STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP813-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DANIEL M. WILSON,

Defendant-Appellant.

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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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. There Was Insufficient Evidence to Convict Mr. Wilson of Repeated Sexual Assault of a Child.

A. The specified timeframe was an essential element of the offense; this is therefore a sufficiency-of-the-evidence case.

The State argues that this is not a sufficiency-of-the-evidence case. It claims the issue is simply whether the timeframe proven at trial conformed to the specified timeframe alleged in the information. (Resp. Br. at 7, 18). This overlooks the critical fact that the specified timeframe *was an essential element of the offense*. *See* Wis. JI-Criminal 2107.

This case is therefore very much a sufficiency-of-the-evidence case. Due process precludes conviction for a criminal offense "unless the prosecution proves beyond a reasonable doubt every element of the charged offense." ***Carella v. California***, 491 U.S. 263, 265 (1989). Thus, if the State failed to present sufficient evidence to prove the timeframe element, then Mr. Wilson's conviction must be reversed. The State cannot escape this outcome simply by calling its failure of proof by a different name.

B. There was insufficient evidence to establish that at least three sexual assaults took place during the specified time period.

In this case, the State failed to present any evidence to prove that at least three sexual assaults occurred during the specified timeframe of January 1, 2013 to May 5, 2014. It therefore failed to prove an essential element of its case.

The State points out that F.T. testified that Mr. Wilson assaulted her one time at her mother's ("momma") house, located at 2477 North 6th Street. (Resp. Br. at 11). Based on Mr. Wilson's acknowledgment of the existence of this testimony, the State asserts that "Wilson effectively concedes that . . . there was sufficient proof of one violation of Wis. Stat. § 948.02(1)(b) at the 6th Street residence during the charged time frame." (*Id.* at 22).

That is false statement. In his initial brief, Mr. Wilson specifically argued that "even with regard to the one assault that F.T. claimed took placed 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." (Br. at 15). The undisputed evidence established that F.T. lived at her mother's house from November 2, 2013 to May 13, 2013. (69:5-6, 8-9, 11-12, 20). The alleged assault that occurred at this residence must therefore have taken place during that period. However, nothing in the record established more precisely when it may have occurred. Thus, any finding by the jury that this assault occurred before May 5, 2014, rather than afterward, between May 6 and May 13, 2014, would have been based on speculation and conjecture. The State completely fails to respond to Mr. Wilson's argument in this respect. That argument should therefore be deemed admitted. ***Brown County DHS v. Terrance M.***, 2005 WI App 57, ¶ 13, 280 Wis. 2d 396, 694 N.W.2d 458 ("Arguments not refuted are deemed admitted.").

The State notes that F.T. testified that numerous assaults occurred at "Anthony's granny's house." (Resp. Br. at 11). However, the person F.T. referred to as "Anthony's granny" is Armer Lloyd—Mr. Wilson's mother and the paternal grandmother of F.T.'s half-brother, Anthony. (68:101-02; 69:3-4, 8-9). F.T. and her family only lived with

Ms. Lloyd from May 13 to May 20, 2014. (69:8-9, 20, 39, 104-05). As there was no evidence that F.T. ever set foot in Ms. Lloyd's house prior to May 13, 2014, any alleged assault that took place there must have occurred outside the specified timeframe of January 1, 2013 to May 5, 2014.

Nevertheless, the State argues that a jury could have reasonably inferred that these alleged assaults took place at the home of F.T.'s maternal grandmother, Rosemary Crawford, where the family lived from June 2013 to November 2, 2013. (Resp. Br. at 11-12). That is simply absurd.

Again, F.T. confirmed that "Anthony's granny" is Mr. Wilson's mother, Ms. Lloyd. (68:101-02). Also, it is simply implausible that F.T. would refer to her own maternal grandmother as "Anthony's granny." No one refers to their own biological grandmother as their brother or sister's grandmother. It is even more far-fetched that F.T. would do so in this case, given that Anthony's paternal grandmother, Ms. Lloyd, is not F.T.'s biological grandmother. [1]

The State claims that the address the family gave Amanda Didier for "Anthony's granny" "was Crawford's Buffum Street address". (Resp. Br. at 13). This claim is factually baseless. The criminal complaint, which the State cites as support, says nothing of the sort. (1:1-2). Officer Cindy Carlson's testimony, which the State also cites, merely

[1] During her testimony, F.T. initially stated that one of the alleged assaults occurred "at Granny's house." (68:75). However, she quickly (and repeatedly) clarified that it occurred at "Anthony's granny's" house. (68:76, 78). It is not surprising that F.T. might refer to Anthony's paternal grandmother—with whom she lived—as "granny." But it is implausible that she would refer to her own grandmother as "Anthony's grandmother."

indicates that she "learn[ed] the address of Anthony's granny's house was 2948 North Buffum Street"—Ms. Crawford's address. (68:58). But Officer Carlson did not say how or from whom she learned that information.

Moreover, even if Officer Carlson did ask a member of F.T.'s family for the address of "Anthony's granny," and was given Ms. Crawford's address, that information would have been totally correct. Anthony has two grandmothers after all—his maternal grandmother, Ms. Crawford, and his paternal grandmother, Ms. Lloyd. Although Officer Carlson appears to have failed to realize this fact, as did the prosecution, *see* 69:48-50; 70:50, her confusion provides no basis for inferring that F.T. somehow "associated 'Anthony's granny' with Crawford, not Lloyd." (Resp. Br. at 13).

The State concedes that, unlike Wis. Stat. § 948.02, "a specific time frame is an element of a charge under Wis. Stat. § 948.025." (*Id.* at 15). It argues, however, that "no one can be convicted of sexual assault under any statute unless and until the State alleges and proves a specified date or time frame" that is "reasonably specific." (*Id.* at 15-16). The State is attacking a straw man here. Mr. Wilson's claim is that the State failed to prove an essential element of it case. Whether the charged timeframe was "reasonably specific" is completely beside the point.

C. Mr. Wilson did not forfeit his right to object to amending the timeframe element after the verdict.

The State claims that Mr. Wilson forfeited his right to object to amending the timeframe because he did not object at trial to the relevance of F.T.'s testimony regarding what happened at "Anthony's granny's house." (*Id.* at 18-21). But again, the timeframe here was an essential element of the

State's case, not just a technical fact alleged in the information.

Mr. Wilson had no an obligation to object at trial to the State's failure to prove its case. He therefore did not forfeit any objection to amending the information post-verdict.

In point of fact, it is the State that should be deemed to have forfeited its right to seek an amendment to the timeframe at this point. By waiting until its response brief on appeal to request the amendment, the State has robbed Mr. Wilson of the opportunity to object before the case was submitted to the jury. *See* ***State v. Duda***, 60 Wis. 2d 431, 441, 210 N.W.2d 763 (1973). ("If the reasoning of the state is viable, then the defendant would have no right to object to such an amendment until after the respondent's brief raising the issue is filed on appeal. Such is not the law.").

Also, if the State had timely moved to amend the timeframe before the close of evidence, Mr. Wilson would have had the additional opportunity to present further evidence in response to the amendment. For instance, at trial, defense counsel considered calling Ms. Lloyd as a witness. (69:48-51). Given that she was the protective adult required to supervise Mr. Wilson and Jeanette Yegger with their children from May 13 to May 20, 2014, she may very well have had important and relevant testimony to offer. (69:8-9, 40-44, 88-89, 104-05). However, she was in the hospital at the time of trial, so she was unavailable to testify. (69:48-51, 75-76). But had the State moved to amend the timeframe prior to the close of evidence—thereby making the events at Ms. Lloyd's house actually relevant—this may have led defense counsel to take additional steps to secure her testimony. For example, counsel could have requested a continuance or asked for an order allowing Ms. Lloyd to

testify by phone. And had defense counsel failed to do so in that scenario, that may have given rise to another ineffective assistance of counsel claim on appeal. The State's failure to timely move to amend the timeframe has denied Mr. Wilson those opportunities, as well. This court should therefore hold that the State has forfeited its right to request an amended timeframe on appeal.

D. This court is barred from amending the timeframe element post-verdict.

The State points out that Wis. Stat. § 971.29(2) provides that after a verdict, "a pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial." (Resp. Br. at 19-21). Section 971.29(2) is inapplicable here.

First, there was no meritorious relevancy objection that could have been made to F.T.'s testimony about the alleged assaults that occurred at Ms. Lloyd's house. The testimony was relevant to both elements of Wis. Stat. § 948.025. It was relevant to the first element—that the defendant committed at least three sexual assaults of the same child—because it tended to make the existence of this element more probable. *See* Wis. Stat. § 904.01. And it was relevant to the second element—that at least three sexual assaults took place during the specified time period of January 1, 2013 and May 5, 2014—because it tended to make the existence of this element less probable. *See id.* Accordingly, any relevancy objection would have been frivolous and without arguable merit.

But more importantly, ***Duda*** makes clear that the portion of Wis. Stat. § 971.29(2) that addresses post-verdict amendments is intended to deal with technical variances only. It is not intended to allow the State to make post-verdict

amendments that are material to the merits of an action. ***Duda***, 60 Wis. 2d at 440-43.[2] In this case, the specified timeframe was not a technicality; it was an essential element. It therefore cannot be amended after the verdict.

Furthermore, allowing a post-verdict amendment that changes an essential element of an offense would violate a defendant's right to have his case decided by a jury. Mr. Wilson had the right not to be convicted of an amended (or any) charge unless *a jury* concluded beyond a reasonable doubt that he committed every single element of that charge. ***State v. Marhal***, 172 Wis. 2d 491, 493, 493 N.W.2d 758 (Ct. App. 1992). This right is not satisfied by having a court enter a conviction on an amended charge *that the jury never considered*, even if the court concludes there was sufficient evidence to support the amended charge.

This is especially true given that it is unknown how the jury wrongfully concluded that Mr. Wilson committed three or more sexual assaults between January 1, 2013 and May 5, 2014. Perhaps the jury mistakenly concluded that the alleged

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[2] The State cites the unpublished case of ***State v. Echols***, 2011 WI App 143, 337 Wis. 2d 558, 806 N.W.2d 269, in which this court suggested that ***Duda*** is no longer good law, as subsequent cases have allowed substantive, not just typographical, amendments to complaints. ***Echols*** is wrong for numerous reasons. First, the court in ***Echols*** lacked the authority to overrule or modify the holding from ***Duda***; only the Wisconsin Supreme Court can do that. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Second, the subsequent cases ***Echols*** cited were also court of appeals decisions that could not have overruled or modified ***Duda***. *See* ***Echols***, 337 Wis. 2d 558, ¶ 27 (and cases cited therein). Third, those subsequent cases all involved amendments the occurred *prior* to the submission of the case to the jury. ***Id.*** Finally, ***Echols*** did not consider the fact that substantive post-verdict amendments violate a defendant's right to have a jury decide his case. *See infra* pp. 7-8.

assaults at Ms. Lloyd's house occurred during the specified timeframe, as the prosecution mistakenly believed. However, all or some of the jurors may have actually disregarded those assaults, since they occurred outside the specified timeframe. Perhaps instead they assumed there must have been additional assaults because, "where there's smoke, there's usually fire." Or perhaps they simply miscounted the number of other assaults they believed occurred. Perhaps they erroneously included alleged incidents of sexual contact in their tally. After all, F.T. described several incidents of alleged sexual contact that did not constitute sexual intercourse. (68:84-85, 92-93; 78, Ex. 3). Or maybe the jury just acted in bad faith. There is no way to know how the jury arrived at its erroneous and unconstitutional verdict that was not supported by sufficient evidence. This court cannot use such an erroneous verdict to assume the jury would have found Mr. Wilson guilty of committing three or more sexual assaults between January 1, 2013 and May 20, 2014.

E. The proper remedy in this case is outright reversal.

In his initial brief, Mr. Wilson argued that this court is barred from converting the judgment to reflect a conviction for the included offense of child sexual assault under Wis. Stat. § 948.02(1)(b), because doing so would violate his right to a unanimous verdict and his right against double jeopardy. He also pointed out that an insufficiency finding for the offense of repeated sexual assault of a child necessarily requires an insufficiency finding for the included offense of child sexual assault under the facts of this case. (Br. at 18-20). The State completely fails to respond to any of these arguments. They should therefore be deemed admitted. ***Terrance M.***, 280 Wis. 2d 396, 13. The proper remedy is thus outright reversal.

II. Mr. Wilson Was Denied Effective Assistance of Counsel Because His Trial Attorney Failed to Properly Object to F.T.'s STD Test Results and Other Irrelevant and Unfairly Prejudicial Expert Testimony.

The State argues that Mr. Wilson's trial counsel was not ineffective because she did object to the medical records showing that F.T. had type 1 herpes on Confrontation Clause grounds. (Resp. Br. at 25). This is an odd "defense." If trial counsel's objection was sufficient to preserve the Confrontation Clause claim, as the State suggests, then this court should simply decide the claim on its merits, and not through the rubric of an ineffective assistance of counsel claim. The State's argument does not defeat Mr. Wilson's claim; it merely simplifies it.

The State also argues that Dr. Judy Guinn personally examined F.T. and observed the lesions produced by genital herpes. The State posits that her testimony was therefore not hearsay. (*Id.*) However, while Dr. Guinn was entitled to testify about her personal observations, there is no indication that she was able to determine, based on her observations alone, that the lesions were specifically from type 1 herpes. That conclusion came only from the medical records. Thus, the admission of the STD test results, and all testimony describing those results, violated Mr. Wilson's right of confrontation.

The State argues that the medical records were admissible under several hearsay exceptions and Wis. Stat. § 907.03. (*Id.* at 25-26). However, whether an out-of-court statement is admissible under the rules of evidence—such as a hearsay exception—"is insufficient to ensure compliance with a defendant's constitutional right to confrontation." ***State v. Weed***, 2003 WI 85, ¶ 22, 263 Wis. 2d 434, 666

N.W.2d 485. As noted in Mr. Wilson's initial brief, the portions of the medical records documenting F.T.'s STD results had a primary purpose that was evidentiary and testimonial in nature. (Br. at 21-30). They were therefore admitted in violation of Mr. Wilson's Confrontation Clause rights.

The State claims that the expert testimony asserting that the vast majority of child sexual assaults are committed by family members or acquaintances was relevant because it "had some 'tendency' to prove . . . that Wilson sexually assaulted F.T." (Resp. Br. at 29). That is simply incorrect. Mr. Wilson is not more (or less likely) to have committed this offense just because most abusers are family members or acquaintances. This testimony also does not tend to prove "why F.T. never told her mother," as the State suggests. (*Id.*) The State does not even explain this conclusory statement in any meaningful way.

Finally, the State argues that Dr. Guinn's testimony that child sexual assault victims are often threatened by their abusers was relevant because it was reasonable for the jury to conclude that F.T. felt threatened, even if she was not actually threatened. (*Id.*) Testimony that child victims may feel threatened even absent explicit threats may have been relevant in this case. But the testimony that children are often threatened by their abusers remains completely irrelevant. There was no evidence that Mr. Wilson ever threatened F.T. Accordingly, Dr. Guinn's testimony simply invited the jury to speculate that there may have been unproven threats. That was prejudicial, and trial counsel was ineffective for failing to object.

CONCLUSION

For these reasons, Mr. Wilson respectfully requests that this court reverse the circuit court's order denying his postconviction motion, vacate his conviction, 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 postconviction order denying his ineffective assistance of counsel claims and remand the case for purposes of an evidentiary hearing.

Dated this 1st day of December, 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 2,979 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 1st day of December, 2017.

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