breasts." R.54:123–24. She testified that Sanders labeled this attack a "peek," and that he forced her into "peeks" "[o]ver 200 times"—including "more than three times" between her thirteenth and sixteenth birthdays, the time period for counts two through four. R.54:123, 126, 132–33; SA2–3.

Nuti corroborated. When he and H.S. were Skyping one evening, Nuti saw Sanders enter H.S.'s room and heard him "sa[y] something [to H.S.] about peeks." R.55:7. H.S. then immediately "ended the call," only to "call[ ] [him] back about a minute later." R.55:7. The next day, H.S. "came over to [Nuti's] house" and told him "what a peek meant." R.55:7–8. She further made him promise not to reveal the abuse, R.55:13, a promise he broke by reporting the abuse to school officials, *see* R.55:8.

This Court has explained that "[c]hild sexual assaults are difficult crimes to detect and to prosecute, as typically there are no witnesses except the victim and the perpetrator." *Hurley*, 361 Wis. 2d 529, ¶ 33. Yet here, even without the testimony from the count-one time period, the jury experienced a full account from H.S. of Sanders' abuse via "peeks" that was corroborated by Nuti. This makes it exceedingly unlikely that a different result would obtain under a new trial without the testimony from the count-one period. *See Trawitzki*, 244 Wis. 2d 523, ¶ 40; *Erickson*, 227 Wis. 2d at 768.

Second, H.S. testified that Sanders forced her to perform oral sex, first in her "walk-in closet"—when she was about "[t]welve or thirteen"—and then "around ten more times" after that initial attack. R.54:124–26. The testimony from the count-one time period only mentions "peeks," not forced oral sex, thus the presence of that testimony would not have bolstered H.S.'s testimony on this score. For this reason

too, the result of the trial would not have been different had the court not adjudicated count one. *See Trawitzki*, 244 Wis. 2d 523, ¶ 40; *Erickson*, 227 Wis. 2d at 768.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated this 29th day of September, 2017.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 10,987 words.

Dated this 29th day of September, 2017.

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KEVIN M. LEROY
Deputy Solicitor General

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