STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP813-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL M. WILSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Was the evidence sufficient for a rational jury to find Defendant-Appellant Daniel Wilson guilty of repeated sexual assaults of the same child in violation of Wis. Stat. §§ 948.025?

The trial court answered: Yes.

This Court should affirm.

2. Did Wilson prove that his trial counsel was ineffective for not bringing a Confrontation Clause challenge to the admissibility of the STD test results revealing that the child/victim had vaginal herpes; and for not challenging expert testimony that a majority of the child sexual assault victims she examined were assaulted by family members, and that most victims she examined were threatened by their abusers?

The trial court answered: No.

This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves the application of established principles of law to the unique facts presented.

INTRODUCTION

The State should prevail because the evidence was sufficient for a rational jury to find Wilson guilty beyond a reasonable doubt of repeatedly sexually assaulting eight-year-old F.T. over a specified period of time, especially given that the child's testimony was corroborated by the fact that she contracted genital herpes from someone who contacted her vaginal region. The child's inability to precisely specify dates and locations of the many assaults does not render the

evidence insufficient. At best, it shows that the proof at trial did not conform precisely to the time frame charged in the information. Wilson did not object on that ground. Had he objected, the information would have been immediately amended to reflect the proof at trial.

Wilson failed to prove ineffective assistance of trial counsel in any respect. The medical records were admissible and the pediatrician who diagnosed the child's genital herpes did so upon personal examination, not on hearsay. The pediatrician and forensic interviewer also rendered admissible opinions based on their contacts with thousands of child sexual assault victims regarding the prevalence of inter-familial abuse.

STATEMENT OF THE CASE

A Milwaukee County jury found Daniel Wilson guilty as charged on January 22, 2015, of one count of sexually assaulting eight-year-old F.T. on three or more occasions between January 1, 2013, and May 5, 2014. (R. 23; 71:2.)

Wilson was the live-in boyfriend of F.T.'s mother, Jeanette Yegger. Young F.T. described in graphic albeit halting detail the multitude of sex acts Wilson performed on her. These consisted of mouth-vagina, mouth-anus, penis-vagina, penis-anus, and digital intercourse. (R. 68:71–95.) They also included Wilson's having F.T. masturbate him and his ejaculating on the child (in her words, he "peed" "white stuff" on her and in her hair). (R. 68:81, 83–84, 93–94.) F.T.'s testimony was corroborated by the discovery that she contracted genital herpes producing lesions on her vagina and around her anus. Wilson had the same type of herpes. Genital herpes is spread by direct contact with another person's genitalia. (R. 67:106–07; 68:7–9, 11–12, 14–17, 20; 69:45.) Wilson had access to F.T. throughout the charging time frame, as he lived with her and her mother almost the entire time. (R. 68:68.)

Children's Hospital forensic interviewer Amanda Didier interviewed F.T. on May 28, 2014. (R. 67:92–94.) The parties stipulated that the DVDs of Didier's interviews with both F.T. and her younger sister, M.Y., could be received into evidence. Didier's interview of F.T. was played for the jury. (R. 67:3; 68:55–56.) Over defense objection (R. 67:90), Didier testified that of the more than 2,000 children she interviewed (R. 67:86), the "most common" form of sexual abuse is inter-familial. The "family" could include a mother's boyfriend. (R. 67:90–91.) Didier also opined that delayed reporting by a child is "considered the norm" due to the child's "concerns or fears" about telling on a family member. (R. 67:91–92.)

Children's Hospital Pediatrician Dr. Judy Guinn, board certified in both general pediatrics and child abuse pediatrics (R. 67:99; 68:42), conducted a "follow-up exam" of F.T. on May 23, 2014 (R. 67:107; 68:16). She relied on STD testing earlier performed by a nurse and transmitted to a medical laboratory for tests. Dr. Guinn explained that the hospital routinely tests for STDs when sexual abuse is suspected. She described two types of herpes: Type 1, which is the common form that often manifests itself in cold sores; Type 2, which is usually found in the genital region. She noted that a person can contract Type 1 in the genital area, and Type 2 in the mouth, as the result of oral-genital contact. (R. 67:104–06.) A first outbreak of herpes normally occurs within 2 to 14 days after contact. Dr. Guinn did not know whether this was F.T.'s first herpes outbreak. (R. 68:35.)

The State and defense counsel stipulated to the accuracy and admissibility of test results showing that Wilson tested positive for both Type 1 and Type 2 herpes. (R. 68:7–8.) The State then introduced without objection the certified medical records for F.T. showing that she contracted herpes Type 1 and Type 2. (R. 68:9.) Although

Dr. Guinn was not the first to examine F.T., she relied on the other examiners' notes to conduct follow-up care. (R. 68:9.)

The first "head-to-toe" examination on May 5, 2014, was like a normal physical where the patient's medical history is taken and the body is completely examined externally. There were no findings in this first examination regarding F.T.'s genitalia. (R. 68:11–12.)

A subsequent genital examination on May 20, 2014, revealed "ulcerated lesions" in her vaginal region. (R. 68:12, 13.) During the May 20 examination, F.T. started crying and exclaimed to the examiner: "Someone did this to me" and "Take it out." (R. 68:16.)

In her May 23, 2014 "detailed genital exam" of F.T., Dr. Guinn discovered painful lesions in her vaginal and anal region diagnostic of genital herpes. (R. 68:16–17.) Dr. Guinn observed "vestibular lesions . . . on the labia majora" that had "spread to the anal area" since the May 20 examination. (R. 68:17.) The injuries she observed were "concerning for sexual abuse," necessitating a forensic interview (R. 68:18.) Dr. Guinn did not ask F.T. what happened to her, leaving that to a trained interviewer. (R. 68:20.) Dr. Guinn opined that F.T.'s injuries were consistent with having been caused by direct oral, digital, and penile contact with her genitalia (R. 68:20), and that to a reasonable degree of medical certainty F.T. was sexually abused based on the examination results and on the child's statements (R. 68:21).

Dr. Guinn testified further that she has worked for the Children's Protection Center at Children's Hospital for 22 years and has examined approximately 3,000 children under age 18 over those 22 years. (R. 67:99.) In the majority of those cases, the children did not report right away. Also, in the "vast majority" of those cases, the assaults were committed by a relative or an acquaintance of the victim. (R.

67:101–02.) Dr. Guinn added that it is "common" in cases of inter-familial abuse that the abuse occurs when others are present in the home because it can happen "very quickly." It is also "common" that the child does not scream or cry out when the abuse occurs. Threats or grooming by the abuser may keep the child quiet. (R. 67:103.) She added that, "in my experience" and in the literature she has reviewed, it is "very common" for children to delay reporting sexual abuse for a number of reasons. (R. 68:24–25.)

The parties stipulated to the admission of records of STD tests performed on Wilson by Dynacare Laboratories. The results showed that Wilson tested positive for both Type 1 and Type 2 herpes and negative for any other STD. (R. 68:7–8; 69:45.) The parties also stipulated to the admission of F.T.'s medical records from Children's Hospital detailing the results of the three examinations performed on her in May, 2014. (R. 68:9.) Wilson objected to the admission of those portions of the records referencing the results of the two examinations of F.T. by a sexual assault nurse examiner (SANE), arguing that the nurse must testify for the records to be admissible. (R. 69:46–47.) The trial court overruled the objection, pointing out that these are certified and self-authenticating medical records admissible under an exception to the hearsay rule. (R. 69:47.)

Wilson took the stand and denied any sexual contact with F.T. anytime, anywhere. He attributed what he contends were her false allegations to their not bonding well and to F.T.'s refusal to do what she was told. He attributed her herpes to having been caused by sharing towels or silverware with other family members. (R. 69:78–100, 108, 115.) Wilson also produced the testimony and forensic interview of F.T.'s younger sister, M.Y., describing their close sleeping arrangements at the various residences where they lived and stating that she never noticed any sexual contact by Wilson with her sister. (R. 69:55–56, 64, 66.) The

seven-year-old M.Y. did testify, however, that she would see Wilson come into their bedroom on occasion during the night and she did not know what he did on those occasions. (R. 69:64.) In the next breath, M.Y. said he never came into their bedroom. (R. 69:64.)

The jury believed F.T. and did not believe Wilson. It found Wilson guilty as charged of committing repeated sexual assaults against the same child over a specified period of time.

Wilson filed a postconviction motion challenging the sufficiency of the evidence because the charged time frame did not match up with the proof at trial. It was off by fifteen days. He also challenged the effectiveness of trial counsel on the same grounds presented here. (R. 40.)

The trial court held that the evidence was sufficient especially given that this case involved a child/victim who had difficulty recalling precise dates and places. (R. 53:2–4; A-App. 102–04.) The court also rejected Wilson's challenges to the effectiveness of trial counsel for allegedly not objecting on confrontation grounds to medical testimony that the victim was diagnosed with genital herpes; and for allegedly not objecting to expert testimony that a majority of the child sexual assault victims they observed were victims of inter-familial abuse, and were frequently threatened by their abusers. (R. 53:4–5; A-App. 104–05.) The court adopted as its own the reasoning put forth by the State in its brief opposing the motion as to why Wilson failed to prove ineffective assistance. (R. 53:5; A-App. 105; *see* R. 48:6–15; A-App. 111–120.)

SUMMARY OF ARGUMENT

The trial court properly denied postconviction relief without an evidentiary hearing.

1. A rational jury found Wilson guilty beyond a reasonable doubt of committing repeated sexual assaults against eight-year-old F.T., contrary to Wis. Stat. § 948.025. F.T. graphically described how Wilson sexually assaulted her more than three times in various ways at her grandmother's house and thereafter at her mother's house, beginning on June 1, 2013, and ending on May 5, 2014.

To the extent that F.T.'s testimony might have been somewhat unclear as to when and where these assaults occurred, the vagaries of her memory do not defeat the State's case; they go to the child's credibility. The jury reasonably believed F.T.'s testimony, corroborated as it was by the discovery that she contracted genital herpes, and disbelieved Wilson's testimony that he never sexually assaulted F.T. anytime, anywhere.

This is not, in reality, a sufficiency-of-the-evidence case. The evidence that Wilson sexually assaulted F.T. three or more times was overwhelming. Rather, the proper issue is whether the time frame proven at trial conformed to the charged time frame in the information. Wilson maintains that, in light of F.T.'s testimony, the time frame proven was off by fifteen days. Wilson forfeited any appellate argument that the time frame charged in the information did not conform to the time frame proven at trial by failing to object on that ground.

Had Wilson timely raised the issue at the close of evidence, the information would have been amended to conform to the proof; fifteen days would have been added to the charged time frame, and the verdict would stand. Wilson would suffer no prejudice because he was able to defend against the original charged time frame, January 1, 2013, to May 5, 2014, as well as against an expanded one, to May 20, 2014. Wilson was able to and did testify that he did not sexually assault F.T. at his mother's house where they

stayed between May 5 and May 20, 2014, or anywhere else before then.

2. Wilson cannot prove his trial attorney was ineffective for not interposing a Confrontation Clause objection to the introduction of medical records relied on by the examining pediatrician, Dr. Guinn. Those records revealed that F.T. was diagnosed with and treated for genital herpes. Counsel in fact did object to the introduction of the records without the testimony of the nurses who examined F.T. before Dr. Guinn did. Once the objection was overruled, there was not much more counsel could do.

Dr. Guinn performed her own examination of F.T. and confirmed that she, indeed, had contracted painful genital herpes, and it had spread. The pediatrician's observations and diagnosis based on her personal examination of the child was properly received. The medical records were properly received because they are admissible under several exceptions to the hearsay rule, and are the type of records reasonably relied on by experts such as Dr. Guinn. Any Confrontation Clause objection would have been baseless because the primary purpose of the medical examinations and records they generated was not for criminal prosecution, but to diagnose and treat the child.

Wilson cannot prove that his trial attorney was ineffective for not challenging the expert opinions of Dr. Guinn and forensic interviewer Amanda Didier that the majority of child sexual assaults are by family members, including a mother's live-in boyfriend, and children may delay reporting because they were threatened by the abuser. Again, trial counsel objected to testimony that the majority of child sexual assaults are by family members. Once the objection was overruled, there was not much more counsel could do.

There was nothing objectionable because both experts' opinions were based on their training and personal experience examining (Dr. Guinn) and interviewing (Didier) thousands of child sexual assault victims. The State presented no evidence that Wilson threatened F.T. The jury could reasonably infer that she feared what might happen to her and her family if she told anyone. F.T. never told her mother and, despite the presence of genital herpes, her mother still does not believe her. This Court should affirm.

ARGUMENT

I. When it is viewed most favorably to the State and the conviction, the evidence was sufficient for a rational jury to find Wilson guilty of committing three or more sexual assaults of F.T.

A. The highly deferential standard for review of a challenge to the sufficiency of the evidence

The highly deferential standard for appellate review of a challenge to the sufficiency of the evidence to convict is firmly established. *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). This Court, "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id.* at 507. If the jury could possibly "have drawn the appropriate inferences from the evidence" to find the defendant guilty, this Court must uphold the verdict "even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id.*

Stated another way: "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently

incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990) (citation omitted). Additionally, the trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See Poellinger*, 153 Wis. 2d at 506.

When more than one inference can reasonably be drawn from the evidence, the inference that supports the fact-finder's verdict must be the one followed by this Court on review. *State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989). It is exclusively within the fact-finder's province to decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence. *State v. Wyss*, 124 Wis. 2d 681, 693, 370 N.W.2d 745 (1985). The standard for review is the same whether the verdict is based on direct or circumstantial evidence. *Poellinger*, 153 Wis. 2d at 503.

This Court may overturn the verdict "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244. An appellate court should not sit as a jury making findings of fact and applying the hypothesis of innocence rule de novo to the evidence presented at trial. *Poellinger*, 153 Wis. 2d at 505–06. "It is not the role of an appellate court to do that." *Id.* at 506. *See State v. Steffes,* 2013 WI 53, ¶ 23, 347 Wis. 2d 683, 832 N.W.2d 101 (citing *Poellinger*, 153 Wis. 2d at 505–06, for the proposition that an appellate court will uphold the verdict if any reasonable inferences support it).

B. The evidence was sufficient for a rational jury to find Wilson guilty as charged of committing three or more sexual assaults against F.T. between January 1, 2013, and May 5, 2014.

Wilson was charged with committing multiple assaults against F.T. between January 1, 2013, and May 5, 2014. (R. 1; 5.) When it is viewed most favorably to the State and the conviction, the evidence was sufficient to sustain the convictions.

Wilson lived with the victim and her mother almost the entire time between June 1, 2013, and May 5, 2014. They lived primarily at two Milwaukee residences. From June to November 2, 2013, they all lived with Jeanette Yegger's mother, Rosemary Crawford, at 2948 North Buffum Street. (R. 68:58; 69:5–6.) Wilson would spend the night there. (R. 69:7.) The children referred to Crawford as "granny." (R. 69:5.) On November 2, 2013, they all moved to 2477 North 6th Street where they stayed until May 13, 2014. (R. 69:8, 79–80.) F.T. testified that Wilson assaulted her during the night at her mother's ("momma") house, presumably the 6th Street residence, and at her "granny's house" or "Anthony granny's house." (R. 68:75–95.) F.T.'s graphic testimony describing multiple assaults, corroborated by her genital herpes and by Wilson's regular access to F.T. at both residences from June 1, 2013, until they moved out of the 6th Street residence in May 2014, was more than sufficient for a rational jury to find beyond a reasonable doubt that Wilson committed three or more sexual assaults against F.T. during the charged time frame.

The jury was instructed that it had to find beyond a reasonable doubt that three or more acts of sexual assault were committed by Wilson against F.T. between January 1,

2013, and May 5, 2014. (R. 70:5.) The jury could rationally have found that F.T. described multiple sexual assaults by Wilson that occurred between January 1, 2013–more precisely June 1, 2013–and May 5, 2014, during the five months when she lived at her "granny" Rosemary Crawford's house where Wilson stayed at night, and during the next six months when she lived with Wilson and her mother on 6th Street. The jury could reasonably infer that Wilson assaulted F.T. on three or more occasions at both Crawford's ("granny's") Buffum Street residence and her mother's (Yegger's) 6th Street residence. The child's testimony was corroborated by her contraction of genital herpes, caused by someone with herpes having direct contact with her genitalia. Wilson was diagnosed with genital herpes. This Court should affirm.

C. The evidence was sufficient for a rational jury to find Wilson guilty of committing three or more sexual assaults against F.T. between June 1, 2013, and May 20, 2014.

Despite the undeniably overwhelming evidence that F.T. was repeatedly assaulted by him, Wilson latches on to the child's apparent confusion as to where the assaults other than at the 6th Street residence occurred. F.T. is Yegger's child from a relationship with another man before she met Wilson. F.T.'s sibling, Anthony, is a child Yegger had with Wilson. Rosemary Crawford is Yegger's mother and F.T.'s maternal grandmother whom the child referred to as "granny" and who lived on Buffum Street. (R. 69:3–5.) Wilson's mother, Armer Lloyd, lived at 5147 North 28th Street. The family was put in protective placement at Lloyd's residence from May 5 to May 20, 2014. (R. 69:8–9, 40–44, 88–90.) F.T. apparently would refer to Wilson's mother as "Anthony's granny." Wilson speculates that F.T. meant to

refer only to assaultive activity that occurred at his mother Armer Lloyd's house when they were placed there between May 5 and May 20, 2014, putting those assaults outside the charged time frame (post-May 5, 2014).

But, the address for "Anthony's Granny" that the family provided to Amanda Didier during the forensic interview was Crawford's Buffum Street address, where they lived for five months during the charged time frame, rather than Lloyd's 28th Street address where they lived for only two weeks outside the charged time frame. (R. 1:1–2; 68:58; 70:50.) So, F.T. associated "Anthony's granny" with Crawford, not Lloyd, and she associated "Anthony's granny's house" with Crawford's Buffum Street house and not Lloyd's house on 28th Street. Wilson does not argue that these assaults could not have occurred at the Buffum Street residence between June 1 and November 2, 2013.

Wilson cannot go free merely by playing on the vagaries of the child's memory, her confusion over which grandmother lived on Buffum Street, or whether she innocently considered Crawford to be both "granny" and "Anthony's granny." The jury could reasonably find that F.T. meant to refer to her "granny" Rosemary Crawford when she described assaults that, the jury could also reasonably find, occurred at Crawford's Buffum Street house where they all lived for five months of the charged time frame before moving to 6th Street where they all lived for the remainder of the charged time frame. "'The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance.'" *State v. Kempainen*, 2015 WI 32, ¶ 22, 361 Wis. 2d 450, 862 N.W.2d 587(quoting *State v. Fawcett,* 145 Wis. 2d 244, 254, 426 N.W.2d 91 (Ct. App.

1988)). The jury believed F.T. despite the apparent vagaries of her memory.[1]

"Sexual abuse and sexual assaults of children are difficult crimes to detect and prosecute. Often there are no witnesses except the victim." *Fawcett*, 145 Wis. 2d at 249. "The child may have been assaulted by a trusted relative or friend and not know who to turn to for assistance and consolation." *Id.* At 249. "Child molestation often encompasses a period of time and a pattern of conduct. As a result, a singular event or date is not likely to stand out in the child's mind. Moreover, child molestation is not an offense which lends itself to immediate discovery." *Id.* at 254.

The child's inability to pinpoint precise dates or a precise time frame is not fatal to the prosecution and does not make otherwise powerful evidence of multiple sexual assaults against her insufficient as a matter of law. *Fawcett*, 145 Wis. 2d at 254. Time is not of the essence in child sexual assault cases when the precise date of the offense is not a material element. *Kempainen,* 361 Wis. 2d 450, ¶ 22; *Fawcett,* 145 Wis. 2d at 250. The child's inability to connect the crime with a specific date or a precise time frame goes only to the credibility of the victim's testimony. That is an issue for the trier of fact to consider and decide. *Thomas v. State*, 92 Wis. 2d 372, 386–87, 284 N.W.2d 917 (1979); *State v. Sirisun*, 90 Wis. 2d 58, 64–65, 279 N.W.2d 484 (Ct. App. 1979) (and cases cited therein).

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[1] Wilson insists that "it is simply implausible" that the eight year old might confuse her two "grannys'" names or homes (Wilson's Br. 14, n.11), but does not explain why. The child did, after all, refer to both of the women by "granny" in one form or another. A reasonable jury could infer that she was confused, and meant to refer to what Wilson did to her at her "granny" Crawford's house on Buffum Street where they lived from June to November 2013.

Wilson argues that a charge under Wis. Stat. § 948.025 is different from all others because a specific time frame is an element of the offense that the State must prove beyond a reasonable doubt; whereas, a specific date or specific time frame is not an element of other sexual assault offenses. He believes the State cannot deviate even one day off of the time frame as charged. (Wilson's Br. 12–17.) Wilson argues that, based on F.T.'s testimony, all but one of the offenses occurred between May 5 and May 20, 2014, at Armen Lloyd's house. (Wilson's Br. 14.) In making that argument, Wilson appears to concede that the evidence would have been sufficient had the information been amended to extend the charged time frame fifteen days to May 20, 2014.

While a specific time frame is an element of a charge under Wis. Stat. § 948.025, no one can be convicted of sexual assault under *any* statute unless and until the State alleges and proves a specific date or time frame sufficiently narrow to give the defendant adequate notice and the opportunity to defend. Due process requires in every case that the charging document be sufficient to state an offense to which a defendant is able to plead and prepare a defense, and that it be sufficient to a degree that conviction or acquittal on the charge bars another prosecution for the same offense. *Thomas*, 92 Wis. 2d at 388; *Holesome v. State*, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968). "In a case involving a child victim, we conclude a more flexible application of notice requirements is required and permitted." *Fawcett*, 145 Wis. 2d at 254. "[U]nless some material right of the defendant is affected . . . the prosecution is not formally tied to" the time frame alleged in the information, "and may prove the commission of the offense charged on some other day within a reasonable limitation." *Hess v. State*, 174 Wis. 96, 99, 181 N.W. 725 (1921). *See Hawkins v. State*, 205 Wis. 620, 624, 238 N.W. 511 (1931) (same).

The due process issue turns, therefore, on whether the charge states an offense to which the defendant is able to plead and prepare a defense, and whether conviction or acquittal bars another prosecution for that offense. *Kempainen*, 361 Wis. 2d 450, ¶¶ 19–20; *Holesome*, 40 Wis. 2d at 102. This is ultimately a question of reasonableness. *State v. Stark*, 162 Wis. 2d 537, 545, 470 N.W.2d 317 (Ct. App. 1991). The charged time frame here was reasonably specific to give Wilson notice and the opportunity to defend. It was off by fifteen days.

The courts look to "the totality of the circumstances surrounding the nature of the accusations" to determine whether the time frame was reasonably specific. *Kempainen*, 361 Wis. 2d 450, ¶ 28. *See id.,* ¶ 30. The relevant factors in the analysis support the conclusion that Wilson had reasonably sufficient notice and an opportunity to defend even if the time frame extended fifteen more days than charged. *Id.* ¶ 24.

F.T. was only eight years old when the assaults occurred. They occurred at night as she tried to sleep. As her mother's live-in boyfriend for the entire time frame, Wilson held a position of authority and trust over F.T. The only potential witnesses were other small children. The youngster had limited ability to pinpoint specific dates and times. Multiple acts of various types of sexual activity not within the knowledge of an eight-year-old were alleged to have occurred in the 17 months between January 1, 2013, and May 5 or May 20, 2014. Assuming F.T.'s testimony added fifteen days to the end of the charged time frame, her testimony also effectively eliminated five months at the beginning; the sexual activity appears not to have begun until after the family moved in with Rosemary Crawford on Buffum Street around June 1, 2013, where Wilson would spend the night. Wilson was arrested when F.T. was diagnosed with genital herpes shortly after the charged time frame ended in May 2014, and he was charged shortly thereafter. Extending the time frame by

fifteen days did not create any statute of limitations issues. *Id.* ¶ 36. It did not adversely affect "some material right of the defendant." *Hess,* 174 Wis. at 99.

Wilson was able to defend. He did not present an alibi defense that might have been impaired by the child's inability to specify dates. Even so, the inability to present an alibi defense is not determinative. *Kempainen*, 361 Wis. 2d 450, ¶ 34. The "victim is not required to allege a specific date for the assault simply because a defendant has a preferred defense." *Id.* ¶ 39. Wilson denied sexually assaulting F.T. anytime, anywhere. Wilson did not deny that he lived with and had regular access to F.T. day and night during most if not all of the time frame. "This [was] not a case of mistaken identity, and an alibi defense [was] not likely to be available to" Wilson. *Id.* ¶ 38. Wilson blamed F.T.'s herpes on sharing eating utensils and towels with family members. Wilson blamed F.T.'s supposedly false accusations against him on her refusal to do what she was told and their inability to bond. (R. 69:94–100, 108, 115.) In addition to his own testimony, Wilson introduced the testimony of F.T.'s younger sister, M.Y., who slept in the same room with her most of the time and said she did not see Wilson touch her sister. (R. 69:64–66.) Jeanette Yegger testified that F.T. never told her Wilson sexually assaulted her and she did not believe F.T. (R. 69:7, 28.)

Wilson acknowledged that they all stayed with his mother, Armen Lloyd, from May 5 to 20, 2014. He described the sleeping arrangements there (R. 69:88, 90–91), as did Yegger (R. 69:13). It should have been easy for him to recall what went on there and testify that nothing untoward occurred during those fifteen days. Wilson did not present a theory of defense that the State failed to prove its case because some of the alleged assaults occurred after May 5, 2014. Wilson "has not articulated any way in which the charging periods have impaired his ability to prepare a defense." *Kempainen*, 361 Wis. 2d 450, ¶ 39.

There was ample evidence for a rational jury to rely on to find Wilson guilty whether the charged time frame ended on May 5 or on May 20, 2014. The presence of genital herpes, the same type of herpes Wilson had, fortifies the credibility of F.T.'s accusations against him. As Wilson readily concedes, "a finding that an eight-year-old child has a sexually transmitted disease necessarily indicates that a criminal offense has occurred." (Wilson's Br. 30.) The evidence was sufficient.

D. Wilson forfeited any challenge that the proof at trial did not conform to the charge in the information.

Wilson's complaint is in reality not that the evidence was insufficient, but that the time frame of the multiple assaults proven at trial did not precisely match the time frame alleged in the complaint and information. But, Wilson never objected on that ground. He only moved to dismiss at the close of the State's case for its "failure to prove a prima facie case" without explaining why. (R. 69:46.) After the verdict, Wilson made a generic motion for judgment notwithstanding the verdict without specifying what was wrong with it. (R. 71:4–5.) This alerted no one to the need to either dismiss or correct the charging document. Wilson thereby forfeited any argument here that the time frame proven at trial did not match the time frame alleged in the information. *See State v. Pinno*, 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).

Failure to object at trial generally precludes appellate review of a claim, even claims of constitutional dimension. *E.g., State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis. 2d 486, 611 N.W.2d 727. To properly preserve an objection for review, the litigant must "articulate the specific grounds for the objection unless its basis is obvious from its context[] . . .

so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." *State v. Agnello*, 226 Wis. 2d 164, 172–73, 593 N.W.2d 427 (1999) (citations omitted).

Wilson was fully aware of the charging time frame and of the evidence as it was presented at trial. Believing that the proof did not conform to the charge, Wilson sat silent, intending to spring this on the court and State for the first time after conviction. Had Wilson made the only proper objection, that the charged time frame in the information did not conform to the proof at trial, the State would have immediately moved to amend the information to conform to the proof by adding fifteen more days to the charge.

The information may be amended at trial "to conform to the proof where such amendment is not prejudicial to the defendant." Wis. Stat. § 971.29(2) Even *after the verdict* the information "shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial." *Id. See State v. Nicholson*, 160 Wis. 2d 803, 806, 467 N.W.2d 139 (Ct. App. 1991) ("The trial court's decision to amend the information to conform with the proof will be upheld on appeal if it was not an abuse of discretion. . . . The effect of the amendment was to add an additional day and location to the felon in possession of a firearm charge. The trial court . . . simply revised the information to conform with the proof that came out during the trial which is its prerogative."). *See also State v. Echols,* 2011 WI App 143, ¶¶ 25–27, 337 Wis. 2d 558, 806 N.W.2d 269, 2011 WL 4445635 (unpublished authored opinion cited for persuasive value) (discussing when the information may be amended after trial to conform to the proof at trial).

Wilson never timely objected "to the relevance of the evidence," Wis. Stat. § 971.29(2), regarding what F.T. testified happened at "Anthony's granny's house." So, the information

"*shall be* deemed amended to conform to" F.T.'s testimony that Wilson insists expanded the time frame by fifteen days. By not making the proper objection, Wilson forfeited any argument on appeal that F.T.'s testimony about what happened at "Anthony's granny's house" after May 5, 2014, was irrelevant, or that the information should have been dismissed because the charge did not conform to the otherwise sufficient proof at trial that F.T. was repeatedly assaulted by him between January 1, 2013, and May 20, 2014. Those challenges had to be raised below and were not. Only a sufficiency of the evidence challenge or an issue "previously raised" need not be preserved for appeal. Wis. Stat. § 974.02(2). Wilson's attorney likely believed the objection would have been futile because, again, the prosecutor would have simply moved to amend the information at the close of trial to conform to the proof and the trial court would have in the sound exercise of its discretion granted the motion. *Nicholson*, 160 Wis. 2d at 806.

Wilson would not have been prejudiced by a post-verdict amendment to add fifteen days to the charge because he was able to present the defense that he did not assault F.T. anytime, anywhere, including at his mother's house in May 2014. The prosecutor indeed amended the information at the close of evidence to conform to F.T.'s testimony that one or more of the assaults occurred at the 6th Street residence. Wilson did not object. (R. 69:51–52.) So, Wilson had no objection to adding an entirely different residence where the family lived for six months, but he now objects to adding a mere fifteen days to the time frame. Just as he suffered no prejudice from amending the information at the close of evidence to add the 6th Street residence, he would have suffered no prejudice from a post-verdict amendment to expand the charged time frame fifteen days, from May 5 to May 20, 2014. Therefore, in response to Wilson's postconviction motion, the trial court could have ordered the

information amended to conform to the trial proof. This Court could and should do the same. Wis. Stat. § 971.29(2).

E. If this Court reverses, it should modify the judgment to find Wilson guilty of the included offense that was submitted to the jury and that the State proved beyond a reasonable doubt.

If this Court agrees with Wilson that his conviction under Wis. Stat. § 948.025 must be reversed because the charged time frame was off by fifteen days, it should modify the judgment to find Wilson guilty of the included offense of first-degree sexual assault in light of F.T.'s compelling and corroborated testimony that she was sexually assaulted by him more than three times between June 1, 2013, and May 20, 2014.

In addition to the charged offense, the trial court instructed the jury on the included offense of first-degree sexual assault, sexual intercourse with a child under age 12. Wis. Stat. § 948.02(1)(b). (R. 70:5.) This is permitted. Wis. Stat. § 948.025(3). This is an "included" offense of the charged Wis. Stat. § 948.025(1)(b) because it "does not require proof of any fact in addition to those which must be proved for the crime charged." Wis. Stat. § 939.66(1). It is not, however, a "lesser" included offense under § 939.66, i.e., a "less serious" type of sexual assault, because both are Class B felonies. It is, instead, an "equally serious" type of sexual assault as the crime charged. Wis. Stat. § 939.66(2p).

The jury necessarily found that Wilson committed multiple violations of Wis. Stat. § 948.02(1)(b) when it found him guilty of violating Wis. Stat. § 948.025(1)(b). This court has the authority to modify the judgment to find Wilson guilty of the included offense that was submitted to the jury. Wis. Stat. § 808.09. *McKissick v. State*, 78 Wis. 2d 176, 179–80, 254 N.W.2d 218 (1977); *Dickenson v. State*, 75 Wis. 2d 47, 51–52,

248 N.W.2d 447 (1977). *Compare State v. Myers*, 158 Wis. 2d 356, 362–63, 461 N.W.2d 777 (1990) (allowing for modification of a judgment to convict of a lesser-included offense that is submitted to the jury and proven; there, modification of the judgment was denied because neither party requested that the lesser-included offense be submitted to the jury). *Accord In re Heidari*, 174 Wash. 2d 288, ¶ 8, 274 P.3d 366 (2012); *Austin v. United States*, 382 F.2d 129, 142 (D.C. Cir. 1967); *Hansen v. Burton,* 2016 WL 5387827, *10 (W.D. Mich. 2016).

Wilson effectively concedes that, if the jury believed F.T., there was sufficient proof of one violation of Wis. Stat. § 948.02(1)(b) at the 6th Street residence during the charged time frame, as well as sufficient proof of violations occurring at his mother's house between May 5 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." (Wilson's Br. 14 (emphasis added).) The "one" being the assault F.T. said occurred at her "momma house" on 6th Street. *Id*. *See also* Wilson's Br. 15 (referring "to the one assault that F.T. claimed took place at her mother's house"). The charges were equally serious, and the State presented sufficient evidence to prove that at least one violation of § 948.02(1)(b) occurred within the original charged time frame. If this Court reverses, it should, accordingly, remand to the trial court with directions to amend the judgment of conviction to reflect Wilson's conviction for the included offense of first-degree sexual intercourse with a child under age 12, in violation of Wis. Stat. § 948.02(1)(b), and for resentencing for that offense.

II. Wilson failed to prove his trial attorney was ineffective with regard to the expert witness testimony.

The trial court properly denied Wilson's ineffective assistance challenges without an evidentiary hearing

because the record conclusively shows that they are utterly devoid of merit.

A. The pleading requirements for alleging ineffective assistance of counsel

The sufficiency of a postconviction motion to require an evidentiary hearing is a question of law to be reviewed by this Court de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

The motion must allege material facts that are significant or essential to the issues at hand. *State v. Allen*, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must specifically set forth within its four corners facts answering the questions who, what, when, where, why and how the defendant would prove at an evidentiary hearing that he is entitled to relief: "the five 'w's' and one 'h'" test. *Id.* ¶ 23. *Balliette*, 336 Wis. 2d 358, ¶ 59; *State v. Love*, 2005 WI 116, ¶ 27, 284 Wis. 2d 111, 700 N.W.2d 62.

If the motion is insufficient on its face, presents only conclusory allegations, or even if facially sufficient the record conclusively shows that the defendant is not entitled to relief, the trial court in the exercise of its discretion could as it did here deny the motion without an evidentiary hearing, subject to deferential appellate review. *Balliette*, 336 Wis. 2d 358, ¶ 50; *Allen*, 274 Wis. 2d 568, ¶¶ 9, 12; *State v. Bentley,* 201 Wis. 2d 303, 310–11, 548 N.W.2d 50 (1996).

To obtain an evidentiary hearing on his ineffective assistance of counsel claim, Wilson had to allege with factual specificity how counsel's performance was deficient and why it was prejudicial to his defense. *Balliette*, 336 Wis. 2d 358, ¶¶ 20, 40, 59, 67–70; *Bentley*, 201 Wis. 2d at 313–18. He could not rely on conclusory allegations of deficient performance and prejudice, hoping to supplement them at an evidentiary hearing. *Bentley*, 201 Wis. 2d at 313, 317–18; *Levesque v. State*, 63 Wis. 2d 412, 421–22, 217 N.W.2d 317

(1974). Even when the allegations of deficient performance are specific, the trial court in its discretion may deny the motion without an evidentiary hearing if the allegations of prejudice are only conclusory. *Id.*

To establish deficient performance, it would not be enough for Wilson to allege that his attorney's performance was "imperfect or less than ideal." *Balliette*, 336 Wis. 2d 358, ¶ 22. The issue is "whether the attorney's performance was reasonably effective considering all the circumstances." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Counsel is strongly presumed to have rendered reasonably competent assistance. *Id.* ¶¶ 25, 27. Wilson had to allege specific facts sufficient to overcome that strong presumption, *id.* ¶ 78, with the understanding that "[s]trategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland,* 466 U.S. at 690). Wilson would have to show in his motion that trial counsel's specified deficiencies, if proven, sunk to the level of professional malpractice, *State v. Maloney*, 2005 WI 74, ¶ 23 n.11, 281 Wis. 2d 595, 698 N.W.2d 583, with the understanding that counsel need not even be very good to be deemed constitutionally adequate. *State v. Wright*, 2003 WI App 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386; *McAfee,* 589 F.3d at 355–56.

Wilson had to also specifically allege prejudice in his motion because it would be his burden to affirmatively prove by clear and convincing evidence at an evidentiary 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. Wilson would have to prove a reasonable probability that he would have received a more favorable outcome at trial but for counsel's deficient performance. *Strickland*, 466 U.S. at 687. "The likelihood of a different outcome 'must be substantial, not

just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

Trial counsel is not ineffective for failing to interpose meritless objections at trial. *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.

B. Trial counsel was not ineffective in how she handled medical evidence that F.T. had genital herpes.

Wilson complains that his trial counsel, Diane Caspari, did not interpose a Confrontation Clause objection to the Children's Hospital medical records revealing that F.T. had genital herpes. (Wilson's Br. 20–31.) Wilson fails to disclose that trial counsel *did object* to the introduction of the medical records unless the SANE nurse testified, i.e., was produced by the State to be confronted and cross-examined about her entries in the records relied on by Dr. Guinn. (R. 69:46–47.) This was the equivalent of a confrontation objection. The fact that counsel's objection was unsuccessful does not prove deficient performance.

Pediatrician Dr. Guinn *personally examined* F.T. on May 23, 2014, and saw for herself that the child had lesions produced by genital herpes in her vaginal and anal regions. (R. 68:16–17.) The genital herpes she observed was consistent with having been caused by multiple types of sexual contact with the child's genitalia. (R. 68:20.) Dr. Guinn's personal observations were not hearsay, and Wilson was able to confront and cross-examine her about what she personally observed. Wis. Stat. § 906.02 (a witness may not testify "unless . . . the witness has personal knowledge of the matter").

The medical records on which Dr. Guinn relied, especially the part where F.T. told the nurse who examined her for herpes on May 20, 2014, that "[s]omeone did this to

me . . . Take it out" (R. 68:16), were admissible "statements for purposes of medical diagnosis or treatment" under Wis. Stat. § 908.03(4). All of the medical records were admissible "records of regularly conducted activity" under Wis. Stat. § 908.03(6), and self-authenticating "patient health care records" under Wis. Stat. § 908.03(6m). These are also the type of records reasonably relied on by pediatric experts such as Dr. Guinn. Wis. Stat. § 907.03. "An expert opinion may be based on inadmissible hearsay." *State v. Williams*, 2002 WI 58, ¶ 28, 253 Wis. 2d 99, 644 N.W.2d 919. "Section 907.03 implicitly recognizes that an expert's opinion may be based in part on the results of scientific tests or studies that are not her own. It is rare indeed that an expert can give an opinion without relying to some extent upon information furnished by others." *Id.* ¶ 29.

So, trial counsel objected to the medical records unless the SANE nurse testified and could be confronted by Wilson, and counsel had no basis to object to the results of Dr. Guinn's personal examination of F.T. confirming that the child had genital herpes likely caused by sexual contact. The record conclusively shows that Wilson would not be able prove deficient performance at an evidentiary hearing.

There was also no basis for a Confrontation Clause objection to these otherwise admissible medical diagnosis and treatment records. They were not "testimonial." The primary purpose of the medical examinations was to diagnose and treat the obviously traumatized child, not to prosecute. *State v. Mattox*, 2017 WI 9, ¶¶ 3–4, 37, 373 Wis. 2d 122, 890 N.W.2d 256 (a laboratory's toxicology report relied on by the medical examiner who performed the autopsy in a drug overdose case was not "testimonial" because its "primary purpose" was to identify the concentration of tested substances in biological samples sent by the medical examiner). Like the toxicology reports upon which the criminal prosecution in *Mattox* was partially based, the

medical reports of F.T.'s diagnosis and treatment for genital herpes upon which this criminal prosecution was partially based were admissible because they were not generated primarily for the purpose of furthering a criminal prosecution. *Compare Williams*, 253 Wis. 2d 99, ¶ 41 ("State crime lab reports . . . are prepared primarily to aid in the prosecution of criminal suspects.").

The fact that F.T.'s medical examinations occurred after the intervention of child welfare authorities who suspected abuse in the house (R. 69:37–39), is largely insignificant. Wilson's subsequent criminal prosecution does not retrospectively change the neutral nature of the diagnostic and treatment medical records prepared by examining nurses and doctors, just as the prosecution for the drug overdose homicide in *Mattox* did not retrospectively change the neutral nature of the findings in the independent laboratory's toxicology report because in both situations the "primary purpose" of the examinations and the reports they generated was not testimonial. There was no statutory or constitutional basis for counsel to object to the medical records.

Wilson cannot prove prejudice because, again, Dr. Guinn personally observed the child's herpes. The impact of F.T.'s compelling and graphic testimony naming him as her repeated assailant would not have been diminished by excluding the portions of her medical records regarding examinations performed by medical personnel other than Dr. Guinn. *Williams*, 253 Wis. 2d 99, ¶ 50. *See generally*, *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.).

C. Trial counsel was not ineffective in how she handled the expert testimony.

Wilson complains that trial counsel was ineffective for not objecting to expert opinion testimony that child sexual assaults are often inter-familial. (Wilson's Br. 33–35.)

As with his previous challenge to counsel's performance, Wilson ignores the fact that trial counsel *did object* to this expert opinion testimony for lack of foundation. (R. 67:90.) Wilson does not explain what more counsel should have done.

1. The experts' opinions were based on personal knowledge gained from examining thousands of children.

There was no basis for an objection to forensic interviewer Amanda Didier's expert opinion regarding inter-familial abuse because it was based on her personal experience. Didier testified that, of the 2,000 children she interviewed, the most common form of abuse is inter-familial, which could include the mother's boyfriend. (R. 67:90–91.)

The same is true with respect to the expert opinion of pediatrician Dr. Guinn. She examined over 3,000 children in her 22 years working at Children's Hospital's Child Protection Center. (R. 67:99.) Dr. Guinn testified that, of the 3,000 children she examined, the "vast majority" were assaulted by persons who were "relatives or acquaintances." (R. 67:101–02.) Because their expert opinions were based on personal knowledge gained by years of examining and interviewing thousands of children, there was no basis for an objection to either Didier's or Dr. Guinn's testimony.

Wilson's argument that this testimony was irrelevant is specious. (Wilson's Br. 33.) At minimum, the experts' opinions about the prevalence of inter-familial abuse, which

could include a live-in boyfriend of the mother, had some "tendency" to prove the fact "of consequence to the determination of the action" that Wilson sexually assaulted F.T., as she testified. Wis. Stat. § 904.01. It tends to explain why F.T. never told her mother who, as it turns out, still does not believe her own daughter despite her acquired genital herpes. (R. 69:28–29, 31.)

Wilson also argues that Dr. Guinn's testimony that children are often threatened by their abusers is irrelevant, but he concedes the State introduced "no evidence" that he threatened F.T. (Wilson's Br. 34.) Also, it is certainly reasonable for the jury to infer that F.T. was fearful of Wilson even without threats, or fearful of breaking up the family and upsetting her mother if she said anything. Even if Wilson did not directly threaten her, it was reasonable for the jury to believe that F.T. *felt* threatened if she told anyone. There was no prejudice.

2. Even if the experts' opinions were not based on personal observations of child sexual assault victims, they were well within the ken of these experts and admissible.

The admissibility of expert testimony is governed by Wis. Stat. § 907.02 (2011–12). *State v. Giese*, 2014 WI App 92, ¶ 17, 356 Wis. 2d 796, 854 N.W.2d 687. Expert testimony is admissible if the expert is qualified to give it, and the expert testimony would help the jury to understand the evidence or determine a fact in issue. Wis. Stat. § 907.02(1).

After the 2011 amendments to Wis. Stat. § 907.02(1), the expert's proffered testimony must also be "based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." *Giese*, 356 Wis. 2d 796, ¶ 17.

The "gatekeeper function" of the trial court "is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Id.* ¶ 18. *See Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589 n.7 (1993).

Both Didier's and Guinn's expert opinions were based on years of hands-on experience with child sexual assault victims and extensive training. They were both qualified by that everyday experience and training to render reliable opinions on the prevalence and effects of inter-familial sexual abuse of children. Wilson does not argue that they lacked such expertise, only that their opinions were irrelevant. For obvious reasons, their opinions were reliable, highly relevant, and admissible. They tended to prove material facts in dispute. They were of assistance to the jury in understanding the evidence and determining the facts in issue. There was no basis for counsel to object to their opinions.

The record conclusively shows that Wilson cannot prove deficient performance and prejudice. The trial court properly exercised its discretion in denying Wilson's postconviction motion without a needless evidentiary hearing.

CONCLUSION

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

Dated this 5th day of October, 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) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,023 words.

_____
DANIEL J. O'BRIEN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 5th day of October, 2017.

_____
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