STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP813-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL M. WILSON,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner Presiding

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## ISSUES PRESENTED

1. In a prosecution for repeated sexual assault of a child, is the State required to prove the second essential element of the offense—that at least three sexual assaults took place within a specified period of time?

The circuit court held that the State was not required to prove this element, ruling that "although the timeframe was an element of the offense, it was not a *material* element." (53:3; App. 103) (emphasis in original).

2. Are certified medical records showing that the alleged child victim has a sexually transmitted disease—which were generated after child protective services removed the victim from her home due to suspected physical abuse—"testimonial" under the Confrontation Clause framework established in ***Crawford v. Washington***, 541 U.S. 36 (2004)?

The circuit court held that the medical records were not testimonial. (53:4-5; App. 104-05).

3. Was Daniel Wilson denied effective assistance of counsel because his attorney failed to object to irrelevant and unfairly prejudicial expert testimony asserting that: (1) the vast majority of child sexual assaults are committed by family members or acquaintances; and (2) victims of child sexual abuse are often threatened by their abusers?

The circuit court concluded that this testimony was appropriate in the context in which it was discussed and denied Mr. Wilson's claims of ineffective assistance of counsel without an evidentiary hearing. (53:5; App. 105).

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The briefs will fully address the issues presented, so Mr. Wilson does not request oral argument. *See* Wis. Stat. § 809.22(2)(b). Publication is necessary, however, to clarify whether the timeframe element of repeated sexual assault of a child is an essential element of the offense. *See* Wis. Stat. § 809.23(1)1. It is a fundamental tenant of due process that the State may not deprive a person of liberty unless it proves *every element* of the charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 365 (1970); ***State v. Harvey***, 2002 WI 93, ¶ 19, 254 Wis. 2d 442, 647 N.W.2d 189. Whether there is some exception to this constitutional guarantee for the offense of repeated sexual assault of a child—as the circuit court concluded—is an issue of substantial and continuing public interest that strongly warrants publication. *See* Wis. Stat. § 809.23(1)5.

Also, publication may be appropriate to clarify the scope of the Confrontation Clause in the context of medical records generated in response to allegations of child abuse. *See* Wis. Stat. § 809.23(1)1.

## STATEMENT OF THE CASE AND FACTS

### A. Allegations of the criminal complaint.

On June 3, 2014, the State filed a criminal complaint charging Daniel Wilson with one count of repeated sexual assault of a child (three or more acts of sexual intercourse in violation of Wis. Stat. § 948.02(1)(am), (b), or (c)), contrary to Wis. Stat. § 948.025(1)(b). The complaint alleged that, between January 1, 2013 and May 5, 2014, Mr. Wilson engaged in numerous acts of sexual intercourse with F.T.

(DOB 12/27/05), who at the time was between the ages of seven and eight. (1:1-2).

B. Evidence presented at trial.

The case was tried to a jury over a three-day period beginning on January 20, 2015. The Honorable Jeffrey A. Wagner presided over the trial. At the outset of the trial, the parties stipulated to the introduction of medical test results showing that Mr. Wilson had type 1 herpes.[1] (66:31; *see also* 75; 77:6). The following testimony was then presented at trial.

F.T.'s mother, Jeanette Yegger, testified that she has five children who were the following ages at the time of trial: F.T., age nine; Mariah, age seven; Anthony, age six; Ebony, age three; and Tatevanna, age one. (69:3-4). She also explained that Mr. Wilson is the biological father only of Anthony. (69:4-5). Ms. Yegger further testified she began dating Mr. Wilson in June 2013.[2] (69:5). At the time, she and her children were living at her mother's house, which was located at 2948 North Buffum Street in the City of Milwaukee. (69:5-6, 79-80). Ms. Yegger stated that she lived there from June 2013 until November 2, 2013. (69:6-7). During this time, she stated that Mr. Wilson did not live with her but did spend the night. (69:6-7).

Ms. Yegger explained that, on November 2, 2013, she

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[1] The stipulation states that Mr. Wilson tested positive for herpes types 1 and 2. (77:6). The actual test results, however, show that Mr. Wilson only tested positive for herpes type 1, not type 2. (75:2). This error is immaterial for purposes of this appeal.

[2] Mr. Wilson clarified that he had known Ms. Yegger "off and on" for eighteen years. (69:78). They had a six-year-old child, Anthony, from a prior relationship. However, the two began dating again in the summer of 2013. (69:78-79).

and Mr. Wilson (along with her children) moved in together at a new house located at 2477 North 6th Street in the City of Milwaukee. (69:5-6, 11-12). In response to a question by the prosecutor, Ms. Yegger initially agreed that her children were "detained" by the Bureau of Milwaukee Child Welfare (BMCW) on May 5, 2014. (69:7). However, she never stated that her children were actually *removed* from her home, either permanently or temporarily, on May 5, 2014. In fact, she specifically stated later that BMCW did not remove her children from her home on May 5, 2014. (69:7-9, 30). Instead, BMCW established a protective plan at this time in response to suspected physical abuse of F.T. (69:8-10, 40-44, 104-05). The protective plan required Ms. Yegger's adult sister to live with her and supervise Ms. Yegger with her children. (*Id.* at 8, 42-44).

Shortly after Ms. Yegger's sister moved in, however, she became unable to continue serving as a "protective adult." (69:8-9, 13, 44, 113-114). As a result, on May 13, 2014, Ms. Yegger and her children, along with Mr. Wilson, moved to the home of Mr. Wilson's mother, Armer Lloyd, at 5147 North 28th Street in the City of Milwaukee. (69:8-9, 20, 43-44, 88-89). Ms. Lloyd then served as the protective adult until all the children were permanently removed[3] from her home on May 20, 2014 due to the suspected physical abuse of F.T. (69:8-10, 40-44, 104-05). The BMCW social worker who made the decision to remove the children, Kayla Williamson, as well as Mr. Wilson, confirmed this time line. Both testified that the children were not removed from the

[3] After her removal, a physical medical examination on May 20, 2014 revealed lesions on F.T.'s genitals. She remained in foster care from then on. (69:8-10, 38-44; 76:10-17).

home until May 20, 2014.[4] (69:39-44, 88-89, 104-05).

F.T. also testified at the trial. She stated that Mr. Wilson[5] had previously touched her vagina with his finger "[m]ore than one time." (68:74-75). F.T. stated that, on one occasion, Mr. Wilson touched her under her clothing "and then he started to dig in there. And then it was hurting and burning everywhere." (68:77.) According to F.T., this incident occurred at "Anthony's granny's house." (68:78). She stated, when it happened, she was lying down going to sleep in "Anthony's granny's room," along with her brother and sisters. (68:76). At a different point, however, she said it took place in Mr. Wilson's room. (68:75). And at yet another point, she said it took place in her own room. (68:76). F.T. stated she was eight years old when this happened. (68:78).

Initially, F.T. stated that Mr. Wilson had never touched any other part of her body and that there was no touching involving "his private parts" or "with mouths." (68:78). She also said she had never seen or touched Mr. Wilson's "private part." (68:80). However, the prosecutor then reminded F.T. that she had previously alleged that Mr. Wilson "peed on [her]" during a forensic interview. F.T. then quickly changed her testimony and asserted that Mr. Wilson had, in fact, "peed on [her] head when [she was] laying [sic] down." (68:81). She said this incident also happened at "Anthony's granny's house" and that she was in Mr. Wilson's room sleeping with

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[4] F.T.'s certified medical records also state that she was not removed from the home until May 19, 2014. (76:9-11). For purposes of this appeal, the difference between May 19 and May 20, 2014 is immaterial.

[5] Throughout her testimony, F.T. referred to Mr. Wilson as "Trey." (68:68-108). The evidence was undisputed that the person F.T. referred to as "Trey" was Mr. Wilson. (*See, e.g.*, 68:57).

her brother and sisters. (68:81-83). According to F.T., Mr. Wilson woke her up and "[p]ee[d] on [her and] put his finger in [her] parts." (68:83). F.T. stated that the "pee" looked like "[w]hite stuff." (68:84).[6]

F.T. also initially denied that Mr. Wilson had ever touched her butt with his "private part." However, after the prosecutor reminded F.T. again about her forensic interview, F.T. changed her testimony once more and agreed that Mr. Wilson had "touched [her] behind with his private part." (68:85-86). She said she was watching a movie with her sisters in their room at "[her] momma house" when this happened. (68:86-87). F.T. soon changed her testimony again, however, and said Mr. Wilson came into her room during this incident and told her to turn around, but she told him no and went back to playing with her sisters. (68:87).

When asked again whether she had ever touched Mr. Wilson's "private part," F.T. said no. But once again, the prosecutor reminded F.T. about her allegations during the forensic interview. F.T. then changed her testimony again and agreed that Mr. Wilson had made her touch "his private parts." She said this also happened at "Anthony granny's house" when she was eight years old. (68:87-88). In further describing the incident, F.T. said she was in the kids' room

[6] During her testimony, F.T. also described other incidents of alleged sexual contact between her and Mr. Wilson; however, these other incidents only constituted sexual contact, not sexual intercourse. (69:84-85, 92-93, Ex. 3). These incidents are thus not described in detail in this brief, as the only type of child sexual assault alleged by the State was first-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(1)(b) (sexual intercourse with a person under twelve). (1:1-2; 70:3-6).

and everyone else was asleep.[7] (68:88-89). According to F.T., Mr. Wilson came into the room and put his finger in her vagina and tried to "put his private part in [her] part." (68:90-91).

F.T. further testified that Mr. Wilson had "pee[d] on [her]" only one time. (68:91). She also said that Mr. Wilson only touched her one time at her mother's house, but more than one time "Anthony's granny's house." (68:92). In addition, she said Mr. Wilson put his penis inside her "behind" one time at "Anthony's granny's house." (68:94-95).

The State also played a DVD of F.T.'s prior forensic interview. (68:56-57; 78:1). During the interview, F.T. stated that Mr. Wilson "tried to let me open my mouth and put his private part in my mouth." (78:1 at 02:48:00 to 02:49:00). F.T. indicated this happened more than more time and stated that it took place at "Anthony's granny's house." (78:1 at 02:50:00 to 02:50:45). She further stated that Mr. Wilson had her lay on her stomach and was "putting his private part on my behind." (78:1 at 02:50:00 to 02:50:45). F.T. also described another incident "at the new house," where Mr. Wilson was "licking on [her], and putting his private part in [her] butt." (78:1 at 02:55:30 to 02:56:45) Also during the interview, F.T. described another incident at "Anthony's granny house," where Mr. Wilson put his finger "deep in [her] private part." (78:1 at 02:56:45 to 02:58:00). She also described a time when Mr. Wilson made her open her legs and put his finger in her vagina. (78:1 at 03:03:00 to 03:3:03:35).

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[7] In her description of this incident, F.T. stated at first that she was awake at the outset of the incident. However, a brief moment later, she said she was asleep. (Tr. 1/21/15 a.m. at 88-89).

During cross-examination, F.T. confirmed that "Anthony's granny" is Mr. Wilson's mother, Armer Lloyd. (68:101-102).

Dr. Judy Guinn, a pediatrician at Children's Hospital of Wisconsin, also testified for the State. During her testimony, the State introduced certified medical records from Children's Hospital regarding the examinations performed on F.T. following her removal from her home on May 20, 2014.[8] (68:12; 76). According to those records, a sexual assault nurse examiner (SANE), Deborah Bretl, discovered lesions on F.T.'s genital region during the examination. (16; 76:10-17; *see also* 16; 67:5). Ms. Bretl then ordered testing for sexually transmitted diseases (STDs), which revealed that F.T. had type 1 herpes. (76:14-16). Neither Ms. Bretl, nor the medical professional who performed the STD tests, testified at trial or was otherwise made available for examination by the defense.

During her testimony, Dr. Guinn asserted that the vast majority of child sexual assaults are committed by relatives or acquaintances of the victim. (67:101-02). She also claimed that victims of child abuse are often threatened by their abusers. (67:103). Amanda Didier, a forensic interviewer for Children's Hospital, also testified that interfamilial sexual abuse (which, according to her, includes abuse perpetrated by a boyfriend) is the most common type of child sexual abuse.[9] (67:90-91).

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[8] Defense counsel objected to these medical records on hearsay grounds but was overruled. She did not object to them on Confrontation Clause grounds. (69:47).

[9] Defense counsel objected to Ms. Didier's testimony on foundational and leading grounds but was overruled. She did not object on the grounds of relevance or unfair prejudice. (67:90-91).

Mr. Wilson exercised his right to testify in this case and categorically denied ever touching F.T. in an inappropriate or sexual manner. (69:98-102). After the close of evidence, the circuit court granted the State's request to submit a lesser-included offense instruction for a single count of first-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(1)(b). (66:30; 69:117-18; 70:3-7). The court also instructed the jury that the specified period of time within which the sexual assaults were alleged to have occurred was January 1, 2013 through May 5, 2014. (70:3-4).

Thereafter, the jury returned a verdict finding Mr. Wilson guilty of repeated sexual assault of a child. (71:2-5). On March 12, 2015, the circuit court sentenced Mr. Wilson to a fifty-year term of imprisonment, consisting of thirty-seven years of initial confinement and thirteen years of extended supervision. (72:37).

C. Postconviction proceedings before the circuit court.

Following entry of the judgment of conviction, Mr. Wilson filed a timely notice of intent to pursue postconviction relief. (29). He later filed a postconviction motion seeking an order vacating his conviction and sentence and directing the entry of a judgment of acquittal on the grounds that there was insufficient evidence to convict him of repeated sexual assault of a child. In this regard, Mr. Wilson pointed out that the State had failed to present any evidence to prove an essential element of its case—that the alleged sexual assaults occurred during the specified time period of January 1, 2013 to May 5, 2014. (40:8-12).

In the alternative, Mr. Wilson requested a new trial on the grounds that his trial attorney was ineffective for: (1) failing to object on Confrontation Clause grounds to the

admission of the medical test results (and related testimony) showing that F.T. had type 1 herpes; (2) failing to object on the grounds of relevance and unfair prejudice to the expert testimony asserting that the vast majority of child sexual assaults are committed by family members or acquaintances; and (3) failing to object on the grounds of relevance and unfair prejudice to the expert testimony asserting that victims of child sexual abuse are often threatened by their abusers. (40:12-17). Mr. Wilson asserted that these errors, both individually and collectively, undermined confidence in the outcome of the case and entitled him to a new trial.[10] (40:17-19). He also requested an evidentiary hearing on his ineffective assistance claims. (40:1-2, 20).

After further briefing by the parties, the circuit court issued a written decision and order denying Mr. Wilson's postconviction motion. (53; App. 101-05). Regarding his sufficiency of the evidence claim, the court concluded "that although the timeframe was an element of the offense, it was not a *material* element." (53:3; App. 103) (emphasis added). In this respect, the circuit court cited ***State v. Fawcett***, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1998), and ***State v. Kempainen***, 2015 WI 32, 361 Wis. 2d 450, 466, 862 N.W.2d 587, for proposition that "time is not of the essence in sexual assault cases." (53:3; App. 103).

***Fawcett*** and ***Kempainen*** both dealt with the offense of sexual assault of a child under Wis. Stat. § 948.02, which does not have a time element, unlike Wis. Stat. § 948.025. Nonetheless, based on these cases, the circuit court held that the State was not required to prove that at least three of the alleged sexual assaults occurred during the specified time

[10] Mr. Wilson's postconviction motion also requested an order granting him an additional twenty-one days of sentence credit, which the circuit court granted. (40:19-20; 53:5; App. 105).

period of January 1, 2013 to May 5, 2014. The court provided the following reasoning:

> Based on the above case law, the court cannot find that the May 5, 2014 date in the complaint had to be rigidly adhered to, and there is nothing to suggest in the defendant's motion that the timeframe was somehow a material element of the offense in this case or that the additional fifteen days from May 5-20, 2014 jeopardized him with respect to notice of the pertinent timeframe. He knew he was part of the family up until May 20, 2014. Under the circumstances, even if some of the sexual assaults occurred during the fifteen day period beyond that set forth in the complaint, the court declines to vacate the convictions. As it is, the verdict of the jury was fully supported by more than sufficient evidence. The child testified credibly about multiple instances of sexual assault under sec. 948.02(1), Stats., The court rejects the defendant's contention that the State failed to met [sic] its burden of proof or that sufficient evidence did not exist.

(53:3-4; App. 103-04).

The circuit court also rejected Mr. Wilson's claims of ineffective assistance of counsel. With respect to his Confrontation Clause challenge, the court held that the medical records were not testimonial according to the Wisconsin Supreme Court's recent decision in ***State v. Mattox***, 2017 WI 9, 373 Wis. 2d 122, 890 N.W.2d 256, *petition for certiorari filed* (May 16, 2017) (No. 16-9167). (53:5; 48:8-12; App. 105, 113-17). Regarding Mr. Wilson's challenges to portions of Dr. Guinn's and Ms. Didler's expert testimony concerning the nature of child sexual assault, the circuit court stated that "[t]he testimony was appropriate in this case in the context of what was discussed or addressed by the expert, and counsel was not ineffective." (53:5; App.

105).

This appeal follows. (55).

## ARGUMENT

I. There Was Insufficient Evidence to Convict Mr. Wilson of Repeated Sexual Assault of a Child Because the State Failed to Present Any Evidence Establishing that the Alleged Sexual Assaults Occurred During the Specified Time Period.

A. General legal principles and standard of review.

A conviction that is based on insufficient evidence cannot constitutionally stand. ***Jackson v. Virginia***, 443 U.S. 307, 309 (1979). The due process clauses of the United States and Wisconsin constitutions provide individuals with protection from conviction in a criminal case except "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***Winship,*** 397 U.S. at 365; *accord* ***State v. Smith,*** 117 Wis. 2d 399, 415, 344 N.W.2d 711 (Ct. App. 1983). Accordingly, the State "may not 'deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense.'" ***Harvey***, 254 Wis. 2d 442, ¶ 19 (quoting ***Carella v. California***, 491 U.S. 263, 265 (1989)).

In Wisconsin, a criminal defendant may challenge the sufficiency of the evidence on appeal regardless of whether he specifically raised the issue at trial. ***State v. Hayes***, 2004 WI 80, ¶ 4, 273 Wis. 2d 1, 681 N.W.2d 203. An appellate court does not substitute its judgment for the fact-finder, but instead asks whether the evidence, viewed in the light most favorable to the State, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found

guilt beyond a reasonable doubt. ***Id.*** ¶ 56. If the reviewing court concludes the evidence was insufficient, the conviction must be reversed, with a remand to the circuit court for entry of a judgment of acquittal. ***State v. Wulff***, 207 Wis. 2d 143, 144-45, 557 N.W.2d 813 (1997) (citing ***Burks v. United States***, 437 U.S. 1, 18 (1978)).

B. The evidence, in the light most favorable to the State, did not establish that at least three sexual assaults took place during the relevant time period.

The offense of repeated sexual assault of a child, contrary to Wis. Stat. § 948.025(1)(b), has the following two elements:

1. The defendant committed at least three sexual assault of the same child. In this case, Mr. Wilson was alleged to have committed sexual assault of F.T. only by violating Wis. Stat. § 948.02(1)(b), which prohibits a person from having sexual intercourse with a person who has not attained the age of twelve. (1:1-2; 70:3-6).

2. At least three sexual assaults took place within a specified period of time. The specified time period in this case was from January 1, 2013 through May 5, 2014. (1:1-2; 5; 70:3-4).

(Wis. JI-Criminal 2107).

It is this second element that the State failed to prove in this case. The State failed to present one shred of evidence establishing that any of the alleged sexual assaults took place between January 1, 2013 and May 5, 2014. The evidence in

the light most favorable to the State established that Mr. Wilson lived with and/or had access to F.T. from June 2013 through May 20, 2014. (69:5-9, 11-13, 39-44, 88-89, 104-05). As a result, the alleged sexual assaults must have taken place sometime between June 1, 2013 and May 20, 2014. However, nothing in the record established that any of the assaults occurred on or before May 5, 2014, rather than afterward, between May 6, 2014 and May 20, 2014.

In fact, the undisputed evidence actually established that all but one of the alleged assaults took place after May 5, 2014. F.T. testified that all the assaults—except one which she stated occurred at "[her] momma house"—occurred at "Anthony's granny's house." (68:78, 81-83, 86-88, 92, 94-95; 78:1). She also confirmed that "Anthony's granny" is Mr. Wilson's mother, Armer Lloyd.[11] (68:101-02). The undisputed evidence also established that F.T. and her family lived with Mr. Wilson at Ms. Lloyd's house from May 13, 2014 to May 20, 2014. (69:8-9, 20, 39, 88-89, 104-05). And there was no evidence that F.T. ever set foot in Ms. Lloyd's house prior to May 13, 2014. Thus, the evidence in the light most favorable to the State established that all but one of the alleged assaults took place at Ms. Lloyd's house, between May 13, 2014 and May 20, 2014. No reasonable fact-finder could thus have found that three or more assaults took place between the specified time period of June 1, 2013 to May 5, 2014.

In its decision, the circuit court stated that Mr. Wilson:

[11] In addition, it is simply implausible that F.T. would refer to her own maternal grandmother, whom she shared with Anthony, as "Anthony's granny," given that Anthony's paternal grandmother (Armer Lloyd) was not F.T.'s grandmother.

> assumes that because the child indicated that many of these sexual encounters occurred at 'Anthony's Granny's house' (Armer Lloyd), they occurred between May 13 and May 20, 2014 when they were staying with his mother (Armer Lloyd). However, the child witness was unable to specify any exact dates, and it is unknown if the family ever stayed at Mrs. Lloyd's home at any other period of time.

(53:4 n. 4; App. 104). This statement turns the burden of proof on its head. Mr. Wilson did not have to prove that the alleged sexual assault occurred outside the specified timeframe. Rather, it was the State's burden to affirmatively prove that they occurred within that timeframe. Given the complete lack of evidence showing that F.T. ever set foot in Ms. Lloyd's house prior to May 13, 2014, it would be pure speculation to conclude that the assaults that took place at "Anthony's granny's house" occurred on or before May 5, 2014.

Moreover, even with regard to the one assault that F.T. claimed took place at her mother's house, the evidence was still insufficient for a reasonable fact-finder to conclude that it occurred between June 1, 2013 and May 5, 2014. Again, the evidence was undisputed that F.T. lived at her mother's house at 2477 North 6th Street from November 2, 2013 to May 13, 2014. (69:5-6, 8-9, 11-12, 20). Thus, without resorting to speculation or conjecture, a reasonable fact-finder would have had no way of deciding whether this assault occurred on or before May 5, 2014, or afterward, between May 6 and May 13, 2014. *See* ***Merco Distrib. Corp. v. Commercial Police Alarms Co.***, 84 Wis. 2d 455, 460, 267 N.W.2d 652 (1978) ("Speculation and conjecture apply to a choice between liability and nonliability when there is no reasonable basis in the evidence upon which a choice of liability can be made.").

In ***Merco***, the plaintiff brought suit against its alarm company, alleging that the company's negligent operation of the alarm system was the proximate cause of losses it suffered as the result of a burglary. ***Id.*** at 456. The Wisconsin Supreme Court dismissed the case because the plaintiff had failed to prove when the burglary occurred, a dispositive fact in the case. ***Id.*** at 460. The court reasoned that a trier of fact could have concluded that the burglary might have been thwarted if the alarm company had followed its usual operating procedures. But a trier of fact could just as fairly have concluded that, even if the alarm company had followed the correct procedures, the burglary might have occurred anyway. ***Id.*** Because there was nothing in the record to indicate when the burglary occurred, there was no evidence upon which a trier of fact could have based a reasoned choice between the two possible inferences. As such, any finding of causation would have been in the realm of speculation and conjecture. ***Id.***

In this case, the State failed to prove the timeframe element in a similar fashion. The sexual assault that allegedly occurred at Ms. Yegger's home might have taken place on or before May 5, 2014. But it could have just as easily taken place after May 5, 2014, between May 6 and May 13, 2014. Because there was nothing in the record to show more precisely when this assault may have occurred, there was no evidence upon which a reasonable trier of fact could have based a reasoned choice between these two possible alternatives. There was no way to choose between them without guessing. Any finding that Mr. Wilson sexually assaulted F.T. (even one time) during the specified time period of January 1, 2013 through May 5, 2014 would therefore have been in the realm of speculation and conjecture. As a matter of law, therefore, the State failed to prove beyond a reasonable doubt that any of the alleged

sexual assaults (much less three or more) occurred between January 1, 2013 and May 5, 2014. Since this was an essential element of the State's case, there was insufficient evidence to convict Mr. Wilson and he is entitled to a judgment of acquittal on the charge of repeated sexual assault of a child.

The circuit court, however, erroneously concluded that "the timeframe . . . was not a material element" of the offense in this case. (53:3; App. 103). The court did not cite a single case that contradicts the plain language of Wis. Stat. § 948.025 indicating that the specific time period is an essential element. Instead, it relied on a number of cases that involved the crime of sexual assault of a child under Wis. Stat. § 948.02. (53:3; App. 103) (citing ***Fawcett***, 145 Wis. 2d at 249-50; ***Kempainen***, 361 Wis. 2d 450, ¶ 22). But unlike Wis. Stat. § 948.025, Wis. Stat. § 948.02 does not have a time element. ***Fawcett*** and ***Kempainen*** are therefore inapplicable here. In fact, both ***Fawcett*** and ***Kempainen*** even suggest that when time *is* an essential element of an offense (as in this case), it must be specifically alleged and proven. *See* ***Fawcett***, 145 Wis. 2d at 250, ("where the date of commission of the crime is not a material element of the offense charged, it need not be precisely alleged"); ***Kempainen***, 361 Wis. 2d 450, ¶ 34 (same). Furthermore, the circuit court's position would render the second element of repeated sexual assault of a child completely meaningless. This court should reject such an unreasonable interpretation.

C. Even though the State requested an instruction for the lesser-included offense of first-degree child sexual assault, the proper remedy is outright reversal and the entry of judgment of acquittal.

A judgment of acquittal must also be entered for the lesser-included offense of first-degree sexual assault of a child. This court is barred from converting the judgment to reflect a conviction, or ordering a new trial, for this lesser-included offense. As an initial matter, ordering a judgment of conviction for this lesser-included offense would violate Mr. Wilson's right to a unanimous verdict, as well the prohibition against duplicity. Here, the State charged and presented evidence of multiple acts of sexual intercourse, but only requested an instruction for one lesser-included offense. This had the effect of combining the separate acts into one duplicitous lesser charge.

Mr. Wilson had the right not to be convicted of the lesser charge in this case unless the jury unanimously agreed on which particular act constituted the offense. *See* Wis. Const. art. I, §§ 5, 7; ***State v. Seymour***, 183 Wis. 2d 683, 694, 515 N.W.2d 874 (1994); ***State v. Lomagro***, 113 Wis. 2d 582, 586-92, 335 N.W.2d 583 (1983). However, the greater offense of repeated sexual assault of a child did not require the jury to unanimously agree on which specific acts constituted the requisite three violations of Wis. Stat. § 948.02(1)(b), only that at least three violations occurred within the specified time period. *See* Wis. Stat. § 948.025(2)(b). Because there was evidence that more than three sexual assaults may have taken place in this case, it is unknown whether the jury actually agreed unanimously that Mr. Wilson committed any single specific act of first-degree child sexual assault. All twelve jurors *may have* unanimously

agreed that Mr. Wilson committed one or more particular acts of child sexual assault. But perhaps all the jurors concluded that he committed at least three acts, but did not unanimously agree that he committed any one particular act. There is simply no way to know.

In addition, the double jeopardy clauses of the United States and Wisconsin constitutions prevent a retrial on the lesser-included offense in this case, because Mr. Wilson has already been tried on the merits for the greater offense and the State failed to present sufficient evidence to convict him. *See* ***State v. Henning***, 2004 WI 89, ¶ 22, 273 Wis. 2d 352, 681 N.W.2d 871 ("double jeopardy principles prevent a defendant from being retried when a court overturns his conviction due to insufficient evidence"); ***State v. Harrell***, 88 Wis. 2d 546, 571, 277 N.W.2d 462 (Ct. App. 1979) (for double jeopardy purposes, "a greater and lesser included offense are the 'same offense' and trial for one bars a second trial for the other").

Finally, a finding of insufficient evidence for the greater offense of repeated sexual assault of a child logically requires an insufficiency finding for the lesser-included offense of first-degree child sexual assault. A single count of child sexual assault, submitted as a lesser-included offense for repeated sexual assault of a child during a specified time period, must necessarily have been committed during the same specified time period. Otherwise, it would not be a lesser-included offense, but rather a different offense altogether. As a result, the State was required to prove beyond a reasonable doubt that the greater and lesser offenses were both committed during the alleged time period. *See* WIS. JI-CRIMINAL 255A ("If you find that the offense was committed by the defendant, it is not necessary for the State to prove that the offense was committed on a specific date. If the evidence shows beyond a reasonable doubt that the

offense was committed *during the time period alleged* in the (information) (complaint), that is sufficient.") (emphasis added); *see also* ***State v. Elverman***, 2015 WI App 91, ¶ 45, 366 Wis. 2d 169, 873 N.W.2d 528 (citing Wis. JI-Criminal 255A approvingly). Because there was insufficient evidence to establish that any sexual assaults in this case occurred during the alleged time period, the only proper remedy is a judgment of acquittal for both the greater and lesser offenses.

## II. Mr. Wilson Was Denied Effective Assistance of Counsel Because His Trial Attorney Failed to Object to F.T.'s STD Test Results on Confrontation Clause Grounds.

At trial, Mr. Wilson's attorney could have lodged a successful objection to the STD test results showing that F.T. had type 1 herpes on Confrontation Clause grounds. Her failure to do so constituted deficient performance and prejudiced Mr. Wilson.

### A. Legal standard for ineffective assistance of counsel claims and standard of review.

Both the United States and Wisconsin constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Wis. Const. art. 1, §7. "This right includes the right to effective assistance of counsel." ***State v. Roberson***, 2006 WI 80, ¶ 23, 292 Wis. 2d 280, 717 N.W.2d 111.

To prevail on an ineffective assistance of counsel claim, the defendant must show: (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Artic***, 2010 WI 83, ¶ 24, 327 Wis. 2d 392, 768 N.W.2d 430. To prove deficient performance, the

defendant must show "facts from which a court could conclude that counsel's representation was below the objective standard of reasonableness." ***State v. Wesley***, 2009 WI App 118, ¶ 23, 321 Wis. 2d 151, 772 N.W.2d 232. To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997) (citing ***Strickland***, 466 U.S. at 694). The defendant need only demonstrate that the outcome is suspect, not that the final result would have been different. ***Id.*** at 275.

A trial court must hold a ***Machner*** hearing if the defendant alleges facts which, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996) (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)).

Appellate review of a trial court's conclusions about ineffective assistance claims involves a mixed question of law and fact. This court "grant[s] deference only to the circuit court's findings of historical fact." ***State v. Thiel***, 2003 WI 111, ¶ 24, 265 Wis. 2d 571, 665 N.W.2d 305). Nevertheless, "[w]hether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that [appellate courts] review de novo." ***Bentley***, 201 Wis. 2d at 310. This court also reviews de novo "the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding." ***Thiel***, 265 Wis. 2d 571, ¶ 24.

B. Trial counsel performed deficiently by failing to object to F.T.'s STD test results on Confrontation Clause grounds.

The Sixth Amendment to the United States Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Wisconsin Constitution also guarantees the right of confrontation: "In all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face." Wis. Const. art. 1, § 7. The two clauses are "generally" coterminous. ***State v. King***, 2005 WI App 224, ¶ 4, 287 Wis. 2d 756, 706 N.W.2d 181.

This fundamental protection requires the State to present its witnesses in court to provide live testimony subject to adversarial testing, i.e., cross-examination. ***Crawford***, 541 U.S. at 43. Out-of-court testimonial statements are barred by the Confrontation Clause, unless the witness is unavailable and the accused had a prior opportunity to confront that witness. ***Id.*** at 68; ***State v. Hale***, 2005 WI 7, ¶ 54, 277 Wis. 2d 593, 691 N.W.2d 637.

Although a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right of confrontation is a question of constitutional law subject to de novo appellate review. *See* ***State v. Williams***, 2002 WI 58, ¶ 7, 253 Wis. 2d 99, 644 N.W.2d 919.

1. The Confrontation Clause bars testimonial out-of-court statements unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.

Previously, the United States Supreme Court's jurisprudence allowed unavailable witnesses' out-of-court statements so long as they had "adequate indicia of reliability." ***Ohio v. Roberts***, 448 U.S. 56 (1980).

However, in ***Crawford***, the Court overruled ***Roberts***, holding that the ***Roberts*** test was not faithful to the founders' intent and not sufficient to protect a defendant's right of confrontation. The Court made two changes to its Confrontation Clause jurisprudence. First, it held that the Confrontation Clause only governs "testimonial statements," and that all other out-of-court statements are regulated by hearsay law. ***Id.*** at 61. Second, it created an absolute bar to statements that are testimonial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine that witness. ***Id*** at 61, 68.[12]

The Court did not define "testimonial" in ***Crawford***, but it identified three core formulations of testimonial statements:

> [E]x parte in-court testimony or its functional equivalent – that is, materials such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements

[12] ***Crawford*** also indicated that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." ***Crawford***, 541 U.S. at 59-60, n.9 (citing ***Tennessee v. Street***, 471 U.S. 409 (1985)).

> that declarants would reasonably expect to be used prosecutorially.
>
> . . . .
>
> [E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.
>
> . . . .
>
> [S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

***Id.*** at 51-52.

A statement's formality is also relevant to deciding its testimonial nature. ***Michigan v. Bryant***, 562 U.S. 344, 366 (2011); ***State v. Jensen***, 2007 WI 26, ¶ 16, 299 Wis. 2d 267, 727 N.W.2d 518. For example, a casual remark to an acquaintance would not suffice as a solemn declaration. ***Crawford***, 541 U.S. at 51. However, a statement does not need to be as formal as an affidavit either. ***Bullcoming v. New Mexico***, 564 U.S. 647, 664 (2011) (limiting the application of the Confrontation Clause only to sworn statements "would make the right to confrontation easily erasable"). Instead, a testimonial statement is typically a solemn declaration such as a formal statement to government officers. ***Crawford***, 541 U.S. at 51.

The United States Supreme Court has addressed the testimonial nature of laboratory reports in two cases.[13] First,

[13] The Supreme Court also addressed a forensic report in a third Confrontation Clause case, ***Williams v. Illinois***, 567 U.S. 50, 132 S. Ct. 2221 (2012). ***Williams*** involved a sexual assault where the defendant

in ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009), the Supreme Court held that affidavits admitted into evidence at trial, which documented the results of forensic analysis showing that a substance seized by police was cocaine, "were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." ***Melendez-Diaz***, 557 U.S. at 307, 311. The Court in ***Melendez-Diaz*** further held that "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that the petitioner had a prior opportunity to cross-examine them, the petitioner was entitled to 'be confronted with' the analysts at trial." ***Id.*** (emphasis in original) (citation omitted).

The ***Melendez-Diaz*** Court also rejected the state's claim "that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is 'prone to distortion or manipulation,' and the testimony at issue here, which is the 'resul[t] of neutral, scientific testing.'" ***Id.*** at 317. The Court similarly dismissed the argument "that confrontation of forensic analysts would be of little value because 'one would not reasonably expect a laboratory professional . . . to feel quite differently about the results of his scientific test by having to look at the defendant.'" ***Id.*** The Court noted that "there is little reason to believe that confrontation will be useless in testing analysts' honestly, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts." ***Id.*** at 321. Ultimately, the Court concluded that

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claimed that use of a DNA profile violated his confrontation rights. ***Id.*** at 2227. Five Justices concluded the DNA report was not testimonial; however, they were unable to agree on a single rationale. The concurring opinions have no theoretical overlap and thus ***Williams*** has no precedential value except in a case with substantially similar facts. *See* ***State v. Mattox***, 2017 WI 9, ¶ 30, 373 Wis. 2d 122, 890 N.W.2d 256. It therefore does not apply here.

the affidavits were testimonial, as they were "made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial.'" ***Id.*** at 310 (quoting ***Crawford***, 541 U.S. at 52).

Second, in ***Bullcoming***, the Supreme Court concluded that a laboratory report concerning the alcohol content of the defendant's blood was testimonial, despite the fact it was not sworn, but merely certified. ***Bullcoming***, 564 U.S. at 664-65. The Court held that the report's "formalized" nature was demonstrated by the fact that it was a signed document and titled a "report." ***Id.***

The Supreme Court has also held that, in order for a statement to be testimonial, it must meet what has come to be known as the "primary purpose test":

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

***Davis v. Washington***, 547 U.S. 813, 822 (2006). This primary purpose test has also been formulated as follows: "the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" ***Ohio v. Clark***, ___ U.S. ___, ___, 135 S. Ct. 2173, 2180 (2015) (quoting ***Bryant***, 562 U.S. at 358).

Recently, in ***Mattox***, the Wisconsin Supreme Court considered whether a toxicology report, which was admitted to prove that the decedent had died as the result of a heroin overdose, was testimonial. Distinguishing both ***Melendez-Diaz*** and ***Bullcoming***, the Wisconsin Supreme Court held that ***Clark*** "pronounces the controlling principles in determining whether an out-of-court statement is 'testimonial' and therefore subject to the Confrontation Clause." ***Mattox***, 373 Wis. 2d 122, ¶ 32. The Wisconsin Supreme Court derived the following doctrinal teachings from ***Clark***:

> ***Clark*** reaffirms the primary purpose test: the dispositive "question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the [out-of-court statement] was to creat[e] an out-of-court substitute for trial testimony." ***Clark***, 135 S. Ct. at 2180 (quoting ***Bryant***, 562 U.S. at 358). The primary purpose test decides whether the declarant is acting as a witness against the defendant, *see* ***Clark***, 135 S. Ct. at 2185 (Scalia, J., concurring), by considering whether the primary purpose of the out-of-court statement "was to gather evidence for [the defendant's] prosecution." ***Id***. at 2181.

***Mattox***, 373 Wis. 2d 122, ¶ 32.

The court further noted that ***Clark*** instructs that the following factors may be relevant to the primary purpose analysis: (1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant; and (4) the context in which the statement was given. ***Id.***

Applying this factor-based test derived from ***Clark***, the Wisconsin Supreme Court concluded that, under the facts of that case, the primary purpose of the toxicology report was

non-testimonial. In so holding, the court relied primarily on the following factors:

- The toxicology report was requested by a medical examiner, who "was simply looking for information to determine cause of death." ***Id.***, ¶ 28.

- "The police were not involved in sending the samples to the lab" or requesting the toxicology report. ***Id.***

- The toxicology report did not give an opinion as to cause of death or "even contain the word 'heroin,'" but was simply comprised of numerical quantifications of substances contained in the decedent's blood. ***Id.***, ¶ 29.

- The toxicology report was not certified or sworn. ***Id.***, ¶ 34.

- The analyst who signed the report had no knowledge that the report related to a crime. ***Id.***, ¶ 35.

Based on these factors, the Wisconsin Supreme Court concluded that the toxicology report was non-testimonial, because it primary purpose was to assist the medical examiner in determining cause of death, not to create an out-of-court substitute for trial testimony. ***Id.***, ¶¶ 4, 35-37.

2. The portions of the medical records documenting F.T.'s STD test results are testimonial.

This case, however, presents a very different set of facts than ***Mattox***. Here, the STD test results were prepared as part of a medical examination requested by BMCW. BMCW had been investigating F.T.'s case for suspected child

abuse. (69:37, 40-41). It had also just removed F.T. from her home because of unexplained injuries. (69:39-41; 76:10). There was thus no ongoing emergency at the time of the examination or when the medical records were generated thereafter.

In addition, although BMCW is not a law enforcement agency *per se*, it is a government agency that investigates cases of suspected child abuse and neglect, both of which are criminal offenses. *See* Wis. Stat. §§ 948.03, 948.21. Ms. Williamson, the BMCW social worker in this case, even testified that her agency works "in collaboration with the police and Child Protection Center." (69:37). BMCW also participates in and assists with termination of parental rights (TPR) cases and children in need of protection and/or services (CHIPS) cases, both of which are quasi-criminal actions.

Moreover, this was no routine medical examination. It took place immediately after BMCW removed F.T. from her home due to suspected physical abuse. (69:8-10, 39-44; 76:8-17). The initial exam and follow-ups were therefore highly analogous to SANE examinations, if not actually SANE examinations. Indeed, the State referred to the nurse practitioner who conducted the exam and ordered the STD testing as a SANE nurse. (16; 67:5; 76:10-17). While such examinations no doubt serve the patient's health, they also have a clear and primary forensic/evidentiary purpose. The medical providers who conduct these types of examinations certainly know they can generate evidence that will be used in a criminal and/or quasi-criminal action.

The medical professionals in this case who requested, performed, and documented the STD test results would thus have reasonably expected that they would be available for use at a later criminal and/or quasi-criminal trial. The initial

medical exam was performed at the request of BMCW, who informed the medical provider that F.T. had been removed from her home due to physical abuse. (76:10). The STD tests were then requested by a nurse practitioner who had discovered lesions on F.T.'s genital region after the exam. (76:10-17). The objective of the tests was to determine whether this eight-year-old girl had contracted a sexually transmitted disease. Under these circumstances, the STD test results were something that any medical professional would have reasonably expected would be available for use in a potential future criminal trial. This is all the more true since medical professionals are mandatory reporters under Wisconsin law. *See* Wis. Stat. § 48.981.

The conclusions contained in the test results were also generated "for the purpose of establishing or proving some fact." ***Melendez-Diaz***, 557 U.S. at 310-11. The fact in question here was whether F.T. had contracted a communicable disease from sexual contact or intercourse. This fact was obviously "potentially relevant to later criminal prosecution." ***Davis***, 547 U.S. at 822. Any person who has sexual contact or intercourse with an eight-year-old child is subject to criminal liability. Thus, a finding that an eight-year-old child has a sexually transmitted disease necessarily indicates that a criminal offense has occurred.

Finally, the test results in this case were contained in certified medical records. (*See generally* 76). These were not casual remarks made to an acquaintance. Rather, they bore the name of a recognized hospital, were electronically signed with time and date stamps near the signature, listed the specific test results for various STDs, asserted that these were the results of testing for F.T., and specifically alleged that F.T. had type 1 herpes. (76:14-17). The test results therefore

contained a higher level of formality than the toxicology report in ***Mattox***.

Given all these factors, F.T.'s STD test results were testimonial. They were prepared pursuant to medical examinations that had a primary purpose that was forensic and evidentiary in nature. Defense counsel therefore should have objected to their admission (as well as to the admission of any testimony related to or based on those test results) on Confrontation Clause grounds. Had she done so, the test results would have been excluded at trial in this case, since the medical professional who performed and authored the test results was not unavailable, and Mr. Wilson never had a prior opportunity to cross-examine this individual. Counsel thus performed deficiently by failing to make that objection

C. Trial counsel's failure to object to F.T.'s STD test results on Confrontation Clause grounds was prejudicial.

Without the improperly-admitted STD test results, the only evidence actually implicating Mr. Wilson would have been F.T.'s testimony. And standing alone, her testimony suffered from serious reliability and credibility problems. To begin with, at the outset of her testimony, F.T. stated that she did not know the difference between a truth and a lie. (68:65-66). She also said she did not think it was important to tell the truth. (68:67). While the State rehabilitated her testimony to a degree on these points, these initial statements still raised a red flag regarding F.T.'s credibility from the get-go.

In addition, as discussed above in the statement of facts, F.T.'s testimony was littered with self-contradictory statements, as well as inconsistencies with her prior statements during her forensic interview. (68:75-78, 80-83,

85-88, 101; *see also generally* 78:1). It was also contradicted by the testimony of her mother and sister. F.T. testified that she had told her mother that Mr. Wilson was sexually abusing her. (68:76). She also stated during her forensic interview that Mr. Wilson had sexually assaulted her sister, Mariah, as well. (76:1 at 02:59:39 to 03:00:45). Both her mother and sister denied these allegations, however. (69:7, 69). They also denied ever seeing Mr. Wilson sexually assault F.T. or go into her bedroom at night. (*Id.* at 16, 19, 32-33, 64-67). Additionally, Mr. Wilson himself categorically denied all of F.T.'s allegations against him. (69:98-102). Thus, at the end of the day, this case ultimately came down to a credibility dispute between F.T. and Mr. Wilson.

It is therefore entirely possible that without any additional supporting evidence, the jury may have concluded that F.T.'s testimony was insufficient to find Mr. Wilson guilty beyond a reasonable doubt. However, the admission of F.T.'s STD tests results provided critical circumstantial evidence bolstering her claims. The test results showed that she had contracted the very same STD that Mr. Wilson suffered from. They also showed that she almost certainly had been the victim of a sexual assault. This made F.T.'s testimony appear more credible, as it suggested that Mr. Wilson was indeed the person who had sexually assaulted her and was the source of her STD. Thus, without F.T.'s STD test results, there is a reasonable probability that the outcome of this case would have been different.

## III. Mr. Wilson Was Denied Effective Assistance of Counsel Because His Trial Attorney Failed to Object to Irrelevant and Unfairly Prejudicial Expert Testimony Asserting that: (1) the Vast Majority of Child Sexual Assaults are Committed by Family Members or Acquaintances; and (2) Victims of Child Sexual Abuse Are Often Threatened by Their Abusers.

Defense counsel also performed deficiently by failing to object to Dr. Guinn's and Ms. Didier's assertions that the vast majority of child sexual assaults are committed by family members or acquaintances. This testimony was totally irrelevant. *See* Wis. Stat. § 904.01. The salient issue in this case was whether Mr. Wilson ever sexually assaulted F.T. and, if so, how many times. The fact that the vast majority of child sexual assaults are committed by family members or acquaintances has no bearing on this issue. Mr. Wilson is not more (or less) likely to have committed this offense simply because most abusers are family members or acquaintances.

Before the circuit court, the State argued that this testimony was relevant to explaining why there is often a delay in children disclosing sexual abuse. (48:14; App. 119). However, even if interfamilial abuse is related to disclosure delay, this still does not make the testimony at issue here relevant. The assertion that children delay reporting in the context of interfamilial abuse because they fear telling on a person in their family may be relevant and admissible. But the assertion that family members or acquaintances commit the vast majority of child sexual assaults remains completely irrelevant.

Moreover, even if this testimony did have some marginal relevance, its probative value was substantially outweighed by the danger of unfair prejudice. This testimony

suggested that Mr. Wilson may have been guilty, not because it tied him in any way to the actual offense, but because he belonged to a class of individuals who are "the usual suspects" for this type offense. This testimony is thus no different in kind than testimony during a homicide trial for the murder of a spouse asserting that, nine time out of ten, the other spouse did it. Such testimony should be excluded under Wis. Stat. § 904.03 as unfairly prejudicial.

Dr. Guinn's testimony that victims of child sexual abuse are often threatened by their abusers was also irrelevant and unfairly prejudicial. There was no evidence in this case that Mr. Wilson ever threatened F.T. As such, Dr. Guinn's testimony in this regard did not having any tendency to make the existence of any fact at issue more or less likely. *See* Wis. Stat. § 904.01. It simply invited the jury to speculate that F.T. may not have disclosed the abuse sooner because Mr. Wilson threatened her with physical violence. Again, even if this evidence had some marginal relevance (which it does not), its limited probative value is so substantially outweighed by the risk of unfair prejudice that it should have been excluded under Wis. Stat. § 904.03.

As such, defense counsel should have objected to both these pieces of evidence on the grounds of relevance and unfair prejudice. As there was no strategic reason for counsel not to do so, her failure to object fell below an objective standard of reasonableness.

The admission of this irrelevant and unfair expert testimony was also prejudicial. The expert testimony asserting that the vast majority of child sexual assaults are committed by family members or acquaintances, like F.T.'s STD test result, provided crucial evidence supporting F.T.'s allegations. Since Mr. Wilson was the only adult male

member of F.T.'s household, this testimony created a real and substantial risk that the jury would unfairly speculate that, notwithstanding F.T.'s credibility concerns, Mr. Wilson was likely the person who assaulted her, since most sexual assaults are committed by a family/household member. The admission of this irrelevant testimony therefore undermined the reliability of the proceedings, as well.

Finally, Dr. Guinn's testimony that victims of child sexual abuse are often threatened also invited the jury to make other improper assumptions. It invited the jurors to assume, without any evidentiary basis, that Mr. Wilson may have threatened F.T. with physical violence to keep her from telling anyone about the alleged abuse. It also invited them to unfairly speculate that this may have been the reason F.T. did not disclose the abuse sooner. This testimony thus likely improperly bolstered F.T.'s credibility in the eyes of the jury and, conversely, undermined Mr. Wilson's. Again, given that this case largely came down to a credibility dispute between F.T. and Mr. Wilson, there is a reasonable chance that this improper testimony also affected the outcome of the case.

Accordingly, had defense counsel objected to any one of the foregoing pieces of evidence (including F.T.'s STD test results), there is a reasonable probability that the outcome of the case would have been different. Also, the probability of a different outcome only increases when counsel's deficiencies are aggregated. *See* ***Thiel***, 264 Wis. 2d 571, ¶ 60, (effects of multiple incidents of deficient performance can be aggregated in determining the overall impact of deficiencies). Thus, defense counsel's deficiencies, both individually and collectively, prejudiced Mr. Wilson. The circuit court therefore should have granted Mr. Wilson an evidentiary hearing to determine if he should be entitled to a new trial.

## CONCLUSION

For the foregoing reasons, Daniel Wilson respectfully requests that this court reverse the circuit court's order denying his postconviction motion, vacate his conviction and sentence, and remand the case to the circuit court for entry of a judgment of acquittal. Should this court conclude that Mr. Wilson is not entitled to a judgment of acquittal, then he requests that this court reverse the circuit court's order denying his postconviction claims for ineffective assistance of counsel and remand the case to the circuit court with instructions to hold an evidentiary hearing on these claims.

Dated this 31st day of July 2017.

Respectfully submitted,

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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 9,372 words.

## 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 31st day of July 2017.

Signed:

_____

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## 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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# A P P E N D I X

# I N D E X
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