STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1265-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY P. GREGORY,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the trial court properly exercise its discretion in allowing the State to introduce evidence of a prior sexual assault of a child committed by Gregory?

The trial court allowed the State to introduce, over defense objection, proof that Gregory was convicted of sexually assaulting another child in 1986 because it was relevant to prove his motive, intent, and plan or scheme.

2. Did the trial court properly exercise its discretion when it denied Gregory's mistrial motion, opting for a curative instruction instead, when the mother of the 1986 sexual assault victim gave a non-responsive answer to the prosecutor's question?

When the prosecutor asked the mother of the 1986 sexual assault victim if she knew whether Gregory was charged with assaulting her daughter, she answered that he may have assaulted another child, but it did not go to trial. The trial court immediately instructed the jury to disregard the non-responsive answer and gave another instruction at the close of trial to disregard any testimony ordered stricken. It denied Gregory's motion for a mistrial.

3. Did the trial court deny Gregory the right to present a defense when it disallowed evidence of possible motives for the children to falsely accuse him of sexual assault?

The trial court precluded the defense from presenting evidence that the victims' parents put their daughters up to making false accusations of sexual assault against Gregory because of: (a) a supposed falling out the parents had with their church pastor; and (b) Gregory's supposed refusal to

tell the victims' father the names of men who had affairs with his wife (the victims' mother). The victims' father did not suspect Gregory of having an affair with his wife.

4. Did the trial court properly exercise its discretion when it precluded the introduction of still photographs and a videotape that were not disclosed by the defense to the State before trial?

The court refused to allow the defense to introduce still photographs and a videotape depicting amicable relations between the victims' family and Gregory's family after the assaults allegedly occurred because the evidence was not disclosed to the prosecutor before trial. The court allowed the defense to introduce testimony establishing that the two families socialized together after the assaults allegedly occurred.

5. Did Gregory prove that his trial attorney was ineffective for deciding not to object to the prosecutor's closing argument?

Defense counsel decided not to object or move for a mistrial in response to the prosecutor's alleged propensity argument when discussing the 1986 sexual assault because: (a) counsel believed the trial was going well and she did not want a mistrial; and (b) counsel believed the trial court would have overruled a "propensity" objection.

6. Did the trial court err when it instructed the jury to disregard defense counsel's missing witness argument?

When defense counsel argued to the jury that the State failed to produce the childhood friend in whom one of the victims confided, the prosecutor objected and the trial

court instructed the jury to disregard the argument. On postconviction review, the trial court held that any error was harmless.

7. Has Gregory proven that he is entitled to discretionary reversal in the interest of justice?

Gregory invokes this Court's discretionary reversal authority under Wis. Stat. § 752.35, arguing that the real controversy was not fully and fairly tried.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State, like Gregory, does not request oral argument or publication. This case involves review of several discretionary decisions by the trial court, and the application of established principles of law to the unique facts presented.

STATEMENT OF THE CASE

Timothy Gregory appeals (R.94) from a judgment of conviction and an order denying direct postconviction relief entered in the Circuit Court for Racine County (R.64; 70; 92). After a trial held June 28 through July 1, 2004, a Racine County jury found Gregory guilty of three counts of first-degree sexual assault of a child, in violation of Wis. Stat. § 948.02(1). (The jury found Gregory not guilty of a fourth sexual assault charge.) (R.50–53; 116:3–4.) The court imposed consecutive fifty-year sentences. (R.117:62–63.) An amended judgment of conviction was entered December 22, 2004. (R.70.) That is where the case stood for nearly nine years.

In August of 2013, Gregory filed a petition for a writ of habeas corpus in circuit court seeking reinstatement of his direct appeal rights alleging that appointed postconviction counsel failed to properly preserve his right to file an appeal.

The trial court held a hearing February 10, 2014, to address this issue. After the State conceded that postconviction/appellate counsel was ineffective for not preserving Gregory's appeal rights, the court granted the writ and reinstated his direct appeal rights. (R.118:6–7; A-App. 101–02.)

This Court issued an order April 8, 2014, giving Gregory until June, 2014, to file a notice of appeal or motion for postconviction relief. Despite that deadline, Gregory did not file his motion for direct postconviction relief until July 30, 2014. (R.81.) Gregory raised the same issues he presents here, including a claim that his two trial attorneys were ineffective in several respects. The prosecutor filed a brief in opposition. (R.86.) The trial court ordered an evidentiary hearing initially scheduled for August 29, 2014. After numerous adjournments, the hearing was not held until January 15, 2016. (R.119; A-App. 102.) Both of Gregory's trial attorneys, Assistant State Public Defenders Richard Jones and Michelle Anderson, testified. The 2016 hearing was presided over by the same judge who presided over the 2004 trial, the Honorable Allan B. Torhorst. Judge Torhorst denied the motion in a decision issued May 26, 2016. He determined that Gregory failed to prove his attorneys were ineffective and his other claims lacked merit. (R.92:4–6, A-App. 104–06.) Gregory now directly appeals from that order and from the judgment of conviction.

STATEMENT OF RELEVANT FACTS

Mary[1], who was eighteen at the 2004 trial, testified that Gregory sexually assaulted her under a blanket on a couch while they watched a movie at his home shortly before

[1] The State refers to the two victims by the fictitious names "Mary" and "Susan" rather than by their real names.

Christmas of 1997 when she was twelve years old. Mary testified that Gregory rubbed her vagina under her clothing, inserted his finger into it and made her touch his penis under his clothing. He told Mary not to tell anyone because it was their "little secret." Mary confided in a childhood friend and, later, her mother about the assault in early 1998. (R.113:161–68, 170–71; 114:164–65.)

Mary's sister, Susan, who was fifteen when she testified at trial, told her mother that Gregory sexually assaulted her multiple times. Susan specifically recalled three incidents occurring in 1997 when she was eight years old: (1) Gregory took off her panties, touched her vagina and made her touch his penis under his clothing and underneath a blanket on a couch while they watched a movie at his home in the fall of 1997; (2) while babysitting for Susan and her sisters at their home in the summer of 1997, Gregory came into Susan's bedroom, reached under her nightgown and rubbed her vagina while she lay in bed, then inserted his fingers into and performed oral sex on her vagina, telling her it was their "little secret"; (3) at a church event with other children in the late summer or early fall of 1997, Gregory gave Susan a "piggyback" ride and, while doing so, reached under her panties and "fingered" her vagina, and told her she should "keep quiet about it" because it was their "little secret." (R.122:16–38, 161, 178.)

The jury found Gregory guilty of the lone count involving Mary, and two of the three counts involving Susan. (R.50; 56; 57; 116:3–4.) It found Gregory not guilty of the count that was based on the "piggyback" ride in the church basement. (R.55; 119:56.)

Additional relevant facts will be developed and discussed in the pertinent sections of the argument to follow.

SUMMARY OF ARGUMENT

The trial court properly exercised its discretion when it allowed the State to introduce evidence that Gregory was convicted of sexually assaulting a child under similar circumstance in 1986. It was relevant and probative of his motive, intent and plan to commit the charged child sexual assault offenses.

The trial court properly exercised its discretion when it denied Gregory's mistrial motion, opting for a curative instruction, when the mother of the 1986 sexual assault victim gave non-responsive answers on direct examination.

The trial court did not deny Gregory the right to present a defense when it kept out irrelevant evidence of the supposed motives of the victims' parents to put their daughters up to falsely accusing him. Any probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues on collateral matters.

The trial court properly exercised its discretion when it would not allow Gregory to introduce still photographs and a videotape that were not disclosed by defense counsel to the prosecution before trial. As it turned out, the photos and videotape would have proven an undisputed point: Gregory's family and the victims' family socialized on occasion after the alleged assaults in 1997.

Gregory's trial counsel reasonably decided not to object to the prosecutor's closing argument because it properly addressed the 1986 other-acts evidence and counsel correctly believed that the trial court would have overruled an objection. Gregory failed to overcome the strong presumption that this was reasonable strategy.

The trial court properly directed the jury to disregard defense counsel's "missing witness" argument and to consider only the evidence and the law presented in court. Had the court allowed the argument, the prosecutor could have rebutted it by pointing out that defense counsel has the same subpoena power as does the State to bring in the missing witness.

This is not one of those "exceptional cases" that merits discretionary reversal. The real controversy was fully and fairly tried and justice did not miscarry.

ARGUMENT

I. The trial court properly exercised its discretion when it allowed the State to introduce evidence of the 1986 sexual assaults on D.B.

A. The "other-acts" evidence.

The trial court allowed the State, over defense objection, to introduce proof of a sexual assault committed by Gregory against D.B. in 1986 in the City of Appleton. (R.3; 6.) D.B. testified that she was nine years old when Gregory, who was her mother's boyfriend, sexually assaulted her "several" times. She testified that Gregory touched her vagina with his penis underneath a blanket on a couch and had oral contact with her vagina. There were several incidents on the couch involving touching underneath a blanket. D.B. testified that on another occasion, Gregory sexually assaulted her in her upper bunk bed. Gregory told D.B. not to tell anyone. (R.122:93–101.) Her mother also confirmed D.B.'s account. (R.122:104–07.) Gregory pled guilty and was convicted of sexually assaulting D.B. (R.122:101, 109, 111, 113–114.) Gregory admitted to Appleton police May 21, 1986, that he touched D.B.'s vagina while they sat on the couch, he put his penis and his mouth on her vagina, and tried to penetrate her because he was

sexually aroused by being with D.B. on the couch. (R.122:123–26.)

At a pretrial hearing held December 6, 2002, the trial court allowed the State to use evidence of the 1986 assault on D.B. to prove Gregory's motive, intent, and plan or scheme to sexually assault Mary and Susan. The evidence was relevant to establish those permissible purposes and its probative value was not substantially outweighed by the danger of unfair prejudice. (R.98:9–14.) The court instructed the jury at the close of trial as to the limited purposes for which the evidence was received: "motive, intent and a common scheme." The 1986 assault on D.B. was not to be used to prove that Gregory has a certain character trait or acted in conformity with it, or that he is a "bad person." (R.115:106–07.)

B. The applicable law and standard for review.

The decision whether to admit or exclude other-acts evidence is addressed to the sound discretion of the trial court. If there is a reasonable basis for the trial court's ruling, the appellate courts will not find an erroneous exercise of discretion. *State v. Hunt*, 2003 WI 81, ¶¶ 34, 42, 263 Wis. 2d 1, 666 N.W.2d 771.

In exercising discretion, the trial court must apply the three-step analytical framework established in *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998). Step one is for the court to determine whether the other-acts evidence is offered for a permissible purpose under Wis. Stat. § 904.04(2), such as to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Step two is to determine whether the other-acts evidence is relevant to proving those permissible purposes. The court must determine whether the "evidence

relates to a fact or proposition that is of consequence to the determination of the action." If so, the court must then determine whether the evidence has probative value in that it "has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." Step three is to determine whether the probative value of the other-acts evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of time, or other similar concerns. *Id. See Hunt*, 263 Wis. 2d 1, ¶ 32.

The State bears the burden of proving the first two steps in the *Sullivan* analysis; proper purpose for admissibility and relevance. Once the State meets that burden, the defendant must then prove that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and the like. *State v. Payano,* 2009 WI 86, ¶ 80, 320 Wis. 2d 348, 768 N.W.2d 832. If the probative value of the evidence is close or equal to its unfairly prejudicial impact, it should be admitted. *Id.*

Other-acts evidence is admissible if it is offered for a purpose other than as circumstantial proof of bad character to show that the person acted in conformity with his bad character or has a propensity to commit the act charged. *Payano,* 320 Wis. 2d 348, ¶¶ 62–63.[2] While the State must prove a proper purpose, that first step is "'hardly demanding.'" *Id*. ¶ 63 (citations omitted) (quoting 7 Daniel

[2] Evidence of a prior conviction for a similar sexual assault is now admissible in a prosecution under Wis. Stat. § 948.02(1), "as evidence of the person's character in order to show that the person acted in conformity therewith." Wis. Stat. § 904.04(2)(b)2. (2015–16). On any retrial, this evidence could be used to show Gregory's propensity to assault children.

D. Blinka, *Wisconsin Practice: Wisconsin Evidence Series,* § 404.6 at 180 (3rd ed. 2008)).

Other-acts evidence is admissible to prove the elements of the charged offenses, even when those elements are not in dispute. *State v. Veach*, 2002 WI 110, ¶ 77, 255 Wis. 2d 390, 648 N.W.2d 447.

Other-acts evidence is admissible to establish a defendant's motive for his conduct. *Payano,* 320 Wis. 2d 348, ¶ 65. This is "because purpose is an element of sexual assault, and motive and opportunity are relevant to purpose." *Hunt,* 263 Wis. 2d 1, ¶ 60 (citing *State v. Plymesser*, 172 Wis. 2d 583, 593–96, 493 N.W.2d 376 (1992)). While motive is not an element of the crime, it is circumstantial evidence that may help prove the requisite state of mind elements. *See* Wis. JI-Criminal 175 (2000). Motive is one of the permissible purposes listed in Wis. Stat. § 904.04(2). *State v. Normington,* 2008 WI App 8, ¶ 20, 306 Wis. 2d 727, 744 N.W.2d 867.

Other-acts evidence is properly offered to establish a defendant's plan or scheme "when there is a concurrence of common elements between the two incidents." *State v. Davidson*, 2000 WI 91, ¶ 60, 236 Wis. 2d 537, 613 N.W.2d 606. *See State v. Gray*, 225 Wis. 2d 39, 53–54, 590 N.W.2d 918 (1999). The other-acts need not be identical to be probative of the charged offenses. "Remoteness in time and differences in age are considerations, but they are not determinative." *Davidson,* 236 Wis. 2d 537, ¶ 72. The concepts of motive and plan are closely linked. *See Plymesser*, 172 Wis. 2d at 586, 591–97; *State v. Friedrich,* 135 Wis. 2d 1, 7, 17–18, 22–26, 398 N.W.2d 763 (1987); *Hendrickson v. State,* 61 Wis. 2d 275, 281–82, 212 N.W.2d 481 (1973).

Other-acts evidence is admissible in child sexual assault prosecutions even when the acts are of a different nature and the victims are of different genders because the prior child sexual assault is probative of the defendant's desire to seek sexual gratification from children. *State v. Tabor,* 191 Wis. 2d 482, 494–95, 529 N.W.2d 915 (Ct. App. 1995). Prior sexual misconduct with children is probative of the defendant's motive to seek sexual gratification from the victims of the charged offenses. *Id. See Plymesser*, 172 Wis. 2d at 593–95; *State v. Fishnick,* 127 Wis. 2d 247, 260–61, 378 N.W.2d 272 (1985). The prior act all but eliminates the probability that a like result with another prepubescent child is the product of "mere chance." *Sullivan,* 216 Wis. 2d at 786–87.

Wisconsin courts must permit a greater latitude of proof when considering the admissibility of other crimes, wrongs or acts evidence in child sexual assault cases. *Veach*, 255 Wis. 2d 390, ¶ 51. This time-honored rule has developed because of the recognized difficulties child sexual assault victims have in testifying about these very personal offenses, and the difficulties prosecutors face in obtaining admissible corroborative evidence in such cases. *Id.* ¶ 52. The "greater latitude" rule is not a substitute for the three-part *Sullivan* analysis; it is to be applied at each step of the analysis. *Id.* ¶ 53. The "greater latitude" rule is intended to "help[ ] other acts evidence to come in" under Wis. Stat. § 904.04(2). *State v. Hammer*, 2000 WI 92, ¶ 23, 236 Wis. 2d 686, 613 N.W.2d 629.

When the proponent of the other-acts evidence proves that it is offered for a proper purpose and is relevant to material issues other than mere propensity, it is admissible unless the opponent of the evidence proves that its established probative value is substantially outweighed by

the danger of unfair prejudice. *Payano,* 320 Wis. 2d 348, ¶ 80.

The trial court must take great care in assessing the issue of prejudice. It is not enough to prove that the evidence is prejudicial to the defense because nearly all relevant evidence is prejudicial to the party opposing it. The issue is whether the resulting prejudice is *unfair*. *Id.* ¶ 88. The issue is whether the other-acts evidence will influence the outcome by causing the jury to draw the forbidden propensity inference despite limiting instructions directing the jury not to do so. *Id.* ¶ 89.

Similarities may render the prior acts highly probative of the charged offenses, thereby outweighing the danger of unfair prejudice. *Davidson,* 236 Wis. 2d 537, ¶ 75. The prior act has especially high probative value when it is "a charged, convicted crime, to which the defendant had pled guilty." *Id.* ¶ 77.

Cautionary jury instructions also serve to limit the potential for unfair prejudice. *Id.* ¶ 78. Cautionary instructions go a long way to reduce the potential for unfair prejudice. *Payano,* 320 Wis. 2d 348, ¶ 99*; Hunt,* 263 Wis. 2d 1, ¶¶ 72–75. *See State v. Missouri,* 2006 WI App 74, ¶ 19, 291 Wis. 2d 466, 714 N.W.2d 595 (cautionary instructions "utilized in every other-acts case" help ensure the testimony is used for proper purposes only).

Even when the trial court's exercise of discretion is less than complete, this Court may independently review the record to determine whether there are facts that would support the trial court's decision had it properly exercised discretion. *Payano,* 320 Wis. 2d 348, ¶ 41; *Hunt*, 263 Wis. 2d 1, ¶ 34. *See generally McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

C. Evidence of the 1986 sexual assault on D.B. was admitted for proper purposes, was relevant to prove Gregory's motive, intent and plan or scheme, and its high probative value was not substantially outweighed by the danger of unfair prejudice.

The State proved by a preponderance of the evidence the following proper purposes for admitting the other-acts evidence involving D.B. *Payano,* 320 Wis. 2d 348, ¶ 63.

Gregory's intent was an element of the charged offenses that the State had to prove beyond a reasonable doubt. The State had to prove that Gregory had "sexual contact" with Mary and Susan, who were both under age thirteen. Wis. Stat. § 948.02(1). "Sexual contact" involves the "intentional touching" of the victims' "intimate parts" (here, the "vagina") if done "for the purpose of . . . sexually arousing or gratifying the defendant." Wis. Stat. § 948.01(5). (R.115:100, 101–02.) Other-acts evidence may be used to prove the crime's elements even when they are not in dispute. *Veach*, 255 Wis. 2d 390, ¶ 77.

Evidence of the 1986 sexual assaults of D.B. in Appleton was also properly offered to prove Gregory's motive, opportunity, plan and scheme. There were "distinct similarities" with the charged offenses. *Davidson,* 236 Wis. 2d 537, ¶ 75. As he did with D.B., Gregory touched the vaginas of Mary and Susan underneath a blanket on the couch. Gregory told D.B. not to tell anyone. Gregory told Mary and Susan that this was "our little secret." As he did with D.B., Gregory sexually assaulted Susan underneath her nightgown as she lay in bed. The victims were all prepubescent females. Mary was 12 years old, Susan was eight years old and D.B. was nine years old. These similarities make the 1986 offenses every bit as "strikingly similar" as the prior offenses found to be relevant and

admissible in both *Veach* and *Davidson*. *See Veach*, 255 Wis. 2d 390, ¶¶ 81–85; *Davidson*, 236 Wis. 2d 537, ¶¶ 60–61. "[W]e note the obvious similarity that in both incidents, the defendant was sexually attracted to a child and acted on that sexual attraction by touching the child between her legs." *Davidson,* 236 Wis. 2d 537, ¶ 68.

The 1986 assault on D.B. was especially probative because Gregory pled guilty to it and was convicted. *See Davidson*, 236 Wis. 2d 537, ¶ 77. This was, indeed, the best evidence available. *Plymesser*, 172 Wis. 2d at 596. *Compare State v. Landrum*, 191 Wis. 2d 107, 118–21, 528 N.W.2d 36 (Ct. App. 1995) (a defendant's *acquittal* of the prior crime does not *ipso facto* render it inadmissible in a subsequent trial so long as a reasonable jury could find by a preponderance of the evidence that the defendant committed the prior offense). *See also United States v. LeMay*, 260 F.3d 1018, 1029 (9th Cir. 2001) (proof of a prior conviction based on defendant's own admission was "highly reliable").

Gregory misses the mark when he argues that the "greater latitude rule" does not apply because Mary and Susan were teenagers when they testified. (Gregory's Br. 22.) Mary and Susan were mere children when Gregory sexually assaulted them, and mere children when they first reported the assaults. It was still difficult for them to testify about these very personal and humiliating acts inflicted on them as children, and the State's need for corroboration in the form of the similar 1986 acts remained the same. *Veach,* 255 Wis. 2d 390, ¶ 52.[3]

[3] The "greater latitude rule" is now codified at Wis. Stat. § 904.04(2)(b)1 (2015–16). Its applicability does not depend on the age of the victim at the time of trial so long as it is "a criminal proceeding alleging a violation of . . . ch. 948."

It is true that eleven years passed between the assaults of D.B. and the assaults of Mary and Susan, but Gregory spent six of those eleven years in prison serving his sentence for sexually assaulting D.B. He had no access to children for those six years and was released less than four years before the first assault on Susan in the summer of 1997. (R.98:7.) This was not a significant length of time. *See Veach*, 255 Wis. 2d 390, ¶ 83 (eleven years between offenses); *Davidson*, 236 Wis. 2d 537, ¶¶ 6, 10 (nine years); *Plymesser*, 172 Wis. 2d at 586, 591–97 (thirteen years); *Friedrich*, 135 Wis. 2d at 17–18, 22–26 (five and seven years apart); *State v. Mink*, 146 Wis. 2d 1, 15–17, 429 N.W.2d 99 (Ct. App. 1988) (up to twenty years before the charged assault).

The high probative value of the 1986 conviction was not substantially outweighed by the danger of unfair prejudice. *See Payano,* 320 Wis. 2d 348*,* ¶ 96 ("Consequently, because the other acts evidence was absolutely essential to the State's case, its probative value was compelling."); *Veach*, 255 Wis. 2d 390, ¶ 91 ("We agree that the other acts evidence in this case was graphic, disturbing, and extremely prejudicial. However, as we have determined, the evidence also had tremendous probative value.").

To diminish any prejudicial impact, the trial court gave appropriate cautionary instructions to the jury limiting the use to be made of this evidence. Such instructions greatly diminish any potential for prejudice. *Hunt*, 263 Wis. 2d 1, ¶¶ 72–75; *Davidson,* 236 Wis. 2d 537, ¶ 78. The jury presumably followed those instructions. *State v. Johnston*, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994); *State v. Olson*, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998).

II. The trial court properly exercised its discretion to give a curative instruction rather than declare a mistrial after D.B.'s mother gave a non-responsive answer on direct examination.

A. The mistrial motion.

After D.B. testified about the 1986 assaults by Gregory in Appleton, her mother, S.V., was called to the stand by the prosecutor. S.V. confirmed D.B.'s testimony that Gregory was her boyfriend in 1986, he often stayed overnight, and D.B. told her that Gregory sexually assaulted her. (R.122:104–07.) When the prosecutor asked S.V. the "yes or no" question whether Gregory was arrested for sexually assaulting her daughter (the correct answer being "yes"), she claimed not to know, adding "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." (R.122:107.) Before defense counsel had a chance to object, the trial court immediately instructed the jury to disregard her non-responsive answer and to "destroy" it in their notes. (R.122:108.)[4]

The direct examination of S.V. continued. The prosecutor showed her the judgment of conviction that reflected Gregory's guilty plea to sexually assaulting her daughter. The prosecutor then asked her what the nature of the offense was. S.V. answered, again non-responsively, "I believe down here it says sexual perpetrators group." Defense counsel objected and the court called both attorneys over for a sidebar. After the sidebar, the prosecutor again asked what the nature of the charge was and S.V. this time answered, "Sexual contact with a repeater provision." (R.122:111.) Defense counsel did not object or move for a mistrial. On cross-examination by defense counsel. S.V.

[4] The jury was allowed to take notes during testimony.

acknowledged that she "wasn't sure" whether Gregory was arrested for "other" incidents, but she knew he was arrested for sexually assaulting her daughter, he admitted to it and her daughter did not have to testify as a result. (R.122:112–114.)

As soon as S.V. finished testifying, the trial court offered to give another curative instruction at the close of trial addressing her "spontaneous utterance." The court added that it observed jurors crossing out their notes after it instructed them to "destroy" her first non-responsive answer. (R.122:115.) Later on, defense counsel moved for a mistrial because, despite the court's curative instruction and its offer to give another one, "the bell has been rung." (R.122:120–21.) The court denied the mistrial motion, holding that the curative instruction sufficiently diminished any prejudice from her unsolicited answer. (R.122:122.) At the close of trial, the court instructed the jury as follows:

> Disregard entirely any question that the Court did not allow to be answered . . . If the answer itself suggested that certain information might be true, ignore the suggestion and do not consider it as evidence.
>
> During the trial the Court ordered certain testimony to be stricken. Disregard all stricken testimony.

(R.115:104.)

Trial Attorney Anderson testified at the postconviction hearing that she decided as a matter of strategy not to immediately object to S.V.'s non-responsive answers, opting to move for a mistrial later on instead, because: (a) she did not want to draw any further attention to what S.V. said; and (b) counsel hoped the jury would see through it and find S.V. to be not credible due to her bias against Gregory as

demonstrated in her non-responsive answers. (R.119:74, 76–77.) In its decision denying postconviction relief, the trial court determined that its curative instructions were sufficient to remove any prejudice. (R.92:5, A-App. 105.)

B. The applicable law and standard for review.

The decision whether to grant a mistrial is addressed to the trial court's sound discretion reversible only for a clear showing of an erroneous exercise thereof. *State v. Doss,* 2008 WI 93, ¶ 69, 312 Wis. 2d 570, 754 N.W.2d 150; *State v. DeLain,* 2004 WI App 79, ¶ 25, 272 Wis. 2d 356, 679 N.W.2d 562. When exercising that discretion, the trial court should always consider alternatives short of a mistrial, including the use of cautionary instructions. *State v. Moeck,* 2005 WI 57, ¶¶ 71–72, 78–79, 280 Wis. 2d 277, 695 N.W.2d 783; *State v. Adams,* 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

S.V.'s answer, non-responsive as it was, caused little prejudice. It was undisputed that Gregory pled guilty to and was convicted of sexually assaulting D.B. Also, D.B. testified that Gregory assaulted her on several occasions. And, S.V. admitted on cross-examination that she did not know whether Gregory assaulted anyone else. The trial court properly exercised its discretion to reject the most drastic remedy of a mistrial in favor of immediately instructing the jury to disregard S.V.'s non-responsive answer and destroy it in their notes, and instructing the jury at the close of trial to disregard any testimony ordered stricken.

III. The trial court did not deny Gregory his right to present a defense.

Gregory insists that he was denied the Sixth Amendment right to present a defense when the trial court would not let him put on proof of possible motives for the victims to falsely accuse him of sexual assault.

A. The victims' motives to falsely accuse Gregory.

Gregory sought to introduce evidence that the young victims and their parents had motives to make this all up. (R.40.) The prosecutor filed a motion *in limine* September 7, 2003, opposing the evidence because it was not relevant and any probative value it might have was substantially outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury. (R.22.)[5] The trial court held a hearing on the motion September 30, 2003. (R.105:3–15.)

As best as can be gleaned from Gregory's garbled offer of proof, the victims' father learned that his wife was having extra-marital affairs and that Gregory knew who was involved. (R.105:3–15; 119:23, 31–32.) It is important to note here that the victims' father did not suspect Gregory of having an affair with his wife and there is no proof that Gregory was having an affair with her. (R.119:58.) According to the defense theory, the victims' father confronted Gregory demanding to know who was sleeping with his wife. Gregory refused to identify anyone. This supposedly caused the victims' father to retaliate against Gregory by putting his young daughters up to making false sexual assault allegations against Gregory, who was vulnerable because of his 1986 conviction. (R.119:23, 27, 29.)

Defense counsel also offered the separate theory that this was all made up because the victims' parents had some sort of a falling out with the pastor of their church; the parents put their daughters up to lodging a false accusation

[5] The prosecutor filed another similar motion June 14, 2004. (R.36.) Defense counsel responded by moving for reconsideration of the court's order to exclude evidence of the dispute the victims' parents had with the church pastor. (R.40.)

of sexual assault against Gregory, not against the pastor, in order to have the pastor removed. (R.40:4–5; 105:3–15; 119:34–35.) Attorney Anderson testified at the postconviction hearing that she did not recall there being a schism in the church. (R.119:70.)

In a written decision issued December 1, 2003, the trial court agreed with the State that the proffered evidence was not relevant to any material issue and that any limited probative value it might have was substantially outweighed by the danger of unfair prejudice and confusion of the issues. (R.24.)

B. The Sixth Amendment right to present a defense.

The Sixth Amendment right to present a defense includes within its scope the rights to confront one's accusers and to compel the attendance of witnesses at trial. *Davis v. Alaska,* 415 U.S. 308, 315–16 (1974); *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973).

The confrontation right "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests." *Chambers,* 410 U.S. at 295; *State v. Rhodes,* 2011 WI 73, ¶¶ 34–36, 68, 336 Wis. 2d 64, 799 N.W.2d 850. Trial judges retain wide latitude to restrict cross-examination and the admissibility of evidence that has low probative value on balance with its high potential to confuse, mislead and prejudice a jury. *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986); *Duncan v. Hepp,* 436 F.3d 739, 741–42 (7th Cir. 2006). The Sixth Amendment only guarantees that the defendant may present relevant evidence whose probative value is not substantially outweighed by its prejudicial impact. *State v. Jackson,* 216 Wis. 2d 646, 656–57, 575 N.W.2d 475 (1998). "Only rarely have we held that the right to present a complete defense was violated by the exclusion

of defense evidence under a state rule of evidence." *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) (citation omitted). The desire to avoid mini-trials on collateral issues is one valid reason for keeping out such extrinsic evidence. *Id.* at 1993.

The Supreme Court has given trial judges broad latitude to exclude relevant evidence after engaging in precisely the sort of balancing of probative value against the potential for prejudice, confusion of issues and the like that the trial court engaged in here. *Holmes v. South Carolina,* 547 U.S. 319, 324–26 (2006); *Montana v. Egelhoff,* 518 U.S. 37, 42–43 (1996). There is no Sixth Amendment right to present evidence that has little or no probative value and is prejudicial. *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). The right to present a defense is not a constitutional straitjacket on ordinary trial court evidentiary rulings. *Crane v. Kentucky,* 476 U.S. 683, 689–90 (1986). *See Davis*, 415 U.S. at 316 (the confrontation/cross-examination right is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation"). "Simply put, an accused has no right, constitutional or otherwise, to present irrelevant evidence." *State v. Scheidell,* 227 Wis. 2d 285, 294, 595 N.W.2d 661 (1999) (citation omitted).

C. The proffered motives to falsely accuse Gregory had little probative value on balance with their great potential to confuse and mislead the jury.

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 probable or less probable than it than it would be without the evidence." Wis. Stat. § 904.01.

According to Gregory, "relevancy was not the issue." (Gregory's Br. 27.) He is wrong. If the motive evidence was not relevant, it could not come in. This evidence had no tendency to prove anything of consequence. Gregory could not come up with any plausible reason for the young victims to falsely accuse him of sexual assault and stick with it for seven years. So, he wanted the trial court to let him present two implausible theories in hopes that the jury might bite: (a) the victims' father was mad at Gregory because he knew but would not reveal to him the names of men (not including Gregory) who were having affairs with his wife; (b) the victims' parents had a falling out with the pastor of the church that both Gregory and the victims' family attended, and the false accusations of sexual assault against Gregory would somehow have resulted in the removal of the pastor.

Calling these theories "far-fetched" is an understatement. They are at best confusing and illogical, if not downright preposterous. Gregory was not having an affair with the victims' mother but, because he refused to identify who was, the victims' father supposedly ordered his two young daughters to lie to police and lie under oath at trial to get back at Gregory. The victims' father supposedly directed his daughters to make up lurid stories about having their vaginas fondled and fondling Gregory's penis so that Gregory would be compelled to reveal who was having affairs with his wife. For his part, Gregory inexplicably refused to identify those men even in the face of trial, conviction and a lengthy prison sentence. Presumably, rather than risk conviction, Gregory would have revealed those names long before trial if he had not assaulted the girls.

Equally far-fetched is the theory that the victims' parents ordered their children to lie to police and under oath at trial because of a falling out that the parents, not

Gregory, had with the pastor of their church, in an apparent attempt to embarrass the pastor into leaving. The parents supposedly told their children to commit perjury because they were mad at their pastor, *not* at Gregory. There is nothing to indicate that the pastor left after Gregory was charged, or even after he was convicted.

It is important to note that the victims' parents did not coax these allegations out of their daughter. The assaults came to light after Mary confided in a childhood friend that Gregory assaulted her. The young friend then told her own parents who, in turn, told Mary's parents. (R.113:170–71.) Gregory offered no proof that Mary, her friend in confidence, or her friend's parents shared the victims' parents' motives to falsely accuse Gregory. Also, any dispute with the pastor had nothing to do with Mary or Susan, or for that matter, Gregory. When they learned of the assaults, the victims' parents went first to their pastor for guidance on what to do and they delayed reporting the assaults to police based on the advice he gave them. (R.113:154.) The parents would not have sought out the pastor's guidance on something this serious if they had a vendetta against him.

Gregory confronted and cross-examined both victims, as well as their mother, and defended against the charges by insisting that their testimony was uncorroborated and the State failed to prove its case.

Gregory had no constitutional right to present irrelevant or even marginally relevant evidence of this ilk that would only have served to prejudice, mislead and confuse the jury on collateral points. He had no right to take the jury off on baseless tangents of marital infidelity and church personality conflicts that had nothing to do with the victims. The trial court properly exercised its discretion and did not violate Gregory's right to present a defense when it

excluded these imaginative but irrelevant motives for the victims to falsely accuse him and perjure themselves with the supposed blessing of their parents.

The harmless error doctrine also applies to proven violations of the Sixth Amendment rights to confrontation and to present a defense. *Van Arsdall*, 475 U.S. at 684; *Chapman v. California*, 386 U.S. 18, 24 (1967); *Burns v. Clusen*, 798 F.2d 931, 943–45 (7th Cir. 1986). Any error was harmless for the same reasons that the motive evidence was properly kept out: it had little or no probative value and the jury would likely have seen through it as a defense "smoke screen" offered only to distract them from the task at hand.

IV. The trial court properly exercised its discretion to exclude the photographs and videotape that were not disclosed to the State before trial.

Defense counsel failed to disclose to the prosecution before trial the photographs and videotape that she wanted to introduce into evidence at trial. This was a violation both of the trial court's pretrial order and of the discovery statute, Wis. Stat. § 971.23. The trial court properly exercised its discretion to exclude the evidence.

A. The discovery violation.

The trial court issued identical pretrial orders February 4, 2003, and July 8, 2003, requiring, among other things, that "[n]ot less than 21 days prior to trial . . . Physical evidence shall be identified to opposing counsel and made available for inspection. FAILURE TO COMPLY MAY RESULT IN AN ORDER BARRING THE WITNESS, DOCUMENT, OR PHYSICAL EVIDENCE AT TRIAL." (R.10; 18 (capitalization in original).) The order also provided: "Discovery is to be completed with [sic] according with [sic] sec. 971.23, Stats., and not less than 21 days prior to trial." (R.10.)

Defense counsel sought to introduce into evidence still photographs and a videotape of Gregory's daughter's first birthday party in March of 1999 to prove that the Gregory family and the victims' family continued to socialize in 1998–99 after the assaults on Mary and Susan allegedly occurred in 1997. They would also be used by defense counsel to show that Gregory was never left alone with any children due to his status as a sex offender. The State opposed the motion because defense counsel did not turn over the still photographs or the videotape to it before trial. (R.113:8–9, 199; 122:5–8, 13, 136; 119:22–25, 60–62.)

The trial court disallowed the photographs because it determined that they were not disclosed by defense counsel to the State before trial in violation of its pretrial order. (R.92:4–5; 122:9–11, 137–38.) The court did, however, allow the defense to call witnesses to testify about what the photographs showed. (R.122:11–12.) It took under advisement the issue whether to also exclude the birthday party videotape. (R.122:13–15.) The court revisited the issue later that day and the next. It excluded the videotape as well because it was not disclosed before trial, in violation of its scheduling orders, but it allowed defense counsel to prove through Gregory's wife that the victim's family attended her daughter's first birthday party. (R.122:116–120; 115:10–12.) According to defense counsel, the video showed "glimpses" of the victims at the birthday party. The prosecutor argued that the video was only cumulative to Kim Gregory's testimony. (R.115:11–12.)

Gregory's wife, Kim, testified that the families socialized regularly in 1998 and all the way to 2002 when the assaults were finally reported to police. (R.115:29–30.) Kim testified that the victims' family attended her daughter's first birthday party at her parents' house after

they all had attended a religious dedication for her daughter at their church in late March of 1999. (R.115:18–20.)

Mary testified that she could not recall whether she attended the birthday party in March of 1999. She recalled attending the dedication for Gregory's daughter at the church and it was possible that she also attended the birthday party thereafter. (R.113:170.) Susan testified that she attended both the church dedication and the house party for Gregory's daughter. (R.122:69–70.) The victims' mother, V.T., admitted when called by the State in rebuttal that she and her daughters indeed attended the dedication at the church and the first birthday party for Gregory's daughter at the home of Kim Gregory's parents. V.T. did not know whether a videotape was taken of the party. (R.115:51–52, 70, 73.)

The photographs were in the defense file well before trial, but were not disclosed to the prosecutor because defense Attorney Anderson was called away to military duty for more than a year after she received the photographs from the Gregory family, and Attorney Jones who replaced her for that period of time did not disclose the photos to the prosecutor. (R.119:50.) Attorney Jones admitted that he did not turn over the photos but maintained that he showed them to the prosecutor at a pretrial hearing. The prosecutor said he never saw the photos and they were never mentioned by defense counsel pretrial. (R.122:5.) When contacted by telephone during the trial, Attorney Jones said he did not recall showing the photos to the prosecutor, but recalled telling the prosecutor that he had them. Jones could not recall if this conversation was off the record and he had "no idea" when the conversation occurred. (R.122:7–8.)

At the postconviction hearing, Jones testified that the photos were already in the case file when he received it from

Attorney Anderson. (R.119:16.) Jones recalled telling the prosecutor about the photos during an informal conversation. He did not always document such conversations in his file, and he did not recall whether he documented this conversation about the photos. (R.119:11–13.) Jones did not recall when the conversation occurred or in what context. He did not recall memorializing the conversation and admitted that it was "off the record." (R.119:15.) There is nothing to indicate that during this conversation Jones told the prosecutor that the defense intended to introduce the photographs into evidence at trial.

Attorney Anderson testified at the postconviction hearing that Gregory's wife gave her the photographs, but Anderson had "no idea" when that was, other than it occurred before she left for military duty. (R.119:20.) Anderson testified that she did not disclose the photos to the prosecutor when she received them because she was not sure at that point how or even if they would come into play at trial. She also did not instruct Attorney Jones to turn them over to the State. When she returned from military duty, Anderson said that Jones told her he had disclosed the photos to the State. (R.119:34–35, 55, 57–58.)

With respect to the videotape, Anderson said she did not receive it from Gregory's wife until "the middle of the trial" because no one in Gregory's family could find it. (R.119:41, 62.) She acknowledged that other witnesses, including the victims' mother, testified that the family was at the birthday party depicted in the videotape. Anderson was also concerned that, if introduced into evidence, the photos and videotape might generate sympathy for the victims as the girls appeared "cute" and much younger in the videotape than when they testified at trial. (R.119:69.)

B. The applicable law and standard for review.

Upon demand, the defense "shall, within a reasonable time before trial, disclose to the district attorney and permit the district attorney to inspect and copy or photograph" a number of items "within the possession, custody or control of the defendant," including: "Any physical evidence that the defendant intends to offer in evidence at the trial." Wis. Stat. § 971.23(2m)(c).

"The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance." Wis. Stat. § 971.23(7m)(a).

The trial court's decision whether to impose a sanction for a discovery violation is addressed to its sound discretion. *State v. Martinez*, 166 Wis. 2d 250, 259, 479 N.W.2d 224 (Ct. App. 1991).

C. The trial court properly exercised its discretion to exclude what turned out to be cumulative evidence on an undisputed point.

While the court could have granted the State a recess or a continuance of the trial rather than exclude the evidence, *see Kutchera v. State,* 69 Wis. 2d 534, 543, 230 N.W.2d 750 (1975), it reasonably decided to exclude the photographs and videotape, but to allow defense counsel to elicit testimony through Kim Gregory that the two families regularly socialized after the assaults allegedly occurred and, specifically, that the victims' family attended the first birthday party for Gregory's daughter in March of 1999. Kim Gregory's testimony was confirmed by Susan's testimony

and that of her mother, V.T., admitting that she and both of her daughters attended the first birthday party.

The videotape was properly excluded because it was not disclosed until the middle of trial. Gregory offers no excuse for his wife's failure to find the videotape sooner. With regard to the photographs, it is likely that Attorney Jones was mistaken; he never told the prosecutor about the photos. Certainly, Jones never told the prosecutor that he intended to introduce the photos into evidence at trial because Jones did not even handle the trial, he turned the file back over to Anderson several months before trial and Anderson never instructed Jones to turn the photos over to the prosecutor. The decision to introduce the photos into evidence appears not to have been made until the eve of trial after Attorney Anderson resumed representation. There was, therefore, no "disclosure" of this physical evidence in compliance with the court's order or with Wis. Stat. § 971.23(2m)(c) by any rational understanding of that term. The trial court properly held that the "lack of coordination between Anderson and Jones" was not good cause to excuse their non-compliance with the trial court's pretrial order or with Wis. Stat. § 971.23. (R.92:4, A-App. 104.) *See State v. Wild,* 146 Wis. 2d 18, 27, 429 N.W.2d 105 (1988) ("If good cause is not shown, the statute is mandatory—the evidence shall be excluded.") (emphasis omitted).

Gregory suffered no prejudice even assuming the court should have ordered a recess rather than exclude the previously undisclosed photographs and videotape. The trial court correctly held that neither had significant impeachment value. (R.92:4–5, A-App. 104–05.) After V.T. and Susan testified, it was not disputed that the two families socialized at least to some extent after the sexual assaults allegedly occurred in 1997. The victims and their parents attended the church dedication and first birthday party for

Gregory's daughter in March of 1999. As it turned out, the photographs and videotape of the birthday party would only have been cumulative to testimony on an undisputed point. It is clear beyond a reasonable doubt that Gregory would have been found guilty even had the court allowed the photographs and the videotape into evidence. *See generally State v. Harvey,* 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189. This lack of prejudice necessarily defeats Gregory's claim that trial counsel was ineffective for causing the discovery violation. (Gregory's Br. 32–33.)

V. Defense counsel reasonably decided not to object to the prosecutor's closing argument.

Gregory complains that the prosecutor made an improper "propensity" argument in his closing arguments to the jury. Defense counsel did not object. Attorney Anderson decided not to object because she believed the trial court would overrule her objection. Anderson did not move for a mistrial because she believed the case was going well for the defense and she preferred to have the case go to verdict before this particular jury. This was a reasonable strategic call.

A. The prosecutor's closing argument regarding the other-acts evidence.

The prosecutor asked the jury to decide whether Gregory is the type of person who is sexually attracted to children. (R.115:117.) To help the jury answer that question, he referenced the testimony of the victim in the 1986 Appleton case, D.B., to insist that the only reasonable answer is, "yes;" the same answer Mary and Susan would give. (R.115:117–119.) He referred to the striking similarities between the charged offenses and the 1986 assaults against nine-year-old D.B. in Appleton: they occurred on a couch underneath a blanket (a "familiar playing field" for Gregory); Mary and Susan said he did the

same with them (R.115:119–122); this was the same "M.O." and a "common scheme" used by Gregory. The prosecutor asked again whether Gregory is the type of person who is attracted to children. If he is, then the next question to be answered is whether he touched Mary and Susan. (R.115:128.) He argued that the assault on D.B. was a precursor of the charged assaults because Gregory employed a "common scheme" that began with D.B., leading up to the assaults on Mary and Susan. (R.115:127–28.)

Defense counsel responded in her closing argument by telling the jury that the pertinent question was not whether Gregory is attracted to children, but whether he is guilty or not guilty of assaulting Mary and Susan. (R.115:141–42.) Counsel argued that the alleged assault during the "piggyback" ride with Susan did not share the same "M.O." as the assaults on D.B. or the other offenses.

In rebuttal, the prosecutor argued that if the assaults did not happen, then Mary and Susan lied to everyone. (R.115:146–48.) He stated that the jury had to answer the simple question whether Gregory sexually assaulted Mary and Susan. The "proof is in the pudding," he argued, because these offenses had the same "M.O." as the assaults on D.B. in 1986. (R.115:148–49.)

The court instructed the jury that the remarks of counsel are not evidence. "Consider carefully the closing arguments of the attorneys, but their arguments and conclusions are not evidence. Draw your own conclusions from the evidence, and decide upon your verdict according to the evidence under the instructions given to you by the Court." (R.115:104–05.) It instructed the jury not to be "swayed by sympathy, prejudice or passion." (R.115:146.)

Attorney Anderson testified at the postconviction hearing that she considered objecting to the prosecutor's argument and moving for a mistrial, but strategically decided not to do so because: (a) she believed the trial court would overrule the objection having already allowed the 1986 assault of D.B. into evidence; and (b) she believed the trial was going well for Gregory and it was better to let the case go to a verdict before this particular jury. (R.119:44–45, 63–64, 76.)

B. The applicable law and standard for review of a challenge to the prosecutor's closing argument.

The prosecutor is given considerable latitude in closing argument, subject only to the rules of propriety and the trial court's discretion. *State v. Burns,* 2011 WI 22, ¶ 48, 332 Wis. 2d 730, 798 N.W.2d 166; *State v. Bergenthal*, 47 Wis. 2d 668, 681, 178 N.W.2d 16 (1970). Prosecutors are permitted to argue their cases with vigor and zeal. They may strike hard blows, but not foul ones. *United States v. Young*, 470 U.S. 1, 7 (1985); *Hoppe v. State*, 74 Wis. 2d 107, 119–20, 246 N.W.2d 122 (1976); *State v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983).

A conviction is not to be reversed unless the prosecutor's argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted); *Burns,* 332 Wis. 2d 730, ¶ 49 (citation omitted). This Court must evaluate the prosecutor's remarks in light of the entire trial record, not in isolation, to determine whether they denied the defendant a fair trial. *Burns,* 332 Wis. 2d 730, ¶ 49; *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995).

Even when a prosecutor's closing argument is improper, a trial court's instruction to the jury that the arguments of counsel are not evidence places the closing arguments in their proper perspective. *State v. Hoffman*, 106 Wis. 2d 185, 220, 316 N.W.2d 143 (Ct. App. 1982); *State v. Draize*, 88 Wis. 2d 445, 455–56, 276 N.W.2d 784 (1979). The jury is presumed to have followed those instructions. *Johnston*, 184 Wis. 2d at 822; *Olson*, 217 Wis. 2d at 743.

To properly preserve an appellate challenge to the prosecutor's closing argument, the defendant must timely object to the offending remarks and move for a mistrial. *Davidson,* 236 Wis. 2d 537, ¶ 86; *Haskins v. State,* 97 Wis. 2d 408, 424, 294 N.W.2d 25 (1980). *See State v. Pinno* and *State v. Seaton,* 2014 WI 74, ¶¶ 8, 56–68, 356 Wis. 2d 106, 850 N.W.2d 207 (the right to challenge on appeal a structural constitutional violation may be forfeited by the defendant's failure to timely object).

Absent an objection, the propriety of the prosecutor's argument may only be reviewed in the context of a challenge to the effectiveness of trial counsel for not objecting, with the burden of proving both deficient performance and actual prejudice squarely on the defendant. *Pinno* and *Seaton,* 356 Wis. 2d 106, ¶¶ 81–82. *See Kimmelman v. Morrison,* 477 U.S. 365, 374–75 (1986).

To establish deficient performance, it would not be enough for Gregory to prove that his attorney was "imperfect or less than ideal." *State v. Balliette,* 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334. The issue is "whether the attorney's performance was reasonably effective considering all the circumstances." *Id.* Counsel is strongly presumed to have rendered reasonably competent assistance. *Id.* ¶¶ 25, 27. Gregory had to present facts sufficient to overcome that strong presumption. *Id.* ¶ 78. "Strategic choices are 'virtually

unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland v. Washington,* 466 U.S. 668, 690 (1984)).

Gregory had to affirmatively prove by clear and convincing evidence at the postconviction hearing that he suffered actual prejudice as the result of counsel's proven deficient performance. He could not speculate. *Balliette,* 336 Wis. 2d 358, ¶¶ 24, 63, 70.

C. Defense counsel reasonably decided not to object because, when viewed in the context of the entire trial, the prosecutor properly focused on the similarities between the 1986 assault of D.B. and the charged offenses.

Defense counsel made a sound strategic decision not to object. Gregory cannot overcome the strong presumption that counsel acted reasonably and competently in so deciding.

The prosecutor had to convince the jury that Gregory fondled the children under their clothing for the purpose of his own sexual gratification. To that end, he properly focused on the similarities between the 1986 offenses and the charged offenses to argue that, as he did with D.B., Gregory had sexual contact with Mary and Susan for his own sexual gratification. These are the similarities in plan and purpose for which evidence of the 1986 acts was properly received. The prosecutor could rightly emphasize these similarities to argue that the jury should believe Mary and Susan because, just as with D.B. in 1986, Gregory became aroused and fondled them for his own sexual gratification. The prosecutor could rightly rely on the proven fact that Gregory acted on his sexual attraction to a nine-year-old girl in 1986, pled guilty to it and was convicted, to prove that he also acted on his sexual attraction to eight-year-old Mary and twelve-year-

old Susan under strikingly similar circumstances. In the end, that was the gist of the argument and that was entirely permissible. *Tabor,* 191 Wis. 2d at 494–95.

Finally, the argument did not so prejudice the jury to prevent it from finding Gregory not guilty of the charge involving Susan's "piggyback" ride. Had the jury truly been swayed by an improper "propensity" argument, it would likely have found Gregory guilty across the board. Instead, the jury parsed through the similarities and dissimilarities of the various offenses to arrive at four independent verdicts based on the evidence and not on an emotional appeal to find Gregory guilty because he is a bad man.

Because there was no basis for defense counsel to object, Attorney Anderson reasonably decided not to do so. Anderson was not ineffective for failing to interpose a meritless objection. *E.g., State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987); *State v. Berggren,* 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110.[6]

VI. The trial court properly instructed the jury not to speculate about what a missing witness might have said.

Mary first confided in a childhood friend in early 1998 that Gregory sexually assaulted her in late 1997. (R.113:170–71.) In her closing argument, defense counsel noted that the State did not call the childhood friend in whom Mary initially confided to testify at trial. The prosecutor objected. (R.115:140.) The trial court sustained the objection and instructed the jury that Wisconsin law prohibits comments about witnesses who were not called to testify because the jury may not speculate about what the

[6] The prosecutor is now allowed to make a propensity argument should this case be retried. *See* n.2 above.

witness might have said. The jury was to decide the case solely on the testimony and evidence introduced at trial. (R.115:141.)

The trial court properly instructed the jury not to speculate about what the witness might have said, and to decide the case only on the evidence and instructions presented at trial. Gregory cites no authority for his proposition that the jury was free to speculate about what someone who did not testify might have said if called to testify.

A party's failure to call a "material" witness at trial is probative only if it supports a reasonable conclusion that the party is unwilling to let the jury hear the full truth and the testimony, had it been presented, would have been unfavorable to the party's case. *State v. Sarinske,* 91 Wis. 2d 14, 53–54, 280 N.W.2d 725 (1979). Gregory has made no such showing. The young friend's testimony would have been favorable to the State's case. It would have corroborated Mary's claim that Gregory assaulted her. The trial court properly refused to let defense counsel knowingly mislead the jury in this fashion. *See State v. Saunders,* 2011 WI App 156, ¶¶ 11–14, 24, 26, 338 Wis. 2d 160, 807 N.W.2d 679 (The prosecutor did not shift the burden of proof by commenting on the defendant's failure to call a witness, "Paul," who may not even have existed and who could not have corroborated the defendant's alibi.).

Gregory also fails to explain why this matters. There is no dispute that Mary confided in her young friend, who then told her parents who, in turn, told Mary's parents. To this day, Gregory offers no proof that the young friend would deny that Mary confided in her about the assault or was in on Mary's parents' supposed plot to falsely accuse Gregory. Just as he wanted the jury to do at trial, Gregory wants this

Court to speculate without any proof that the young friend might have had something important and exculpatory to say.

Even if Gregory were permitted to ask the jury to speculate about what Mary's childhood friend might have said if called to the stand, the State would have responded by pointing out that Gregory could have subpoenaed the young girl to testify if he truly believed she had something important to say. After all, Gregory knew who she was before trial and presumably could have located and subpoenaed her to testify.

In *State v. Jaimes,* 2006 WI App 93, 292 Wis. 2d 656, 715 N.W.2d 669, the defendant was convicted of two counts of delivery of cocaine. In his closing argument, defense counsel questioned the lack of testimony from two collaborators in the alleged drug deals—Velazquez and Albiter. The prosecutor in rebuttal pointed out that these people were not likely to come into court and admit their involvement in the drug deals. *Id.* ¶ 18. The prosecutor also pointed out that "they have the same rights as he [Jaimes] does" not to testify, and "he's got subpoena power the same way I do to ask people to come here." *Id.* ¶ 19.

This Court upheld the trial court's determination that the prosecutor's rebuttal argument "was a proper response to defense counsel's argument" that the collaborators' failure to testify should be held against the State because defense counsel's argument would prompt the jury to speculate. *Id.* ¶¶ 20, 24.

This Court held that the prosecutor's argument about the equal ability of the defense to subpoena witnesses was also proper especially in response to the defense argument about the State's failure to call a specific witness. *Id.* ¶ 26.

See also State v. Gonzalez, No. 2012AP1818-CR, 2013 WL 3795683, ¶¶ 22–30 (Wis. Ct. App. July 23, 2013) (unpublished) (cited for persuasive value only), *affirmed on other grounds, State v. Gonzalez,* 2014 WI 124, 359 Wis. 2d 1, 856 N.W.2d 580. Gregory could have called the witness to the stand both at trial and at the postconviction hearing. His failure to do so proves that she had nothing exculpatory to offer.

Finally, any error was harmless with respect to the two convictions involving Susan because only Mary confided in the missing witness and their conversation was only about Gregory's assault of Mary, not of Susan.

VII. Gregory is not entitled to discretionary reversal.

Having failed to prove any independent ground for relief, Gregory presents the "last gasp" argument that this Court should nonetheless exercise its discretion under Wis. Stat. § 752.35 to award him a new trial in the interest of justice.

The discretionary reversal power is, however, formidable and should only be exercised in "exceptional cases." *State v. Avery,* 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted).

This Court may not even consider the issue of discretionary reversal until after it has determined that all other challenges to the conviction are without merit and, even without any other meritorious ground for relief, this is that rare "exceptional case" that warrants discretionary reversal. *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258.

This Court also may not grant discretionary reversal until after it has balanced the compelling State interests in

the finality of convictions and proper procedural mechanisms against any factors favoring discretionary reversal. *State v. Henley*, 2010 WI 97, ¶ 75, 328 Wis. 2d 544, 787 N.W.2d 350.

This is not one of those "exceptional cases." The other-acts evidence was properly received for permissible purposes and the jury was so instructed. The prosecutor properly, albeit emotionally, utilized the prior acts involving D.B. for those permissible purposes in his closing argument. Defense counsel made a sound strategic decision not to object and move for a mistrial. The defense discovery violation was properly addressed by the trial court and, as it turned out, the photographs and videotape would have provided only cumulative proof on an undisputed point: the victims' family and Gregory's family socialized on occasion after the assaults. The trial court properly instructed the jury not to speculate about what a missing witness might have said, but to decide the case only on the evidence and law presented in court. Had the court let the argument go, the prosecutor would have properly responded that the defense had the same subpoena power to bring the witness into court as did the State.

Gregory has not proven by clear and convincing evidence that justice miscarried in any respect. *State v. Williams*, 2000 WI App 123, ¶ 17, 237 Wis. 2d 591, 614 N.W.2d 11. "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). It would be a miscarriage of justice to award Gregory a new trial for the flimsy reasons put forth in his postconviction motion and in his brief to this Court.

CONCLUSION

The judgment of conviction and order denying postconviction relief should be AFFIRMED.

Dated: April 10, 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 10,690 words.

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Dated: April 10, 2017.

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