STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2017AP2364 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID GUTIERREZ,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT DAVID GUTIERREZ

On Appeal From the Circuit Court For Green Lake County
Circuit Court Case No. 12-CF-115
The Honorable Andrew w. Voigt, Judge Presiding

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Statement on Oral Argument and Publication

Oral argument is not requested. The law is well settled relative to all issues and therefore publication is not requested.

Statement of the Case

David Gutierrez was charged in an Amended Complaint on November 16, 2012 on a ten (10) counts. He was charged with three (3) counts of 1st Degree Child Sexual Assault-Under age 13, contrary to WI. Stat. §973.046(1r), three (3) counts of Child Enticement, contrary to WI. Stat. §948.02, three (3) counts of Incest with Child by Stepparent, contrary to WI. Stat §948.06 (1m) and one (1) count of Exposing a Child to Harmful Material, Contrary to WI. Stat. §948.11 (2)(a).

The Amended Criminal Complaint recites that on November 2, 2012, Mr. Gutierrez's stepdaughter, A.R. d.o.b. 05/04/00, had made disclosures at her school about having been sexually assaulted by Mr. Gutierrez. She alleged an assault from the previous day wherein she said an assault occurred while her mother was in the shower. She was brought to the Sheriff's Office and a forensic interview was conducted. At that time, she disclosed two other occasions where she described being sexually assaulted by Mr. Gutierrez. She further

described being forced to watch pornographic movies. The Amended Criminal Complaint is appended hereto as "App.-1."

Mr. Gutierrez was bound over after a Preliminary Examination on 11/16/12 and entered pleas of not guilty to the information on the same date.

On February 13, 2014, the State filed a Motion in Limine to admit other acts evidence. The State was asking to be allowed to introduce an alleged incident when A.R. was approximately six years old as well as other unspecified sexual acts. The trial court ruled that the state could only introduce evidence of things that maybe (Gutierrez) did leading up to the charged acts that would put the case in context. *Rec. 110, 30-32*. The state would not be allowed to present evidence of specific acts of prior sexual assault.

On April 4, 2014, the state file a motion to reconsider, requesting that the court allow the same evidence from its previous request. *Rec. 40*. The court modified its prior ruling and allowed the state to present evidence to the jury of the alleged incident

when A.R. was approximately six years old. *Rec. 119, 51-52*.

On March 31, 2014, the defense filed a motion seeking to admit evidence obtained from the Wisconsin State Crime Lab. *Rec. 38*. On the night that A.R. reported the assaults, a sexual assault exam was completed by a SANE Nurse. Swabs were taken from the inside and outside of her mouth. The following day, law enforcement collected the underwear that A.R. said she was wearing during the assault. The evidence was submitted to the Crime Lab for testing. The defense motion sought to introduce the Lab's findings that DNA from at least five different males was found on the inside of A.R.'s underwear and DNA from at least three different males was found on the outside of her mouth. The DNA was not saliva or semen and none of it matched Gutierrez. The Court ruled that the evidence would not violate the rape shield law but found that it was not relevant *Rec. 119, 38-42*. The Court did allow that Gutierrez could present evidence that DNA testing was performed and that his DNA was not found.

The matter proceeded to jury trial which was commenced on April 13, 2015 and was heard over the course of three days. At the conclusion, the jury found Mr. Gutierrez guilty of counts 1-9 and not guilty on Count 10 (Exposing a Child to Harmful Material).

Mr. Gutierrez was sentenced on July 9, 2015. He was sentenced to concurrent time on all counts which then amounted to twenty (20) years of Initial Confinement and twenty (20) years of Extended Supervision. The Judgement of Conviction is appended hereto as "App. -2."

On August 11, 2016, Mr. Gutierrez filed a motion for Post-conviction relief. *Rec. 66*. The motion requested a new trial asserting that the jury was not impartial because trial counsel failed to strike a juror after she stated that she didn't know if she could be impartial. It also alleged that trial counsel was deficient for failing to elicit testimony from Mr. Gutierrez's mother who had heard the victim recant and failed to subpoena Mr. Gutierrez's wife who would have

given testimony favorable to the defense. That motion was denied by oral decision on the same day. Notice of Appeal was filed on November 28, 2017. *Rec. 75* and this is Mr. Gutierrez's Brief.

Argument

I. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT ADMITTED OTHER ACTS EVDIDENCE THAT GUTIERREZ SEXUALLY ASSAULTED A.R. WHEN SHE WAS APPROXIMATELY SIX YEARS OLD.

A. Standard Of Review.

Appellate courts employ an erroneous exercise of discretion standard when reviewing a circuit court's admission of other acts evidence. *State v. Sullivan, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (Wis. 1998).* An appellate court will affirm a circuit court's ruling if it finds that the circuit court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Id.* At 780-81.

The circuit court must articulate its reasoning for admitting or excluding the other acts evidence.

Sullivan, 216 Wis. 2d at 774. A circuit court's failure to explain its rationale constitutes an erroneous exercise of discretion. *Id* at 781. If a circuit court failed to articulate its reasoning, an appellate court will independently review the record to determine whether it provides a reasonable basis for the circuit court's ruling. *Id*.

The trial court in this case did not adequately articulate its reasons for admitting the other acts evidence. In admitting the 6-year old allegation the trial court mentioned that its ruling was not controlled by *Sullivan* and *State v. Davidson*, but did not apply the law to the specific facts of Gutierrez's cases. *Rec. 119, 52-53*. In light of the trial court's reasoning, this Court should review the record independently to determine if the trial court's admission of evidence was reasonable. That review reveals that the trial court erroneously exercised its discretion when it admitted the other acts evidence.

B. *Sullivan* Analysis

Wisconsin law precludes admitting evidence of prior bad acts to prove that a defendant had a propensity to commit the crime charged. Wis. Stat. §904.04 (2013-14). Other acts evidence is therefore generally disfavored. *State v. Harris, 123 Wis. 2d 231, 236, 365 N.W.2d 922 (Ct. App. 1985).* The Wisconsin Supreme Court has pronounced that "[e]vidence of prior crimes or occurrence should be sparingly used by the prosecution and only when reasonably necessary." *Whitty v. State, 34 Wis. 2d 278, 297, 149 N.w.2d 557 Wis. 1967).* Excluding other acts evidence "is based on the fear that an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." *Sullivan, 216 Wis. 2d* at *783* (citing *Whitty, 34 Wis. 2d at 292).* Therefore, when approached with a motion to admit other acts evidence, a court must engage in a three-step analysis. *Sullivan, 216 Wis. 2d at 771.* The analysis is as follows:

> (1) Is the other acts evidence offered for

> an acceptable purpose under Wis. Stat. §904.04(2)?
>
> (2) Is the other acts evidence relevant, considering the two facets or relevance set forth in Wis. Stat. §904.01?
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *Id.* at 772-73

Other acts evidence must satisfy all three prongs of the *Sullivan* analysis to be admissible. See id. At 783. A court may not admit other acts evidence if it fails any of the Sullivan prongs. See *Id.*

The first step of the analysis asks if the evidence was admitted for a proper purpose, "such as to establish motive, opportunity, intent, preparations, plan, knowledge, identity, or absence of mistake or accident." *Sullivan, 216 Wis. 2d at 783.*

When the defendant's motive for an alleged sexual assault is an element of the charged crime, other acts evidence may be admitted for that purposes. *State v.*

Davidson, 236 Wis. 2d 537, 566, 613 N.W.2d 606 (Wis. 1999). Because sexual contact is defined as a type of "intentional touching," Wis. Stat. §948.01 (2013-14), motive is an element of the sexual assault crime charged in Gutierrez's case. Therefore, Gutierrez concedes that the other acts evidence was admitted for a proper purpose.

The second step of the Sullivan analysis asks whether the other acts evidence is relevant. *Sullivan, 216 Wis. 2d at 785*. Relevance has two facets. *Id*. The first facet of relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the case. *Id*. The substantive law determines the elements of the crime charged and therefore the "facts and links in the chain of inferences that are of consequence to the case." *Id*. At 785-86. Because motive is an element of the crime of sexual assault, other acts evidence that speaks to motive is of consequence to the case and is relevant. Therefore, the other acts evidence in this case satisfies the first facet of relevance.

The second facet of relevance is whether the evidence has probative value. *Sullivan, 216 Wis. 2d at 786*. Probative value is found in the similarity between the charged offense and the other acts allegation. *Id*. At 787. The greater the "similarity, complexity, and distinctiveness" of the events, the greater the probative value of the other acts evidence. *Id*. The number of similar events required, depends on the "complexity and relative frequency" of the events rather than the total number. *Id*. At 787-88.

Gutierrez was on trial for three incidents of sexual assault: in his home, while delivering scrap metal, and in a garage. The *Sullivan* court ruled that §904.04 "permits the admission of other acts evidence if its relevance does not hinge on an accused's propensity to commit the act charged." *Sullivan, 216 Wis. 2d at 783* (emphasis added). Whether A.R. was allegedly assaulted approximately six years prior to those three incidents does not make the charged assaults any more or less probable, but rather only

shows that Gutierrez may have had a propensity toward sexual assaults. This is clearly an impermissible purpose. *Whitty v. State, 34 Wis. 2d 278, 291-92, 149 N.W.2d 557 (Wis. 1967)*. Therefore, the other acts evidence is not probative.

Finally *Sullivan* requires an analysis to determine whether the probative value of the other acts evidence is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Sullivan, 216 Wis. 2d* at 772-73.

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Id. At 789-90.

The trial court acknowledged the prejudice in admitting the 6-year-old allegation. At the first motion hearing the trial court ruled to exclude discussion of "any specific acts of alleged sexual

contact." *Rec. 110, 31*. The court ruled that "the probative value of those acts [would be] outweighed by what could be viewed as cumulative or collective effect" against Gutierrez. *Rec. 110, 32*. The court also acknowledged that if the 6-year-old allegation were admitted it would be "almost impossible" for Gutierrez "to raise any reasonable response" to the allegation. *Rec. 110, 32*. At the second motion hearing the court modified its ruling to admit the 6-year-old allegation *Rec. 119, 51*, but did not address why the same prejudice concerns were no longer present.

"A defendant is entitled to be informed of the charges against him." *State v. Fawcett, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988)*. A defendant is also entitled to notice of the underlying facts, including the time frame in which the conduct allegedly occurred. *Id*. While cases involving child victims enjoy a more flexible application of notice requirement, *Id*. At 254, it does not obliterate the defendant's notice rights. The alleged other acts incident occurred when A.R. was "approximately" six.

Webster's Dictionary defines "approximate" as "almost correct or exact; close in value or amount but not precise." Under this definition, "approximately six-years-old" may mean five-years-old, seven-years-old, or even four-years-old or eight-years-old. Indeed, "approximately six-years-old" may actually span a four-year window of time when the alleged incident could have occurred. Such an expansive time frame necessarily precluded Gutierrez from providing a reasonable response to the allegation.

In addition to an inability to respond to the other acts allegation, the State's prejudicial use of the other acts evidence at trial outweighed its probative value. First, the State's use of the other acts evidence misled the jury. During her opening statement, the prosecutor stated,

> You will also have an opportunity to hear what [A.R.] told Ms. Cody on November 2nd, 2012 about what happened to her at the hands of her step-father *beginning when she was approximately six years old*.

Rec. 116, 101 (emphasis added). In her closing argument the prosecutor stated, "This has been what

[A.R.] has known since she was six years old. *Rec. 118, 114*(emphasis added).

While juries are advised against relying on counsels' opening and closing statements, the Sullivan court recognized the potential for prejudice in light of a prosecutor's repeated references to the admitted other acts evidence. See *Sullivan, 216 Wis. 2d at 792*. In Gutierrez's case, the prosecutor's repeated references to the 6-year-old allegation made the sexual assaults seem as though they had been happening continuously since A.R. was six years old.

Second, the State's use of the other acts evidence at trial contradicted the evidence's supposed relevance and purpose. At trial the State failed to explicitly indicate any similarities between the charged crimes and the prior alleged incident, and at no point during trial did the State compare the charged crimes with the 6-year-old incident. Indeed, the State only used the other acts evidence at trial to show that A.R. had been sexually assaulted before, and that the assaults began when she was six-years-

old. *Rec. 118, 154-155*.

It has been stated that despite unfair prejudice, a cautionary instruction "can go far to cure any adverse effect attendant with the admission of the other acts evidence." *Sullivan, 216 Wis. 2d at 791*. The instruction in this case directed the jury to consider the other acts evidence only for the purposes on context/background and motive. (Rec. 118, 91-92). While the instruction in this case did not track all permissible purposes as in *Sullivan, 216 Wis. 2d at 780, 791*, it was still improperly vague.

The instruction allowed the jury to consider the other acts evidence to provide a more complete presentation of the evidence relating to the offense charged. *Rec. 118, 91-92*. The context the State created by admitting evidence of an alleged incident that occurred six years prior to the charged crimes is extremely broad and vague. The corrective instruction allowing the consideration of evidence for the purpose of context therefore did not cure the prejudicial

effect of the admitted evidence.

C. The erroneous admission of other acts evidence was harmful.

If an appellate court finds that a circuit court erroneously admitted other acts evidence, it must then address whether that error was harmless or prejudicial. *Sullivan, 216 Wis. 2d at 773*. The test for harmless error is whether there is a *reasonable possibility* that the error contributed to the conviction. *Id*. At 792 (emphasis added). The burden of proving that the error was harmless is on the beneficiary of the error (the State). *Id*. The State must show that there is no reasonable possibility that the error contributed to the conviction.

The *Sullivan* court acknowledged the influence of other acts evidence in light of a weak case. The court found, "In light of the complainant's inconsistent statements, any evidence that tended to support one version over the other necessarily influenced the jury." *Sullivan, 216 Wis. 2d at 793*. Here, the overwhelming lack of evidence presented by the State clearly demonstrates that the other acts

influenced the jury's verdict.

The State collected several items for DNA testing, including swabs of A.R.'s mouth and a pair of A.R.'s underwear. Despite A.R.'s allegations that Gutierrez repeatedly touched her during the November sexual assault, authorities could not match any of the tested items to Gutierrez. *Rec. 118, 12*. Indeed, authorities found no DNA evidence. *Rec. 118, 12*.

Gutierrez himself disputed the charges against him. *Rec. 118, 19-23, 28-32*. During his testimony at trial, Gutierrez denied under oath ever assaulting A.R. on any occasion. *Rec. 116, 157-158*.

Furthermore, A.R.'s accounts of the incidents were inconsistent. In the video statement presented to the jury, A.R. stated that the scrap metal sexual assault occurred in the front seat of a van and involved A.R. giving oral sex. *Rec. 85, 38:05*. At trial. A.R. testified that the scrap metal incident occurred in the back seat of the van and involved A.R. receiving oral sex. *Rec. 116, 157-158*.

The State also failed to present any testimony to

corroborate A.R.'s allegations. Despite the fact that the November incident allegedly took place while the entire family was in the home sleeping, the State failed to present any of the other five Gutierrez children to testify that they heard A.R. and their stepfather that night. Despite Gutierrez's testimony that he has herpes, the State failed to present evidence that A.R. has herpes as well.

Therefore, based on the above, Mr. Gutierrez respectfully requests that the verdicts be set aside and he be granted a new trial.

II. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT DENIED GUTIERREZ'S MOTION TO ADMIT EVIDENCE THAT SEVERAL DIFFERENT INDIVIDUALS' DNA WAS FOUND ON THE ALLEGED VICTIM'S UNDERWEAR AND OUTSIDE HER MOUTH

During trial, the jury heard that law enforcement took several swabs from A.R. and her residence, along with items of A.R.'s clothing, to the Wisconsin State Crime Lab for testing. It then heard that Gutierrez's DNA was not fond on these items. Still, the State argued at trial that the absence of Gutierrez's DNA

was not exculpatory because DNA is easily washed or rubbed off.

Gutierrez testified and presented one expert witness. Samantha Delfosse, an analysist from the Wisconsin State Crime Laboratory. She testified that Gutierrez's DNA was not found on any of the tested swabs or clothing. *Rec. 118, 12*. She also testified that DNA could be transferred by touch and from person to person or person to object. *Rec. 118, 12-13*. On cross-examination, the State stressed how DNA can be easily removed:

> Q: Now, in terms of DNA itself, can it be washed off?
>
> A: Yes, it can.
>
> Q: Can it be scrubbed off?
>
> A: Yes.
>
> Q: Can it be wiped off?
>
> A: Yes.
>
> Q: If there was biological material on the person's body and that person showered, cleansed

themselves, wiped themselves off, might you expect something would happen to the biological or DNA material?

A: Yes, I would.

Q: What do you think?

A: Basically, if you are washing or wiping, the more this is done, the more likely you are removing any kind of DNA that was deposited.

Rec. 118, 14-15.

Further, during closing argument, the State reiterated that "[Delfosse] was also not surprised that no DNA of the Defendant was found under the circumstances the way this case developed in terms of the timing of the SANE exam and search warrant when we compare that to the assault from November 1st." *Rec. 118, 121*. The State also stated:

> In real life some kinds of sexual contact do not leave physical evidence. Sometimes they do, but if the evidence is not collected quickly and under the right circumstances, that is not likely to exist. Just because there is not physical evidence, that doesn't mean there is reasonable

doubt. *Rec. 118, 124*.

A mixture of DNA from at least three people was found on a swab taken from the outside of A.R.'s mouth and the DNA of at least five people was found on the inside of A.R.'s underwear. This evidence would have supported Gutierrez's defense that, had he committed the assault, his DNA would have been there, and rebutted the State's argument that DNA is easy to remove. Therefore, the circuit court erroneously exercised its discretion in denying Gutierrez's motion to admit this evidence.

This Court reviews the circuit court's decision to exclude DNA evidence using an erroneous exercise of discretion standard, *State v. Shomberg, 2006 WI 9, ¶ 10, 288 Wis. 2d 1, 709 N.W.2d 370*. The circuit court properly exercised its discretion only if it "examined the relevant facts, applied a proper legal standard, and … reached a reasonable conclusion." *State v. Kandutsch, 2011 WI 78, ¶ 23, 336 Wis. 2d 478, 799 N.W.2d 865* (citations omitted). Absent harmless error, the remedy for an erroneous exercise of discretion is

a new trial. *Martindale v. Ripp, 2001 WI 113, ¶ 30, 246 Wis. 2d 67, 629 N.W.2d 698*.

Like all evidence, the DNA results should have been admitted if they were relevant and their probative value was not substantially outweighed by the danger of an unfair prejudice, confusion of the issues, or misleading the jury. *State v. Sullivan, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).*

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. §904.01. In this case, the DNA evidence was relevant because it directly rebutted the State's argument that DNA can be removed easily, and therefore, it was of no significance that Gutierrez's DNA was not found. It also supported Gutierrez's defense that the absence of his DNA was exculpatory.

At the motion hearing, Gutierrez argued that the State's theory at trial would be that it is normal for his DNA not to be found, given the passage of time and

A.R.'s statement that she cleaned herself before the sexual assault exam. (Rec. 113, 5). If the State made this argument at trial, he would not be able to rebut this claim by demonstrating that DNA *was* found. Thus, the complete DNA results were relevant because they showed that DNA is easily transferred and is not easily destroyed.

Gutierrez's fear was realized at trial. The State presented expert testimony throughout trial that DNA is easily destroyed. The State cross-examined Gutierrez's DNA expert and she acknowledged that it is likely that DNA would be removed if a person washed him or herself. *Rec. 118, 14*. Furthermore, the State repeated during closing argument that it was predicable that law enforcement did not find Gutierrez's DNA: "In real life some kinds of sexual contact do not leave physical evidence." *Rec. 118, 124*.

Because the circuit court excluded the DNA evidence, Gutierrez was unable to rebut the State's repeated arguments that DNA is easily washed away. He

was unable to point to the DNA evidence to show that DNA *can* endure for some time because a mixture of DNA from several individuals was found on A.R. and her underwear. This is especially true of the underwear, which A.R. testified Gutierrez removed multiple times during the assault.

The court allowed the State to argue at trial that DNA is easily removable yet prohibited Gutierrez from offering evidence to rebut that claim. In short, the State was allowed to present favorable evidence without allowing contradictory evidence to be admitted.

The DNA evidence was directly relevant to assessing whether Gutierrez was guilty of the sexual assault. The absence of his own DNA made it less likely that he was guilty of the assault. And the presence of other DNA further supported his defense that if he actually committed the assault, his DNA would have been detected.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the jury...” Wis. Stat. §904.03. In this case, the DNA evidence was sufficiently probative to warrant admission, especially in light of the State’s insistence to the jury that it was normal that Gutierrez’s DNA was not found.

As explained above, the DNA evidence was critical for Gutierrez to rebut the State’s assertion that DNA is easily destroyed. The absence of Gutierrez’s DNA supported his claim that he did not commit the sexual assault. Evidence that DNA from numerous other individuals could still be found on A.R. and her underwear further supported that defense and disproved the State’s disingenuous claim that DNA should not be expected to remain.

The probative value of the DNA evidence was not substantially outweighed by unfair prejudice, confusion of the issues, or misleading the jury. At the motion hearing, the State argued that introducing the evidence would invite jury speculation about where the DNA came from and the reason for admitting the

evidence. But this fear is unfounded. A limiting instruction to the jury would have cleared up any confusion about why the evidence was admitted and not to speculate on whose DNA it might be.

Gutierrez did not intend to present the DNA evidence for any reason other than to rebut the State's assertion that DNA is easily destroyed. Without this evidence, the State was able to offer testimony about the lack of durability of DNA and then to suggest that no DNA evidence was ever found. The risk that the jury would not understand the purpose of the evidence was slight compared to the probative value of the evidence.

The State's case against Gutierrez was far from overwhelming. As previously discussed, although law enforcement tested several items and swabs were collected from A.R. and her home, none of Gutierrez's DNA was found. There was no physical evidence of sexual assault. Gutierrez testified at trial that he never sexually assaulted A.R. *Rec. 118, 29-32*. Additionally, the State did not present any witnesses

to the alleged assault, even though A.R. testified that during the November assault she lived in an apartment with her mother and seven younger siblings. *Rec. 116, 150*.

Although A.R. testified at trial about these alleged assaults, her testimony was inconsistent with her previous statements to law enforcement. When first interviewed, A.R. said that one of the incidents occurred in the front seat of a van an d involved her giving oral sex. (Video 38:05-39:02). At trial, however, A.R. testified that the assault occurred in the back seat of the van and involved A.R. receiving oral sex. *Rec. 116 at 157-158*.

In light of the State's lack of physical or corroborating evidence and A.R's inconsistent statements. The DNA evidence was of great importance. The DNA results were evidence that Gutierrez did not commit the assault and refuted the State's argument that the lack of his DNA had no significance. Therefore, the circuit court's decision to exclude this evidence at trial was not harmless.

III. MR. GUTIERREZ IS ENTITLED TO A NEW TRIAL WHERE THE TRIAL COURT DENIED HIS POST-CONVICTION MOTION CLAIMS OF IMPARTIAL JURY AND INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Mr. Gutierrez is entitled to a new trial, where he was denied his constitutional right to a fair and impartial jury.

During vior dire, defense counsel addressed the jury panel. He reiterated the allegations and inquired as to whether prospective jurors could be impartial. He stated:

> **Mr. Haase**: Now, as you heard, there are allegations of sexual assault. Anyone here who feels just because of the type of crime charged that you don't think that you could sit here, listen to this, and be fair and impartial to Mr. Gutierrez?

It's apparent from the transcript that three jurors raised their hands. Two jurors were questioned with one of them being dismissed from the panel. Attorney Haase indicated that he had no other questions and then the Court reminded him of the third juror that had raised her hand. The record reveals the following:

Mr. Haase: Ms. Golz.

Juror Golz: I don't know if I could be impartial. I work with kids. I drive school bus, so I deal with kids all the time, and I just, I don't know if I can be impartial.

Mr. Haase: Your honor, I have no more questions. I would ask she be excused.

The Court: Ms. Vanden Brandon.

Ms. Vanden Brandon: I just think we need a little more certainty if possible.

The Court: There was a question before that we didn't explore that we can depending on whether that's necessary or not. We can adjourn briefly to address. So Mr. Haase, was that all of your questions on that topic or all of your questions total?

Mr. Haase: I think it's all my questions on that topic. Rec. 116, 69.

No other vior dire was done with Juror Golz. Both sides proceeded to make their peremptory strikes and Juror Golz remained on the jury, serving as one

of the twelve that convicted Mr. Gutierrez on nine counts.

Where a juror openly admits bias and his or her partiality was never questioned, that juror is subjectively biased as a matter of law. *State. V. Carter, 250 Wis. 2d 851, 641 N.W.2d 517 (2002)*. The similarities between *Carter* and Mr. Gutierrez's case are striking. In *Carter*, also a sexual assault case, a juror was asked whether having a relative who had been sexually assaulted would influence or affect his ability to be fair and impartial. The juror answered "yes." Some situational questions were then asked but no follow up relative to his potential bias. He was not struck and served on the jury that convicted the defendant.

The Court of Appeals noted the three types of juror bias-statutory, objective and subjective:

> We intend the term "subjective bias" to describe bias that is revealed through the words and the demeanor of the prospective juror. While the term "subjective" is not meant to convey precisely the same sense of bias as did the term "actual," the two terms are closely related. As did actual bias, subjective bias refers to the bias that is revealed by the prospective juror

> on vior dire; it refers to the bias that is revealed by the prospective juror on vior dire; it refers to the prospective juror's state of mind. *State v. Faucher, 227 Wis. 2d 700, 707, 596 N.W.2d 770 (1999*).

Here, Juror Golz's response demonstrates that she was subjectively biased. She said "I don't know if I could be impartial." She further explained why and then restated "I don't know if I can be impartial." The fact that this juror remained on the jury and participated in deliberations overwhelmingly indicates an unreliable outcome in the verdicts. On this alone, Mr. Gutierrez is entitled to a new trial.

B. Trial counsel was ineffective for failing to remove the partial juror

Defense counsel was ineffective in allowing the juror to remain on the panel. Every defendant has a Sixth Amendment right to the effective assistance of counsel. *Strickland v. Washington, 466 U.S. 668 (1984), Article I, §7 Wisconsin Constitution*. "In order to establish a violation of this fundamental right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and,

if so, (2) that the deficient performance prejudiced the defense." *State v. Fritz, 212 Wis. 2d 284, 569 N.W.2d 48 (1997)*, citing *Strickland, 466 U.S. at 687*.

Here, Counsel's performance was clearly deficient. When questioned, he could not state any reason or strategy for allowing her to remain on the jury. In fact, he had no recollection of Juror Golz, the vior dire as it pertained to her or why he did not use a preemptory strike. *Rec. 120, 8-10*. Although Strickland requires that a defendant demonstrate that Counsel's representation fell below an objective standard of reasonableness considering all the circumstance, a reviewing Court should not construct a strategic defense which Counsel does not offer. *Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990)*.

Here, Counsel failed to question the juror further, despite her repeated claim that she didn't know if she could be impartial. He did not ensure that she was stricken for cause or ask the Court for a specific ruling. Lastly, he did not use a preemptory challenge to remove her from the jury. Any

reasonable counsel, having heard the response of the jury, would have pursued all of the three options and trial counsel's failure falls well below the standard of reasonableness.

Further, as in *Carter*, Mr. Gutierrez was unduly prejudiced by trial counsel's failure. As in this case, trial counsel in *Carter* failed to further question the juror, have him stricken for cause and failed to use a preemptory challenge. The Court found that "[a] guilty verdict without twelve impartial jurors renders the outcome unreliable and fundamentally unfair." Carter, at 860 citing *State v. Krueger, 240 Wis. 2d 644, 623 N.W.2d 211 (2001*).

From this, Mr. Gutierrez is clearly entitled to a new trial.

C. Mr. Gutierrez was denied his right to effective assistance of counsel when trial counsel failed to call as a witness, Andrea Gutierrez who would have testified that A.R. recanted her allegations.

Andrea Gutierrez is David Gutierrez's mother. *Rec. 120, 34*. It is undisputed that she made contact with Mr. Gutierrez's trial counsel, prior to trial,

and told him that A.R. had confessed to her that she had made up the allegations against Mr. Gutierrez. At the December 9, 2016 post-conviction motion hearing, Ms. Gutierrez testified as follows:

> Q: Okay. Thank you. So now I want you to tell me about that conversation. Who brought up the subject?
>
> A: She brought it up because she was crying, and I said Amber, why are you crying. And she said because I want my dad and my mom.
>
> I said you want your dad? Well, he is in jail. According to what you said he molested you and then I said Amber, tell the truth. Did he molest you in any way?
>
> He deserves to be in jail if he touched you inappropriately. It's your testimony put him there. I cannot help you. She said I want my dad, I want my dad. I said I cannot help you.
>
> I said I cannot do that. You have to tell including you have to tell your therapist. You have to let her know. And she also told me I have already told her, but they told me Amber, you already stated your facts and that's it.
>
> They don't' listen to me, Grandma. They don't listen to me she said. I said well, there is nothing I can do, honey, because they said that you, that he molested you. If he did not.

I was angry, Grandma. Can you understand, Grandma, I was sad. Can you understand that? I was angry because I wanted to go to the party. Dad and mom not let me, they grounded me.

I said what party? (Unintelligible) and there is nothing wrong with her. I just wanted to go to party.

Q: So she told you that she made this up because she was angry at Mr. Gutierrez?

A: At my mom and at dad because they both said Amber, you are not going. You are grounded because you went to that party without our permission. You had permission to be in your house with your aunt, not going to any parties. That's what she state. *Rec. 120, 37, 38*.

Mr. Gutierrez asserts that the failure to elicit this testimony was deficient and Mr. Gutierrez was prejudiced by the failure as stated by the Supreme Court in *Strickland V. Washington, 466 U.S. 668 (1984)*.

i. Trial Counsel was deficient

There is no question that trial counsel was aware of this important testimony before trial. He testified to that fact. (12). He also knew that the

evidence was essential to the defense. He had previously stated in Court that "... from the defense point of view, we feel it is extremely important information to our case. *Rec. 114, 4*.

The testimony was easily attainable. The witness was present for the trial and anticipated offering her testimony. *Rec. 120, 42*. She had told counsel that she would testify (13).

Despite the above, Counsel did not call her as a witness and offered the following explanation:

> Q: Now, Andrea was not a witness at trial. Why did you decide not to call her as a witness?
>
> A: Well, several reason. Obviously, I didn't make that decision until it became our turn to present our case in chief.
> So it was going back and forth through my mind, but some of the things that came to my mind is that this was obviously a case about credibility. Does the jury want to believe Amber, or does the jury want to believe David.
>
> So when I thought about his mother testifying, things came to my mind like she cannot be specific about when this statement that Amber told her when that happened. She couldn't

> tell me when it happened.
>
> She couldn't tell me why Amber was there. She couldn't tell me who brought her there. No reason as to why when she was originally told by Amber of the story, why she didn't immediately report it. Why it took so long to get that information to me.
>
> So I had concerns about that because I had nothing to verify. It was only her and Amber. Also in talking with Mrs. Gutierrez, a very nice lady, very religious lady, but I guess I would describe it as a loose cannon.
>
> In talking with her, she loved to talk. And then you would ask a question, then she would just go off on something else. And some of the things said, I felt if that happened on the stand, that wouldn't have been beneficial to our case.
>
> There were, again, I thought that her on cross-examination especially, I thought her credibility would have been undermined. That wouldn't have been beneficial to our case. So that the basic reasons I did not call her. (14-16).

Trial counsel explained that Mrs. Gutierrez could not be specific about when A.R. recanted or the details about what A.R. said. The record demonstrates

exactly the opposite. She testified that the conversation took place in her home in Brownsville, Texas, (36) that it was a conversation that she had in person with A.R. (36) that lasted about one-half hour (36). She was also, very clearly, able to provide very specific testimony:

> Q: So she told you that she made this up because she was angry with Mr. Gutierrez?
>
> A: At mom and dad because they both said Amber, you are not going. You are grounded because you went to that party without our permission. You had permission to be in your house with your aunt, not going to any parties. That what she stated. (38).

Trial counsels only other explanation was his assertion that Mrs. Gutierrez tended to go off on other topics when she was asked a question. Although possibly true, all Counsel would have had to do is redirect her to the specific question. Her testimony at the post-conviction motion hearing is demonstrative. Even though some of her answers could be seen as rambling, when redirected she gave very specific and compelling testimony. Further, that

testimony stood up to the State's cross-examination.

This case rested solely on the credibility of A.R. This testimony would have undeniably affected her credibility.

> Thus, when we look to a lawyer's conduct and measure it against this court's standard to determine effectiveness, we cannot ratify a lawyer's decision merely by labeling it, as did the trial court, "a matter of choice and of trial strategy." We must consider the law and the facts as they existed when trial counsel's conduct *503 occurred. Trial counsel's decision must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied. We will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment. *State v. Felton, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983).* Here, not calling this witness was not rational nor based on any prudent judgment. Trial counsel's performance was therefore ineffective.

i.i. Mr. Gutierrez was prejudiced by trial counsel's ineffective performance.

> In order to demonstrate that counsel's deficient performance is constitutionality prejudicial, 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 the confidence in the outcome. *State v. Thiel, 264 Wis. 2d 571, 587, 665 N.W.2d 305 (2003)* citing *Strickland, 466*

U.S. at 694 and *State v. Pitsch, 124 Wis. 2d 628, 642, 369 N.w.2d 711 (1985)*.

Here, as previously stated, these verdicts rested only on the testimony of A.R. There was no DNA. There was no supporting physical evidence. There was no corroborating testimony. There was no testimony or even suggestion from Mr. Gutierrez that he committed these offenses. As a result, the verdicts were entirely based upon the credibility of A.R. Mrs. Gutierrez's testimony went directly to A.R.'s credibility. It was evidence, from A.R. herself that would have directly contradicted A.R.'s trial testimony which was the *only* evidence that supports the verdicts.

As a result, the confidence in the outcome of this trial is exceedingly undermined. Had trial counsel present this critical testimony there is a reasonable probability of a different outcome.

Conclusion

Based upon the argument above, the Defendant-

Appellant, David Gutierrez, by his counsel, Chris A. Gramstrup, respectfully requests an Order remanding the matter back to circuit court for a new trial.

Dated: April 23, 2018

Chris A. Gramstrup
State Bar No.1014456

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 using a monospaced font. The length of the brief is 48 pages.

Dated: April 23, 2018

Chris A. Gramstrup
State Bar No.1014456

Appendix Table of Contents

Appendix

Certification of Mailing

I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on April 23, 2018. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated: April 23, 2018

Chris A. Gramstrup
State Bar No.1014456

Appellant's Brief Appendix Certification

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 s.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 trial 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.

Dated: April 23, 2018

Chris A. Gramstrup
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