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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016-AP-1265

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STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
TIMOTHY GREGORY,
Defendant-Appellant.

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ON APPEAL OF A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE RACINE COUNTY COURT, THE HONORABLE ALLAN B. TORHORST PRESIDING

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# BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

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## SUMMARY OF ARGUMENT

Defendant, Timothy Gregory, was previously convicted of a sexual assault of a child, and he has tried to argue that made him a vulnerable target for the charges here that were motivated by a desire for revenge. At trial, the court made several decisions that made the jury trial in this case fundamentally unfair. First, it allowed evidence of the prior conviction for sexual assault of a child into evidence despite its deeply prejudicial effect. The admission of that evidence led to other impermissible and extremely prejudicial evidence that the court found was inadmissible. Specifically while testifying about a 1986 sexual assault conviction, the mother of the prior victim testified that she had "found out later that there had been somebody else's child who didn't or couldn't testify so it didn't go to court." The crime alleged by that testimony was improper as the alleged violation was never charged, never proven, and never ordered admitted in this case. A cautionary instruction was inadequate to remedy the error. Once the jury heard of multiple, prejudicial, and potentially false prior sexual assaults, Gregory could not receive a fair trial.

The court also disallowed Gregory from presenting his theory of defense. His theory was that the girls' father was angry at Gregory and had pressured his daughters to lie because the father was angry about the mother's affairs and was angry at the members of their church, including Gregory, who knew but did not tell him about the affairs. Therefore he had "vowed revenge on … the Gregorys and the pastor and the church." It was error to disallow this theory of defense because it did not, as stated by the trial court, create unfair prejudice or confusion and Gregory had a constitutional right to present a defense.

The court also erred by disallowing photographs and a videotape of the girls and the defendant enjoying close proximity and relating in a friendly way after the date of the alleged sexual assaults. The court disallowed this evidence on the finding that that counsel failed to provide them to the State on discovery, but there was no discovery violation. The court's discovery order required only that "physical evidence shall be identified to opposing counsel and made available for inspection," (10:1) and the court found that the defense had probably informed the State of the photos but they had never been physically displayed. (114:9-10) It was error to exclude the photos because they were disclosed and the videotape was disclosed as required by Wis. Stat. 971.23(7) as soon as it was discovered. Alternatively, if the exclusion of the photographs and videotape was proper, then counsel was ineffective for failing to comply with the court's discovery order.

There were three errors made at the end of the trial which also require reversal. First, the district attorney made an improper propensity argument in closing. The State argued that Gregory committed these crimes because he is "a person who is sexually attracted to children." The State asked the jury to find that Gregory looks to children "to fulfill his sexual appetites" because of his 1986 sexual conviction for sexual assault of a child.

Second, counsel was ineffective for failing to object to the due process violation that this created.

Third, the court erroneously instructed the jury to ignore a missing witness argument. The court got the law completely backward when it gave that instruction. Gregory's missing witness argument was entirely proper.

## ISSUES PRESENTED

1. Was it error to admit other acts evidence of a prior sexual assault of a child where the evidence was not necessary to prove motive or intent?

   The trial court allowed this evidence.

2. Did the court err when it denied a motion for mistrial made after the mother of the prior victim told the jury that there was another prior victim whose case was not charged.

   The trial court denied a motion for mistrial.

3. Did the court deny the constitutional right to present a defense when it disallowed evidence that the victims had a motive to falsely accuse Gregory of sexual assault?

   The trial court denied this claim.

4. Did Gregory comply with the discovery order and statutes such that exclusion of photographs and a videotape showing friendly interactions after the alleged assault should have been admitted, and, if not, was counsel ineffective for failing to comply?

   Despite finding that the photos had been identified but not delivered to the State, the court disallowed them. It also found that a videotape discovered during trial could not be admitted pursuant to Wis. Stat. §971.23(7).

5. Was the District Attorney's closing argument forbidden propensity argument and was counsel ineffective for failing to object?

   The trial court denied a postconviction claim that counsel was ineffective for failing to object to the District Attorney's propensity arguments.

6. Was the trial court's instruction to the jury to ignore a "missing witness" argument error, and, if so, does it require reversal?

   The trial court denied this postconviction claim.

7. Should this court vacate Gregory's convictions in the interest of justice.

   Not raised before the trial court.

## STATEMENT ON ORAL ARGUMENT/PUBLICATION

Neither oral argument nor publication are requested.

## STATEMENT OF THE FACTS

On September 30, 2004, the Racine County Circuit Court, Hon. Allan B. Torhorst, presiding, sentenced Gregory to a total of 150 years incarceration. A jury previously convicted him following a four-day trial of three counts of violating Wis. Stat. §948.02(1). The jury acquitted on a fourth count.

The criminal complaint, filed October 25, 2002, alleged 4 counts of 1st degree sexual assault of a child, violations of Wis. Stat. §948.02(1). (1:1-3) It alleged that Gregory had sexual contact with the vagina of M.T. (D.O.B.

8/25/85) in late December, 1997, while she, her mother and sisters were visiting at Gregory's home and watching a movie on the television (Count 1). The complaint further alleged that Gregory had sexual contact with S.T. (D.O.B. 5/12/89) on three occasions "[o]n or during Summer 1997" (Counts 2 and 3) and "[o]n or during late Summer to early Fall 1997" (Count 4). S.T. alleged in that complaint that Gregory had touched her vagina while giving her a piggyback ride in the basement of the Apostolic Faith Church in Caledonia, WI (Count 2). Also, although the complaint did not specify which count corresponded with which alleged acts, she also alleged in the complaint that (1) Gregory was babysitting S.T. and her sister when he entered the room where they were sleeping and licked S.T.'s vagina and (2) Gregory touched her vagina and had her touch his penis while she and her family were visiting at Gregory's home and watching a movie on the television.

**A. Prior bad acts.**

Prior to trial, the state moved for admission of other acts evidence to the effect that Gregory was convicted in 1986 for sexually assaulting the 9-year-old daughter of his then girlfriend. The state sought to admit the evidence on the issues of "motive, intent and opportunity." (3:1-5). Gregory objected on the grounds that the evidence was not relevant for any valid purpose and that any probative value from its admission was substantially outweighed by its unfairly prejudicial effect. (7:1-60) Following a hearing, the Court granted the state's motion. (98:9-14)

At trial, the victim of the prior incident testified. (114:93-103) Her mother, [S.V.], then testified as well. (114:104-14) During her testimony, S.V., made several unsolicited comments that suggested that Gregory was guilty

of sexually assaulting other children in addition to her daughter.

> Q. Do you know if Mr. Gregory was ever arrested for these allegations?
>
> A. I don't know if he was ever arrested for them but I found out later that there had been somebody else's child who didn't or couldn't testify so it didn't go to court

(114:107)

Gregory's attorney objected and the Court gave a cautionary instruction:

> THE COURT: Ladies and gentlemen of the jury, quite clearly you've heard a spontaneous response that was unexpected by the attorneys with regards to what this witness believed happened. That's an inadmissible statement. I'm instructing you that you must disregard it with regards to this proceeding. It does not go to prove any allegations in this proceeding. It's not intended to do that, and therefore, in that respect, if you've made note of it, destroy it. Disregard it with regards to your considerations and deliberations when you are in the jury room.

(114:108)

S.V. persisted in introducing unsolicited prejudicial information, resulting in another objection but no curative measures from the Court:

> Q. And what was the nature of that offense?
>
> A. I believe down here it says sexual perpetration -- perpetrators group.
>
> MS. ANDERSON: I'm going to object at this point. And I'll--and move for a side bar.
>
> THE COURT: Come on up.

(Whereupon, a conversation was held off the record.)

THE COURT: All right.

(114:111)

She promptly followed with another:

Q. All right. Ms. S.V., is there a section on this document that indicates the crime? "Yes" or "no".

A. Yes.

Q. And what does it indicate?

A. Sexua**l** contact with a repeat provision.

Q. Your Honor -- I'm sorry. Ms. S.V., as I'm looking at your Honor, do you believe that to be a judgment of conviction regarding the sexual allegations of your daughter against Mr. Gregory?

A. Yes.

S.V.'s insistence on inserting unsolicited, inadmissible, and prejudicial allegations persisted during cross-examination:

Q: Okay. And you testified that you were not sure if Mr. Gregory was arrested for these incidents; is that correct?

A. I testified that I was not sure that he was arrested for other incidents.

Q. Okay.

A. He was arrested for this.

(114:112).[1]

[1] This is contrary to her testimony on direct where she had testified that, "I don't know if he was arrested for them, but I found out later that there had been somebody else's child who didn't or couldn't testify so it didn't go to court." ***Id.*** at 107.

At the postconviction hearing Attorney Anderson testified that she did not object to all of the statements because she:

> [D]idn't want to continue to highlight the information to the jury at each time. I was also, I believe, hoping that the jury would not consider her to be very credible based on what was going on, in contrasting her testimony with her daughter's testimony who was actually the victim in the case.

(119:74)

She thought that, "the jury would believe that–or come to a theory that she was trying to basically get Mr. Gregory again for what had happened to her daughter as well." (119:77).

**B. Denial of the motion for a mistrial.**

After excusing the jury for lunch, the Court asked the parties to consider whether additional curative measures were necessary, observing that several members of the jury had noted S.V.'s assertion that Gregory had sexually assaulted another child:

> THE COURT: All right. Jury is out of the room. We'll adjourn. The parties simply consider whether you want a more curative instruction with regards to the spontaneous utterance of the witness. If you do I'll be glad to give one because it's clearly one that wasn't expected. But on the other hand, when I instructed the jury, I noticed several of them apparently had made a note, they crossed it out, and my understanding, from that, was if they noticed it, which they did, they will in fact not consider it. But you may want reassurance at the time of closing instructions.

(114:115)

Gregory then moved for a mistrial on the grounds that S.V.' s outbursts were so unfairly prejudicial that mere cautionary instructions could not overcome the damage they caused to the defense case. (114:120-22) The Court, however, denied the motion on the grounds that the instruction was sufficient. (114:122)

### C. Denial of Gregory's presentation of a motive defense.

The state moved prior to trial for an order preventing Gregory from presenting evidence that the complainants' family had a motive to falsely accuse Gregory, and that the complainants' parents had a motive to influence them to do so, due to a pre-existing conflict with the pastor at the church they all attended. The central issue in this case concerned the credibility or reliability of the complainants' allegations against Gregory. No one else witnessed the alleged assaults, the complainants did not report them until years after they allegedly took place, and the state presented no physical evidence corroborating their claims. The state's case thus relied entirely upon its ability to convince the jury that the particular versions of their stories that they presented to it were both truthful and accurate.

At the hearing on the motion to exclude a motive defense, (105:3-15) Gregory's attorney explained that exclusion of the evidence would violate Gregory's constitutional right to present a defense because a crucial part of the defense theory was that the complainants were influenced and that the foundation or the basis for that influence is the on-going dispute over the affairs that the mother had that the Gregorys knew about, that the pastor knew about, but that the husband did not know about; and

that he became angry and vowed revenge on not only the Gregorys but the pastor and the church. (105:5-6; 5-13)

The state did not dispute Gregory's right to present evidence of a potential motive for the complainants to falsely accuse him. Rather, the state disputed Gregory's factual allegations and whether he would be able to prove what he claimed he could prove. It instead alleged its own interpretation of the facts, claiming that the real dispute between the complainants' family and the pastor was over how he handled their reporting of the alleged assaults, (105:4), that it was not the complainants' family but a third party who first reported the alleged assaults, (105:8), that there was no connection between the complainants' family's disputes with the pastor and the church and the complainants' allegations against Gregory, (105:9), and that the complainants' father "didn't know about some of these affairs until after this matter was actually in the process of being investigated." (105:9) The state also speculated that upholding Gregory's right to present a defense might be a problem because the rape shield law might bar evidence of the complainants' mother's affairs and anyone with firsthand knowledge of those affairs might be subject to prosecution for adultery and thus might assert their Fifth Amendment privilege. (105:11)

Gregory's attorney responded that factual disputes are for the jury and that"[t]he issue here is not whether I can deliver what I say I'm going to deliver." (105:10) Rather, "[t]he issue is whether it's relevant, and it's directly relevant because it pertains to my client's due process right to present a defense. And whether I prove it or not, that's what a trial is all about. The issue is whether I get an opportunity to prove it." (105:12) Counsel also noted that it is unnecessary to go at

length into the details of the affairs; their mere existence is what matters. (105:12-13)

By written order dated December 1, 2003 (24:1-4) the Court granted the state's motion, holding that the evidence proffered by the defense was irrelevant. The Court held that it "cannot envision any evidence, as argued by the Defendant that would make the existence of any fact that is of consequence to the determination in this matter more probable or less probable." (24:3) Having already held that the evidence was irrelevant, the Court further held that what it perceived as the nonexistent probative value of the evidence was "substantially outweighed by the danger of unfair prejudice or confusion of the issues." (24:3-4) The Court did not identify what unfair prejudice or confusion it believed would result from the evidence.

Gregory sought reconsideration and the Court held a hearing on June 24, 2004. (112:32-57) As counsel for Gregory explained at that hearing:

> [T]his is a situation where the argument from the defense is that these are false allegations and that the [T] girls have a motive to present these false allegations to the Court, and that relates back to their family, the [Ts], and the dispute that they had with Pastor Schumacher. And in fact as I've outlined again in my brief, we are asking the Court to allow us to admit evidence that the [T] family had an on-going dispute with Pastor Schumacher; that Mr. Gregory is also a member of that same church; and we allege that the accused [sic, accusers], his [sic, their] father, because of this dispute that he had with Pastor Schumacher, influenced his daughters and as a result his daughters made these false accusations basically to bolster his claim to have Pastor Schumacher

> removed from the church because he had a dispute with Pastor Schumacher.

(112:35)

Counsel further explained that the complainants' father knew of Gregory's prior conviction for a sex offense, knew that he would be vulnerable on those grounds, and knew that accusing Gregory of sexual assault of a church member would be a way to get back at the pastor who had allowed him into the church. (112:42-43) Counsel explained that evidence of motive to falsify is inherently relevant and that, while relevant evidence may be excluded if outweighed by its prejudicial effect, that effect must be "unfairly prejudicial," meaning that it must "tend to influence the case outcome by an improper means." (112:35-38)

The state again relied upon its disagreement with the facts the defense offered to prove as reason to declare evidence of the complainants' motive "irrelevant" and “speculative," noting that neither the pastor nor the church were parties in the case, that someone other than the complainants' family first reported the alleged assaults, and that, according to one of the complainants, she reported them to a friend first. (112:38-40,43-44)

The Court did not doubt that the conflict existed between the complainants' family and the pastor. (112:44) However, based on the prosecutor's factual allegations, the Court concluded that there was no connection between that dispute and the complainants' allegations against Gregory. (112:44-46)

At the postconviction motion hearing, trial counsel testified that the trial court’s ruling prevented the defense

from arguing its theory of case. According to trial counsel Michelle Anderson:

> The problem was the Court had shut down pretty much all of my opportunities to [prove bias or fabrication] and I had to shift my theory of defense from having a very strong motivation or bias component to having that as a much smaller component of the theory and had to rely primarily more on the fact that one of the allegations, I believe, wasn't even physically possible for Mr. Gregory to do, and then to rely heavily on the fact that Mr. Gregory was never alone with these children and therefore could not have committed these assaults. So I had to shift away from motivation and bias based on the Court's rulings. It pretty much took away any ability that I had to go into that.

(119:32)

Counsel also testified that the inability to try to prove bias prejudiced Gregory's case. According to her, she wanted to discuss motive or bias because the jury:

> need[ed] an answer for why would these little girls be making these allegations up in order to return a not guilty verdict...And that's a key component to a child sexual assault case in which it's not a situation where there is DNA or physical evidence...the jury has to have an understanding why the girls would make up such a serious allegation.

(119:56)

**D. Exclusion of Photographs.**

On February 4, 2003, the Court issued a Pretrial Order which, among other things, required "[p]hysical evidence shall be **identified** to opposing counsel and made available

for inspection" not less than 21 days prior to trial. (10) (Emphasis added). Attorney Michelle Anderson represented Gregory up until she was called back to Naval duty and was forced to withdraw on March 3, 2003. Attorney Richard L. Jones was appointed and handled the case until he withdrew and Anderson, returning from duty, was reappointed on May 28, 2004. The Court sought assurance that Anderson would be ready for trial on June 28th, which the court stated was a "firm date for trial." (111:2)

On the second day of trial, Anderson attempted to introduce photographs that appeared in the file while she was on military duty. (114:5) Anderson believed these photographs were shown to the prosecution and verified with Attorney Jones that they were disclosed. (114:5) The Court called Jones who confirmed that he disclosed the photograph's existence and informed the state that they contradicted the states assertions that the families stopped spending time together. (114:8) The state, on the other hand, claimed to "not recall being told of the photographs." (114:9) The Court excluded the photographs on the grounds that they were not disclosed in accordance with the order, despite the court being satisfied that Jones likely informed the prosecution to their existence. (114:9-11) According to the court,

> I suspect that Mr. Jones' recollection is isn't (sic) probably far off. He probably did say something to the effect they have some photographs. I'm also satisfied that they were never physically displayed, were never provided to the District Attorney's office.

(114:9-10)

The excluded photographs depicted the two families going on vacation and getting together for the birth,

dedication, and first birthday of Morgan Gregory. Counsel stated these photographs contradicted the state's assertion that the families stopped associating after the events allegedly occurred. (114:7) *See* Trial Exhibits 8-19.

That afternoon Anderson, again, attempted to introduce photographs the court excluded. (114:136) The trial court stated "[t]he scheduling order is one which clearly requires that there be disclosure in a meaningful way." (114:137) The court, once more, suppressed all photographs "not otherwise provided to the state.'" (114:138)

At the postconviction hearing, Attorney Jones reiterated that he told the State about the photographs saying, "If I said it occurred, it occurred." (1-15- 16 at 13).

**E. Exclusion of the videotape**

M.T. was the opening witness for the state. (113:159) She claimed that after being assaulted, she would not go near Gregory because she was afraid of him:

> Q. But in 1998, your family still got together, right?
>
> A. Not that I can recall. I was afraid of him; I wouldn't go near him. *Id.* at 170.

(113:170)

She also asserted that she could not remember their families getting together after the assault, but when pushed, she admitted to being at Morgan Gregory's dedication and possibly being at Morgan's first birthday, but only if it was at the church. (113:170,195-96) She claimed that, after January 1998, she never was near Gregory and tried to keep S.T. away from him. (113:195-96) She was positive that she never would have gone to Kim Gregory's parents' house. (113:196)

After hearing this testimony, Gregory returned on the second day of trial with a video from his daughter's first birthday. (114:13) The video showed that M.T. was indeed there, and, contrary to her claim, was willing to sit right in front of Gregory until he made her move so he could get a better view of Morgan opening presents. (88:29)

Gregory's counsel proffered the video to impeach M.T.'s testimony. (114:14) The state objected, claiming that the video was in Gregory's possession and should have been turned over before trial because he knew the birthday party would be subject to cross examination. (114:13) The Court excluded the evidence on the grounds that it was a late tendered exhibit, and prevented Mrs. Gregory from testifying to its existence or that she reviewed it for her testimony. (115:12)

The State argued that the videotape had not been properly revealed in discovery and furthermore it was merely cumulative. Counsel testified at the postconviction hearing that she wanted to introduce the videotape which she had just received because it would be "strong evidence and would be conclusive" and it would "discredit the testimony" of M.T. (119:63) The tape showed that contrary to M.T.'s testimony, M.T. attended the party and was sitting right in front of Gregory. The court excluded the videotape ruling that it was a late tendered exhibit. (115:12)

### F. The District Attorney's Propensity Argument

Gregory has argued that the prosecutor's closing argument relied squarely and repeatedly on the impermissible propensity inference that, because Gregory sexually assaulted a child in 1986, he must be attracted to children and thus necessarily committed the sexual assaults alleged here. The District Attorney said:

I want you, when you look at your notes, consider your own individual slates and how those slates were filled up. And I want you to ask yourself a question individually, and as a group, looking at your notes, recalling what you heard. I want you to answer a very simple, direct , to-the-point, cut-to-the-chase question: Is Timothy Gregory a person who is sexually attracted to children? And I submit to you that the only reasonable conclusion you can reach is yes.

. . . [Y]ou need to ask yourself, is Timothy Gregory a person who is sexually attracted to children? Again, I say yes . And I think the testimony and the evidence that we presented will make you conclude, beyond a reasonable doubt, that he is a person who sexually looks at children to fulfill his appetites. How do we know this? We know this because in 1986 he repeatedly sexually assaulted a nine-year-old girl. There is no mistake about it .

(115:117-18)

. . . And again, I would ask you to ask is Mr. Gregory the type of person who is sexually attracted to kids?

(115:119)

And then I would again ask you to ask yourself: Is Mr. Gregory a type of person who is sexually attracted to kids? ...

(115:121)

So when you ' re done, the defense is going to go next, then I've got a rebuttal . But I m going to ask you to continue to ask yourself this question. When the defense gets up here and they are going to show you probably diagrams, and charge [sic], and wrote elements out and all this stuff; look at it and go , Yes , okay, but is the Defendant, is Mr. Gregory, a person who is sexually attracted to kids? And if you answer yes, then you have to answer quite logically in sequence: If he sexually is attracted to kids, did he touch M.T.? Yes. Did he touch S.T.? Yes, Not once, not twice, but three times. And did the way he touched S.T. and M.T. reflect a common

> schemed [sic] that started with D.B? I say yes. I don't think D.B.'s experience was an anomaly, it was a one-time screw up in his life. Quite honestly, I think it was a precursor for sexual assaults to come. And we know that because he used the same MO, the couch and the blanket, and there's no getting around that
>
> So I want you to continue to ask yourself. Is this the type of guy that's going to look at a child and think sexual thoughts and act upon them? Yes. And if you answer that yes, then I think you have to logically. and reasonably conclude that he sexually assaulted these girls.
>
> . . . And I think when you ask yourself if he -- I've kept on asking you, is he the type of a person to sexually assault a child, be sexually attracted w a child? Keep on answering, yeah I think he is, then ifs not a very logical far leap to conclude that he acted upon those impulses and violated S.T. and M.T., and then I want you to convict him for it. Thank you.

(115:127-28)

> . . . You know what? He may have wanted to change his stripes, but he couldn't do it. Couldn't do it. Do you think he can? He thought he could. His wife thought he could.

(115:149)

The prosecutor ended with a story about a farmer who saved a poisonous snake from freezing, only to have the snake bite him and kill him, with the snake explaining its actions: "Well, you stupid farmer, you stupid old man, I'm a snake, what else could you expect me to do?" (115:149-50) The prosecutor then equated Gregory with the snake and society with the farmer:

> Well, ladies and gentlemen, today is another winter day. The snake is on the ground. Let's not pick him back up.

(115:150-51)

At the remand motion, counsel testified that she did not object to this because she did not want to highlight the comments and because she anticipated being overruled. (119:63-64)

**G. The instruction to ignore the missing witness argument.**

During defense counsel's closing argument, she sought to argue that the state's failure to call a particular witness who one would have assumed would corroborate M.T.' s testimony if she were telling the truth should create a reasonable doubt The state, however, objected to the missing witness argument and the Court not only affirmed the objection but instructed the jury that the argument was inappropriate:

> We've heard a lot about a number of these things. We've heard a lot about how [M.T.] told her friend. Unfortunately, we never saw her friend. No one called her in. We heard a lot about -
>
> MR. REPISCHAK: Your Honor, may we briefly have a side bar on that issue, please?
>
> THE COURT: Sure. (Whereupon, a conversation was held off the record. )
>
> THE COURT: Ladies and gentlemen, Wisconsin law does not permit comment by counsel on witnesses that were not called. What it does, it requires the jury then to speculate as to what may or may not have been said by that witness. Ms. Anderson indicated a witness wasn't called, and called upon you as to speculate as to what would happen in that respect. Do not draw any conclusions from that situation, The witness quite simply, whoever it may have been, wasn't called. You must decide this case solely on the evidence presented during this trial and upon the testimony given by the witnesses that were called.

(115:140-41)

On appeal, Gregory has argued that "The Court's instruction was exactly wrong," *citing* ***State v. Saunders***, 2011 WI App 156, ¶26, 338 Wis. 2d 160, 807 N.W.2d 679 (attorneys are free to "express skepticism about [their opponent's] uncorroborated version of events" by commenting on the absence of a witness who presumably would have corroborated the story if true). The court denied this issue in its postconviction decision.

## ARGUMENT

### I. It was error to admit other acts evidence of a prior sexual assault of a child where the evidence was not necessary to prove motive, opportunity, or intent.

The court erred when it admitted evidence of other crimes, wrongs, or acts in this case. Such is not generally admissible because of its prejudicial impact and likely misuse by the jury. ***Whitty v. State***, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967). In ***Whitty***, the court wrote:

> The character rule excluding prior-crimes evidence as it relates to the guilt issue rests on four bases: (1) the overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment for other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

***Whitty,*** 34 Wis.2d at 292. *See also*, Wis. Stat §904.04(2):

> (2) Other crimes, wrongs, or acts, Evidence of other crimes, wrongs, or acts in not admissible to prove the character of a person in order to show that the person

> acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

As the Supreme Court reaffirmed in ***State v. Sullivan***, 216 Wis.2d 768, 576 N.W.2d 30 (1998), §904.04(2)

> [P]recludes proof that an accused committed some other act for purposes of showing that the accused had a corresponding character trait and acted in conformity with that trait. In other words, § (Rule) 904.04(2) forbids a chain of inferences running from act to character to conduct in conformity with the character.

216 Wis.2d at 782 (fns. omitted); *see* ***Veach***, *supra*. This requires a three-step analysis:

> 1. Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2)?
>
> 2. Is the other acts evidence relevant under Wis. Stat. § (Rule) 904.01?
>
> 3. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion, or delay under Wis. Stat. § (Rule) 904.03?

***Id.*** at ¶35.

Where the victim of a sexual assault is a child, courts permit "a greater latitude as to other like occurrences." ***State v. Davidson***, 2000 WI 91, 236 Wis. 2d 537, ¶36, 613 N.W.2d 606. The reasons for this rule include "the difficulty sexually abused children experience in testifying and the difficulty prosecutors have in obtaining admissible evidence in such cases." ***Id.*** at ¶42, *citing* ***State v. Friederich*** 135 Wis. 2d at 30-33. However, even where greater latitude applies, "it does not overcome the prohibition against admitting other crimes to establish a defendant's general character, disposition, or

criminal propensity." ***Id.*** at ¶42. The greater latitude rule does not relieve a court of ensuring that the other acts evidence is offered for a proper purpose under sec. 904.04(2) or is admissible under sec. 904.03. ***Id*** at ¶52. Court must still apply the three-step analysis set forth in ***Sullivan.***

In this case, there was no reason to apply the greater latitude rule. The witnesses, who by the time of trial were aged 18 and 15 had no difficulty in testifying. Furthermore, there were two complainants and therefore the state had no difficulty in securing testimony against Gregory. The evidence was also not relevant to prove motive because that was not an issue at trial. It was also not relevant to prove opportunity, because it was conceded that that Gregory's and the alleged victims' knew each other. The only relevance of the prior sexual assault conviction was to prove propensity and, as will be discussed below, that is what it was used for. The character rule excluding prior-crimes evidence as it relates to guilt rests on 4 bases:

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

***Whitty,*** 34 Wis. 2d 278 at 292. Here evidence of the prior bad act commits several of these sins. It caused the jury to believe that Gregory was guilty, it provoked a desire to punish, and it confused the jury about the issues before it. The evidence was simply more prejudicial than probative. It was pure propensity evidence and therefore should have been excluded.

## II. The court erred when it denied a motion for mistrial when a witness testified to an alleged prior sexual assault that the court had not allowed into evidence.

The Court dramatically increased the harm from the admission of the prior bad act when it denied Gregory's mistrial motion following witness S.V.'s testimony about another unproven sexual assault that the court never admitted into testimony. S.V. testified she "found out later that there had been somebody else's child who didn't or couldn't testify so it didn't go to court." (114:107) Once this occurred, Gregory could not get a fair trial. The court correctly ruled that evidence of this uncharged offense should not have been admitted, but the court's remedy of a jury instruction was inadequate. Given the extreme prejudice of this testimony, the court should have granted a mistrial as requested.

"The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court." ***State v. Pankow,*** 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). The denial of a motion for a mistrial will only be reversed on appeal if there is a clear showing that the trial court erroneously exercised its discretion. ***Id.*** A trial court erroneously exercises its discretion if it fails to consider the appropriate facts, bases its conclusion on a misinterpretation of the law, or fails to "reason its way to a rational conclusion." ***State v. Seefeldt,*** 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822.

Here, there is no doubt that S.V.'s insistence on providing inadmissible, inflammatory, and never proven information to the jury was highly prejudicial to the defense. Allegations that Gregory sexually assaulted other children, that he was required to take part in a "'sexual perpetrators" group, and that his 1987 conviction was for "[s]exual contact

with a repeat provision," all improperly (and falsely) indicated to the jury that they were dealing with a defendant who had assaulted multiple children prior to the alleged assaults here. The Court effectively recognized as much, noting that several of the jurors had deemed the information important enough to record it in their notes. Such evidence is the epitome of unfairly prejudicial information that a reasonable jury cannot be expected to ignore even following a cautionary instruction.

The general assumption relied upon by the Court that the jury will follow cautionary instructions, *see* ***State v. Lukensmeyer,*** 140 Wis.2d 92, 110, 409 N.W.2d 395 (Ct. App. 1987), does not hold where the improper information is so highly prejudicial to the core issue at trial. ***State v. Pitsch,*** 124 Wis.2d 628, 644 n.8, 369 N.W.2d 711 (1985); *see* ***Francis v. Franklin,*** 471U.S.307, 323 n.9 (1985). *See also* ***Dunn v. United States,*** 307 F.2d 883, 886 (5$^{1}_{h}$ Cir. 1962) (“If you throw a skunk into the jury box, you can't instruct the jury not to smell it"). Even though the Court immediately admonished the jury on the first instance, such an admonition is akin to an order not to think about pink elephants.

Moreover, it is insufficient merely to instruct the jury not to consider certain highly inflammatory information without advising them as well that the information, or implication, as here, was false. Contrary to the implication of S.V.'s statements, Gregory was not a repeat sex offender at the time of his conviction in 1987.

The Court therefore erroneously exercised its discretion in denying Gregory's mistrial motion. Given that the state's case relied entirely upon the questionable credibility of the complainants' allegations, unsolicited and false assertions that he had sexually assaulted multiple

children in the past could not help but influence the jury regardless of any attempts to instruct the problem away. Human beings are not robots or computers and they cannot unhear the bell once it has rung, especially when the bell rings as loudly as the claims here.

## III. The court denied the constitutional right to present a defense when it disallowed evidence that the victims had a motive to falsely accuse Gregory of sexual assault.

The trial court violated Gregory's constitutional right to present a defense when it ordered that Gregory could not introduce evidence that the victims had a motive to falsely accuse him of sexual assault. At trial the court disallowed Gregory from presenting evidence regarding the victims' parents' conflicts with their church, any mention of counseling with the church, any evidence of any affairs or "sexual practices," and any evidence of marital disputes that the victims' parents may have had. (14:1) Gregory argued that the complainants:

> Were influenced and the foundation or the basis for that influence is the on-going dispute over, one, the affairs that the mother had that the Gregorys knew about, that the pastor knew about, that the husband did not know about; that he became angry but vowed revenge on not only the Gregorys and the pastor and the church.

(105:5-6)

The court held that it could not "envision any evidence, as argued by the Defendant that would make the existence of any fact that is of consequence to the determination of this matter more or less probable." (24:3) On motion to reconsider the court again found that those disputes

were "not relevant to what we're dealing with here today." (112:44-45)

At the postconviction motion hearing, trial counsel testified that the trial court's ruling prevented the defense from arguing its theory of case. According to trial counsel:

> The problem was the Court had shut down pretty much all of my opportunities to [prove bias or fabrication] and I had to shift my theory of defense from having a very strong motivation or bias component to having that as a much smaller component of the theory and had to rely primarily more on the fact that one of the allegations, I believe, wasn't even physically possible for Mr. Gregory to do, and then to rely heavily on the fact that Mr. Gregory was never alone with these children and therefore could not have committed these assaults. So I had to shift away from motivation and bias based on the Court's rulings. It pretty much took away any ability that I had to go into that.

(119:32)

Counsel also testified that the inability to try to prove bias prejudiced Gregory's case. According to her, she wanted to discuss motive or bias because the jury:

> need[ed] an answer for why would these little girls be making these allegations up in order to return a not guilty verdict...And that's a key component to a child sexual assault case in which it's not a situation where there is DNA or physical evidence...the jury has to have an understanding why the girls would make up such a serious allegation.

(119:56)

It was error to disallow Gregory from putting before the jury evidence of potential bias. As stated by the United States Supreme Court in ***United States v. Abel***, 469 U.S. 45, 52 (1984), "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence that [might] bear on the accuracy and truth of a witness." The trial court may exclude bias evidence but only where the very slight probative value of the evidence on the issue of bias fails to overcome its strong likelihood of confusion of the issues and undue delay. ***State v. Lindh***, 161 Wis. 2d 324, 363, 468 N.W.2d 168 (1991). That is not the case here.

A court's decision to admit or exclude evidence is normally entitled to deference unless the circuit erroneously exercised its discretion. ***State v. Head***, 2002 WI 99, ¶43, 255 Wis. 2d 194, 648 N.W.2d 413. A court misuses its discretion if it fails to exercise its discretion, the facts do not support the court's decision, or the court applied the wrong legal standard. *See e.g.* ***Hess v. Fernandez***, 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 655. In this case, the court misused its discretion because it applied the wrong legal standard. Since proof of bias is almost always relevant, relevancy was not the issue. Rather the only issue is whether the evidence created a strong likelihood of confusion or delay. Here it created no such danger. If the evidence was as tenuous or unbelievable as the court seemed to find it, then the court could have limited the scope of the inquiries into the reasons the father may have influenced his daughters to lie without allowing the issue to become distracting.

Second, granting the State's motion in limine was error because it prejudiced Gregory unfairly. As Attorney Anderson testified, it "took away any ability" she had to present Gregory's theory of defense. The constitutional right

to present evidence is grounded in the confrontation and compulsory process clauses of Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution. ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). As the original postconviction motion in this case indicated, the Wisconsin Supreme Court listed the standard for determining whether a defendant has been the right to present a defense in ***State v. St. George***, 2002 WI 50, 252 Wis.2d 499, 643 N.W.2d 777. To establish that exclusion of defense evidence violates his right to present a defense, the defendant must show:

> (1) that admission of the evidence would not have been a misuse of discretion,
> (2) that the evidence "was relevant to a material issue in [the] case,"
> (3) that the evidence "was necessary to the defendant's case, and
> (4) that "[t]he probative value of the [evidence] outweighed its prejudicial effect."

***St. George***, ***Id.*** at ¶54. (footnotes omitted).

> After the defendant successfully satisfies these four factors to establish a constitutional right to present the [evidence,] a court undertakes the second part of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence."

***Id.*** at ¶55

The court's decision violated the ***St. George*** standard. In this case, the court clearly could have admitted the evidence had it wanted to, and as discussed above evidence of possible bias was relevant. As counsel testified, it was also necessary to Gregory's case. Finally, allowing evidence of a possible bias would not have been unduly prejudicial to the state. If the connection between the church infighting and the

affairs and the claims made by the girls were too tenuous to be believed, then there would be no prejudice to the State. On the other hand, were the evidence believable, then the evidence would be much more probative than any prejudice to the State's case. Finally, Gregory's right to present a defense was not outweighed by any compelling reason to exclude it. According to the ***St. George*** standard, therefore, it was error to exclude the evidence as it denied Gregory the right to present a defense.

Furthermore, the State cannot carry its burden of proving that the error was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 161 (1983) ("The burden of proving no prejudice is on the beneficiary of the error."). The credibility of the complainants was central to the State's case and as Attorney Anderson said, the court's ruling denied Gregory the opportunity to provide any explanation for why the girls might have lied. The assaults had not been reported to the police for over four years, the testimony of the complainants differed at points from that of some of the other witnesses, and the evidence was such that Gregory was able to successfully argue that at least one of the claims—that he had sexually assaulted S.T. while giving her a piggy back ride—was impossible. Because the jury found one of the counts unproven, the error in denying him the right to present his defense was significant, and the State cannot carry its burden of proving otherwise. *See e.g.*, ***United States v. Agurs***, 27 U.S. 97, 113 (1976) (where state's case already is marginal, even otherwise minor errors can have significant impact on the jury).

## IV. Gregory complied with the discovery order and with the discovery statutes and therefore the court erred when it disallowed admission of photographs and a videotape.

The court erred when it excluded photographs on the finding that Gregory failed to provide them pursuant the court's discovery order. This was error as Gregory did not fail to disclose evidence. The order itself said that, "Physical evidence shall be identified to opposing counsel and made available for inspection" not less than 21 days prior to trial. The court has found that Gregory identified the photographs, and therefore they should not have been excluded.

On the second day of trial, Attorney Anderson told the court that she had photographs that she intended to introduce but "Mr. Repischak and Ms. Carls indicate they had not seen these photographs...." (114:5). Attorney Richard Jones, who took over the case for a period of time when Attorney Michelle Anderson was on military leave, told the court on the telephone that "...I know I told them that, you know, we even have photographs of them hanging out after this stuff supposedly happened." (114:7). Attorney Repischak told the court, "[W]e've never been provided with those photographs, they were never mentioned." (114:5) Based on this record, the court excluded the photographs saying:

> I suspect that Mr. Jones' recollection is isn't (sic) probably far off. He probably did say something to the effect they have some photographs. I'm also satisfied that they were never physically displayed, were never provided to the District Attorney's office.

(114:9-10)

On appeal, Attorney Jones has reiterated that he told the State about the photographs. According to him, "If I said it occurred, it occurred." (119:13)

Given this record, the court erred when it excluded the photographs as Gregory complied with the discovery order. The order required Gregory to "identify evidence" and Wis.

Stat. §971.23(2m) requires a defendant to "disclose" any physical evidence that he intends to present at trial. The court's findings of fact establish that Gregory did identify and disclose that he had photographs that showed the two families hanging out together after the alleged sexual assaults occurred. The Court also believed Attorney Repischak and found that the photos were "never physically displayed." The court therefore found facts that establish that Gregory did disclose the photographs but never displayed them or showed them to the State. Given the explicit terms of the discovery order and the discovery statute, the court's findings do not establish a discovery violation and the court erred when it excluded the photographs.

Even if Gregory failed to disclosed the photographs, his attorneys had good cause for failing to do so. First, the court erred because it failed to determine whether there was good cause for the failure to provide discovery. *See* ***State v. Wild***, 146 Wis. 2d 18, 28, 429 N.W.2d 105 (Ct. App. 1988). Second, the State has the burden of proving a lack of good cause, and here it cannot. *See* ***State v. Martinez***, 166 Wis. 2d 250, 257, 479 N.W.2d 224 (Ct. App. 1991). Attorney Jones told the State that he had photographs and Attorney Anderson testified that he had told her that, "the pictures had been disclosed." (119:35) Good faith is an important factor in determining good cause. ***Id.,*** 166 Wis. 2d at 259. Given this record, Attorney Anderson had good cause to believe that the photographs had been disclosed, and the State has never claimed otherwise or claimed that she operated in bad faith. If Gregory failed to disclose the photographs, which he disputes, then the failure was due to either a faulty memory or miscommunication—neither of which is bad faith.

Exclusion of the photographs is also error because it denied Gregory the right to present a defense. Gregory

wanted to introduce the photographs for two reasons. First, to prove that the complainants' claims that they were assaulted were inconsistent with their actions after the assaults because the families still socialized together. Second to:

> bolster the credibility of Mrs. Gregory though because Mrs. Gregory would have testified that they had an understanding that Mr. Gregory would never be alone with the children because she knew his background and they didn't want to have any allegations surface based on a person's knowledge of his background alone.

(119:61)

Applying the ***St. George*** test listed above, the exclusion of the photographs denied Gregory the right to present a defense. Admitting the photos would not have been a misuse of discretion; the evidence was relevant to a material issue; it was necessary to Gregory's case; and its probative value outweighed its prejudice. In fact, the state had no compelling interest in excluding the photographs. There was nothing inherently prejudicial in the photographs, and the State has not and cannot claim surprise that the Gregory's had photographs of the two families together.

In addition, the State cannot prove that exclusion of the photographs was harmless error. The case was close enough that the jury did not find that one of the charges was proven, and the case relied entirely on the testimony of the complainants. The photos created reasons to doubt their testimony and the State therefore cannot carry its burden of proving that exclusion of the photos was harmless.

Finally, if this court finds that counsel had failed to disclose the photos and that there was no good cause for failing to disclose the photos, then this court must reverse because counsel provided the ineffective assistance of

counsel. Attorney Anderson testified that she had intended to introduce the photos, they were important to proving her theory of defense that the complainants lied, and she failed to get them in only because the court has found that she failed to comply with the discovery order. This is ineffective assistance of counsel.

To prove ineffective assistance, a party must show that "counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice." ***State v. Love,*** 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. In this case, there is no question that counsel's failings were deficient. She intended to introduce the photographs but they were excluded because she failed to comply with the court's discovery order. Furthermore, her failings were prejudicial. Prejudice and harmless error are virtually the same as prejudice subsumes the harmless error test, *see* ***State v. Dyess,*** 124 Wis. 2d 525, 545, 370 N.W.2d 222 (1984). Finding prejudice in an ineffective assistance of counsel case requires finding a reasonable probability that counsel's errors created an unreliable trial. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). The test is whether there is a reasonable possibility that the error contributed to the conviction. "If it did, reversal and new trial must result." ***Dyess,*** 124 Wis. 2d 525 at 544.

In this case, the failure to introduce the photographs undermines confidence in the outcome. The jury acquitted on the one charge where the evidence was compromised or unconvincing, and the photographs would have compromised the State's claims entirely. Counsel's mistake in failing to get the photos introduced contributed to the conviction, and therefore this court must reverse.

## V. The District Attorney's closing argument was forbidden propensity argument, and counsel was ineffective for failing to object to it.

The prosecutor's closing argument violated black letter law that other acts evidence "may not be used to demonstrate that the accused has a certain character and acted in conformity with that trait." *See e.g.,* ***State v. Veach***, 2002 WI 110, ¶48, 255, Wis. 2d 390, 648 N.W.2d 447, *see also* Wis. Stat. §904.04(2). Evidence of other crimes, wrongs or acts is not generally admissible because of its prejudicial impact and likely misuse by the jury. ***Whitty v. State,*** 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967). This is so because:

> The character rule excluding prior-crimes evidence as it relates to the guilt issue rests on four bases: (1) the overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

As the Supreme Court reaffirmed in ***State v. Sullivan***, 216 Wis.2d 768, 576 N.W.2d 30 (1998), Wis. Stat. §904.04(2):

> [P]recludes proof that an accused committed some other act for purposes of showing that the accused had a corresponding character trait and acted in conformity with that trait. In other words, § (Rule) 904.04(2) forbids a chain of inferences running from act to character to conduct in conformity with the character.

The State's closing argument multiplied the harm in admitting the prior bad acts when it impermissibly argued that the prior sexual assault meant that Gregory committed the offenses alleged here because the prior conviction prove that Gregory is a person "who is sexually attracted to children." (117-118). The evidence, said the D.A., proves that Gregory:

> …is a person who sexually looks at children to fulfill his appetites. How do we know this? We know this because in 1986 he repeatedly sexually assaulted a nine-year-old girl.
>
> …And again, I would ask you to ask yourself, is Mr. Gregory the type of person who is sexually attracted to kids?
>
> …When the defense gets up here and they are going to show you probably diagrams, and charge [sic], and wrote elements out and all this stuff; look at it and go , Yes, okay, but is the Defendant, is Mr. Gregory, a person who is sexually attracted to kids? And if you answer yes, then you have to answer quite logically in sequence: If he sexually is attracted to kids, did he touch M.T.? Yes. Did he touch S.T.? Yes, Not once, not twice, but three times. And did the way he touched S[.] and M[.] reflect a common schemed [sic] that started with [D.B.]? I say yes. I don't think [D.B.'s] experience was an anomaly, it was a one-time screw up in his life. Quite honestly, I think it was a precursor for sexual assaults to come. And we know that because he used the same MO, the couch and the blanket, and there's no getting around that.
>
> So I want you to continue to ask yourself, Is this the type of guy that's going to look at a child and think sexual thoughts and act upon them? Yes. And if you answer that yes, then I think you have to logically. and reasonably conclude that he sexually assaulted these girls.
>
> . . . And I think when you ask yourself if he -- I've kept on asking you, is he the type of a person to sexually assault a child, be sexually attracted to a child? Keep on answering, yeah I think he is, then it's not a very logical

> far leap to conclude that he acted upon those impulses and violated S.T. and M.T., and then I want you to convict him for it. Thank you.

The prosecutor ended with a story about a farmer who saved a poisonous snake from freezing, only to have the snake bite him and kill him, with the snake explaining its actions: "Well, you stupid farmer, you stupid old man, I'm a snake, what else could you expect me to do?" (115:149-50) The prosecutor then equated Gregory with the snake and society with the farmer:

> Well, ladies and gentlemen, today is another winter day. The snake is on the ground. Let's not pick him back up.

(115:150-51)

This is a direct appeal for the jury for convict because of Gregory's propensity to sexually assault little girls. It is not a claim to consider the evidence for a reason such as intent, opportunity, or motive. Instead it is a direct claim to find that Gregory's character trait—being sexually attracted to children—caused him to act in conformity with that trait.

This is strictly forbidden propensity evidence, *see* Wis. Stat. §904.04(2)(a),[2] and counsel was ineffective for failing to object. It was not reasonable under the facts of this case to not object for fear of highlighting the evidence. (119:76)

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[2] **(2)** Other crimes, wrongs, or acts.

**(a)** *General admissibility.* Except as provided in par. (b) 2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Furthermore, this form of argument was extremely prejudicial.

## VI. The court incorrectly instructed the jury to disregard a missing witness argument.

During defense counsel's closing argument, she sought to argue that the state's failure to call a particular witness who one would have assumed would corroborate M.T.' s testimony if she were telling the truth should create a reasonable doubt The state, however, objected to the missing witness argument and the Court not only affirmed the objection but instructed the jury that the argument was inappropriate:

> Ladies and gentlemen, Wisconsin law does not permit comment by counsel on witnesses that were not called. What it does, it requires the jury then to speculate as to what may or may not have been said by that witness. Ms. Anderson indicated a witness wasn't called, and called upon you as to speculate as to what would happen in that respect. Do not draw any conclusions from that situation, The witness quite simply, whoever it may have been, wasn't called. You must decide this case solely on the evidence presented during this trial and upon the testimony given by the witnesses that were called. ·

(115:140-41)

The Court's instruction was exactly wrong. Under its own instructions, the Court properly informed the jury that reasonable doubt is "a doubt for which a reason can be given arising from a fair and rational consideration of the evidence *or lack of evidence."* (115:108) (emphasis added). The appellate courts, moreover, have long made clear that the type of "missing witness" argument attempted by counsel here is appropriate. *See, e.g.,* ***State v. Saunders****,* 2011 WI App 156,

¶26, 338 Wis. 2d 160, 807 N.W.2d 679 (attorneys are free to "express skepticism about [their opponent's] uncorroborated version of events" by commenting on the absence of a witness who presumably would have corroborated the opponent's story if it were true); ***Feldstein v. Harrington***, 4 Wis.2d 380, 388-390, 90 N.W.2d 566 (1958) (proper for party to argue "missing witness" issue when opposing party does not call "a material witness within his control"). *See also* ***Ballard v. Lumbermens Mut. Cas. Co.***, 33 Wis.2d 601, 616, 148 N.W.2d 65(1967)(failure by trial court to give a "missing witness" instruction did not prejudice party when it was permitted to argue issue to jury).

The error here denied Gregory right to present a defense as well. The court erred by excluding the missing-witness argument. The evidence was relevant to a material issue in the case, indeed the core issue in the case - the complainants' credibility. Moreover, a fair assessment of their credibility required consideration of *all* the surrounding circumstances, not just the artificially distorted view the jury was left with given the Court's improper denial of the valid missing-witness argument. Finally, because there was *no* legitimate, let alone compelling, state interest in barring a proper challenge to the complainants' credibility, the probative value of the evidence is not outweighed by any as yet unidentified unfairly prejudicial effect. *See* ***St. George,*** 2002 WI 50, 54-55 (stating applicable standards).

The error also cannot be dismissed as merely harmless. Again, the state must bear the burden of proving harmlessness beyond a reasonable doubt, ***Sullivan,*** *supra*, and resulting prejudice must be assessed in light of all of the evidence and the cumulative effect of all errors. Even when viewed in isolation, however, this error cannot be deemed harmless because Gregory was denied a critical, exculpatory inference

in an otherwise extremely close case. M.T. sought to bolster her allegation by asserting that she promptly reported the alleged assault to her friend. (113-168,170-71) Yet, the friend she supposedly told never testified, raising a proper inference that M.T.'s claim, a claim that may have spelled the difference between a guilty verdict and a not guilty verdict; was not truthful. *E.g.*, ***Saunders,*** *supra.*

## VII. This court should grant a new trial in the interests of justice because the real controversy was not fully and fairly tried.

Even if this court were to find that some of the errors listed above do not require reversal, this court should reverse and order a new trial because the full controversy was not fully and fairly tried. In particular, once the jury heard improper and inadmissible testimony that Gregory had sexually molested more than one child previously, he could not receive a fair trial. Rather than mitigating this error the District Attorney added to it by making a prohibited propensity argument and arguing that Gregory committed the crimes alleged here because he has committed such crimes before. In addition, the court improperly denied Gregory the opportunity to present a defense and explain why the victims were making false allegations against him. Even if none of these errors individually rise to the level of error requiring reversal, collectively they create an unfair trial, one in which the real controversy was not fully and fairly tried.

## CONCLUSION

This court should reverse because this case was infected with error throughout. Once the jury improperly heard that a witness suspected Gregory of a prior uncharged sexual offense, Gregory could not receive a fair trial. That unfairness was magnified by the courts' erroneous evidentiary rulings which disallowed Gregory from presenting his defense. The state also overreached and made a propensity argument. Finally, the court erred as a matter of law when it instructed the jury to ignore Gregory's missing-witness instruction.

For these reasons, Timothy Gregory, the defendant-appellant, respectfully requests that this court reverse his convictions and remand for a new trial.

Dated this 30th day of December, 2016.


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## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,919 words and 40 pages.

Dated this 30th day of December, 2016.


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# A P P E N D I X

# I N D E X
# T O
# A P P E N D I X

# CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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# CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of December, 2016.


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