STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP2364-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID GUTIERREZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN GREEN LAKE COUNTY CIRCUIT COURT, THE HONORABLE ANDREW W. VOIGT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ISSUES PRESENTED

1. Did the trial court erroneously exercise its discretion when it allowed the victim to testify that Defendant-Appellant David Gutierrez, her stepfather, began sexually assaulting her when she was six years old?

In this prosecution for three counts each of sexual assault, child enticement, and incest occurring when the victim was twelve years old, the trial court allowed the victim to testify that Gutierrez began sexually assaulting her when she was six years old because it was probative of his motive, intent, and the context of their relationship.

This Court should affirm.

2. Did the trial court erroneously exercise its discretion when it denied the defense motion to admit evidence that unidentified male DNA, not including Gutierrez's, was found on the victim's underwear and on the outside of her mouth?

The trial court allowed the defense to introduce proof that Gutierrez was excluded as a source of male DNA found on the victim's underwear and around her mouth. The court held that the presence of other unidentified male DNA on her underwear and on her mouth was not relevant because the identity of her assailant was not in issue. Also, what little probative value this evidence had was substantially outweighed by the danger of unfair prejudice to the victim and confusion of the issues.

This Court should affirm.

3. Did Gutierrez meet his burden of proving both deficient performance and prejudice to substantiate his claim that trial counsel was ineffective for: (a) not calling Gutierrez's mother to testify at trial that the victim supposedly recanted to her at some unspecified time before trial, and (b) not exercising a peremptory strike against a

prospective juror who said she was unsure whether she could remain fair and impartial because she works with children?

a. The trial court agreed with trial counsel's strategic decision not to call Gutierrez's mother because she would have been an unfocused, easily impeachable witness.

b. The trial court held that Gutierrez failed to prove deficient performance because it believed trial counsel's postconviction testimony that, as is his normal practice, he likely exercised his peremptory strikes against other prospective jurors whom he felt would be more biased against the defense than the equivocating juror would be; and Gutierrez failed to prove prejudice because he did not prove that the juror was objectively or subjectively biased against him.

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 facts presented. In light of the deferential standards of review, this case is appropriate for summary affirmance. Wis. Stat. § (Rule) 809.21.

STATEMENT OF THE CASE

A Green Lake County jury found Gutierrez guilty of three counts of first-degree sexual assault for having sexual contact with a child under age thirteen, three counts of child enticement into secluded places, and three counts of incest by a stepparent. The jury also found Gutierrez not guilty of exposing a child to harmful materials. (R. 46; 118:200–02.) The court sentenced Gutierrez on July 9, 2015, to aggregate concurrent terms totaling twenty years of initial confinement

followed by twenty years of extended supervision. (R. 115:33–36.) The judgment of conviction was entered on July 15, 2015. (R. 60.)

On August 11, 2016, counsel for Gutierrez filed a motion for postconviction relief raising the same issues he raises here. (R. 66.) The trial court held an evidentiary hearing on December 9, 2016, at which trial counsel and Gutierrez's mother testified. (R. 120.)

The court issued an oral decision denying the postconviction motion on February 3, 2017. (R. 127.) It held: (1) that trial counsel made a sound strategic decision not to call Gutierrez's mother to testify about a supposed recantation by the victim at some unspecified time before trial, because she could not give a straight answer and would be easily impeached, (R. 127:3); (2) that Gutierrez failed to prove the equivocating juror who remained on the jury was not fair and impartial, and given trial counsel's normal practice to strike those jurors who would most likely be biased against the defense, counsel likely decided that this equivocating juror would less likely be biased than the others on whom he used his peremptory strikes. (R. 127:6–9.)

The court issued a written order denying the motion on February 21, 2017. (R. 72.) Gutierrez appeals from the judgment and from the order denying postconviction relief. (R. 75.)

Statement of facts relevant to the sexual abuse of A.R. beginning when she was six years old

The State filed pretrial motions to introduce evidence that the sexual abuse by Gutierrez against his stepdaughter, A.R., began when she was six years old. (R. 33; 40.) The trial court eventually held that the State could introduce the victim's testimony that Gutierrez began sexually assaulting her when she was six years old. The court held that it was relevant to show the context of their relationship; it was at

age six that Gutierrez began grooming his stepdaughter for escalated sexual activity later on. (R. 110:29–35; 105:51–54.)

At trial, A.R. described the three separate charged incidents of sexual contact, child enticement and incest by stepparent that occurred in 2011–12, when she was twelve years old, in which Gutierrez took his stepdaughter into secluded places and performed oral sex on her, forced her to perform oral sex on him to the point of ejaculation, and attempted vaginal intercourse. (R. 116:150–54, 155–57, 157–59.)

A.R. gave a consistent account of the incident that occurred on November 1, 2012, at her home in the Village of Kingston to a Green Lake County sheriff deputy who briefly interviewed her at school around 5 p.m. the next day, November 2, 2012, shortly after the assault was reported by the school principal. (R. 117:120–23, 137–38.) A.R. also gave a similar account to the Sexual Assault Nurse Examiner who interviewed and examined her at the hospital later that night, November 2, 2012. (R. 117:174, 180–83.)

Consistent with the trial court's pretrial ruling, A.R. also testified that when she was "little," Gutierrez took her into a closet, offered her candy, and molested her, but he stopped when she began to cry. (R. 116:154.) On cross-examination, A.R. recalled that the closet incident occurred when she was six years old, but she could not recall in what city or state it happened. (R. 116:181.)[1] A licensed psychotherapist and expert on child sexual assault testified that it is difficult for a child A.R.'s age to remember the date and location of an assault that occurred when she was six years old. (R. 117:161.) A.R. also told the Sexual Assault

[1] The State also introduced into evidence the videotape of the November 2, 2012, forensic interview of A.R. by child abuse and neglect investigator Jessica Cody. The recorded interview was consistent with her trial testimony. (R. 116:121–23, 146–47.)

Nurse Examiner that the November 1, 2012, assault by Gutierrez was not the first one. A.R. told the nurse that Gutierrez began sexually assaulting her when she was "little." (R. 117:188–89.)

Gutierrez testified and denied ever sexually assaulting A.R. He explained that A.R. and her cousins made this all up because A.R. was mad at him and her mother for grounding her, and for not allowing A.R. to stay with her cousins on November 1, 2012. (R. 118:21–32.) He specifically denied engaging in sexual activity with A.R. in a closet when she was six years old. Gutierrez explained that he was living in Texas and not with A.R. at that time. (R. 118:33.) Gutierrez also admitted that he had eleven prior convictions. (*Id*.)

The trial court instructed the jury that evidence of the assault in the closet at age six was introduced for the limited purposes of proving motive and context or background. It was not to be used to prove bad character or a character trait. (R. 118:91–92.) In his closing argument, the prosecutor maintained that A.R. has known sexual abuse by Gutierrez since she was six years old. (R. 118:114.)[2]

Statement of facts relevant to the DNA issue

Gutierrez moved before trial to admit State Crime Laboratory test results showing that unidentified male DNA was found on A.R.'s mouth and underwear, and that Gutierrez was excluded as a source. (R. 105:3–7.) The prosecutor argued that this evidence was irrelevant to the issues in dispute, it would violate the Rape Shield Law, and it would invite jury speculation. (R. 105:8–11.) The prosecutor noted that the crime lab report specifically determined that the source of the male DNA on the child's mouth and underwear was from neither semen nor saliva. Its origin could

[2] The prosecutor also briefly mentioned the closet incident at age six in his opening statement. (R. 116:101–03, 105.)

not be explained. Also, it was not clear whether the tested underwear was the same underwear A.R. wore when assaulted by Gutierrez on November 1, 2012. (R. 105:8–10.) It would also be unfairly prejudicial to the victim. (R. 105:11.)

The trial court pointed out that "[n]o one knows what this is." (R. 105:38–39.) It is not saliva or semen, and it could be a skin cell or hair follicle. It has "extremely limited" relevance. (R. 105:39–40.) The only possible inference is the one prohibited by the Rape Shield Law, namely, that the evidence related to the victim's sexual history with other males. (*Id.*) The court held that the absence of Gutierrez's DNA is relevant (R. 105:41, 44–45), but the presence of other, unidentified male DNA is not. (R. 105:41–42.) It would run afoul of the Rape Shield Law (*id.*), and invite "rampant speculation" to allow this evidence in (R. 105:51).

Gutierrez presented the testimony of State Crime Laboratory DNA Analyst Samantha Delfoss, who testified that Gutierrez's DNA was not found on any of the items she tested. (R. 118:12.) On cross-examination, Delfoss testified that no semen or saliva was found on any of the items and that DNA can be washed off. (R. 118:14–15.) It is unlikely that an examiner would find evidence of ejaculate on a victim's mouth twenty-four hours after the assault because it can be easily removed by a number of normal everyday activities including, washing, eating, and brushing teeth. (R. 118:15.)

Statement of facts relevant to the ineffective assistance claims

1. Defense counsel, Attorney Jeffrey Haase, revealed at a pretrial hearing held on September 4, 2014, that Gutierrez's mother, Andrea Gutierrez, told Gutierrez in a telephone call on July 22, 2014, that A.R. recanted when visiting her in Texas on an unspecified date. Gutierrez did not tell Haase about the telephone conversation until August. As of the hearing date, Haase had not yet been able to contact Andrea Gutierrez. (R. 114:3.) Attorney Haase announced at

the outset of trial that he decided not to call Andrea Gutierrez as a defense witness. (R. 116:12–13.)

In his postconviction testimony, Haase explained why he decided against calling Andrea Gutierrez, even though she came from Texas to Wisconsin for the trial. Andrea could not specify when A.R. recanted to her, why A.R. was with her in Texas, who brought her there, why Andrea did not report her recantation immediately, and why it took so long for anyone to tell Haase about it. (R. 120:14–15.) Haase had nothing with which to verify this information; it was only A.R.'s word against Andrea's.[3] Haase described Andrea as a "loose cannon" who could not stay focused, went off on tangents, and might make inculpatory statements. Her credibility could be undermined on cross-examination. (R. 120:15–17.) Haase feared that she would "hurt our case." (R. 120:16.) Andrea might discuss her son's past, and the jury might see her testimony as a desperation ploy by the defense. (R. 120:17.)

Haase made the decision not to call Andrea after he met with her in person before trial. Haase believed he could control her on direct, but he was fearful how she would perform on cross-examination by the prosecutor. (R. 120:27–28.) The State also was in possession of negative information about the relationship between Gutierrez and his mother that might come out on cross-examination at trial. (R. 120:31.)

Andrea Gutierrez testified by telephone at the postconviction hearing. Suffice it to say that counsel's fears about the quality of her testimony were well-founded. She went off on tangents, did not answer direct questions, and was hopelessly non-specific as to dates and times. (R. 120:34–52.) On brief and rather tepid cross-examination, Andrea said she did not know A.R.'s birthday (R. 120:46–47); she said A.R. recanted on a visit to her Texas home "in February," but she

[3] In her trial testimony, A.R. specifically denied recanting to her grandparents in Texas. (R. 116:182.)

did not know what year (R. 120:47); she only knew that it was some time after her son was arrested in 2012 (R. 120:48–49); before the recantation visit, Andrea last saw A.R. in Iowa when she was only seven years old (R. 120:47–49, 52); while Gutierrez is her son, Andrea has no blood relationship to A.R. (R. 120:49); and a court order was issued preventing Andrea from having any contact with A.R. (R. 120:52). Also, the nature of the child's recantation to her is suspect. A.R. supposedly started crying because she missed her family. She recanted only after Andrea reminded A.R. that it was her testimony that put her stepfather in jail and broke up the family. (R. 120:36–37.)

The trial court held that counsel's strategic decision not to call Andrea was reasonable. It held that she veered off on tangents, and her credibility would have been hurt on far more aggressive cross-examination at trial, just as Attorney Haase feared. (R. 120:81–84.) The court found that her testimony "didn't make a whole lot of sense" (R. 120:82–83), and the jury would have "gotten lost" (R. 120:83).

2. Toward the end of voir dire, defense counsel asked the prospective jurors collectively whether any of them believed they would have difficulty remaining fair and impartial due to the type of crimes alleged. One person immediately answered that she had already made up her mind and was excused by the court for cause. (R. 116:67–68.) Prospective juror Rita Golz then answered the same question as follows: "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." (R. 116:69.)

Attorney Haase moved to strike Golz for cause. The prosecutor responded that "we need a little more certainty." (R. 120:69.) The trial court did not immediately rule on the motion, apparently intending to take it up later. It never did. No one asked Golz any follow-up questions. Attorney Haase

did not exercise a peremptory strike against Golz, and she remained on the jury.

Attorney Haase testified at the postconviction hearing that he could not specifically recall why he did not strike Golz peremptorily after the court did not rule on his motion to strike her for cause. (R. 120:8–10, 29.) Haase did not believe that he overlooked this. He ran a CCAP check on all of the prospective jurors before voir dire. (R. 120:29.) Haase believed that he must have decided to keep Golz on the jury, despite having moved to strike her for cause, because he used all of his strikes on other prospective jurors he wanted off of the jury before her. That, Haase testified, is his usual practice, namely, to exercise peremptory strikes against those who are most likely to be biased against the defense, even though there may be others he would like to remove had he more peremptory strikes at his disposal. (R. 120:10, 30–31.)

The trial court ruled that juror Golz's answer was equivocal; it was "hardly a definite statement that she was unable to be impartial" because she worked with kids. (R. 127:8.) Golz also had plenty of opportunity to speak up if she truly believed she could not be fair and impartial. Finally, the court accepted Haase's explanation that he likely kept Golz on the jury because there were other jurors ahead of her that he preferred to peremptorily strike and did. (R. 127:9.)

STANDARD OF REVIEW

1. The decision whether to admit or exclude other-acts evidence is addressed to the sound discretion of the trial court. If there is a reasonable basis for the trial court's ruling, the appellate courts will not find an erroneous exercise of discretion. *State v. Hurley*, 2015 WI 35, ¶ 28, 361 Wis. 2d 529, 861 N.W.2d 174. The reviewing court may consider acceptable purposes for the admission of the evidence beyond those relied on by the trial court to uphold its decision. *Id.* ¶ 29.

2. On review of an ineffective assistance of counsel challenge, this Court is presented with a mixed question of law and fact. The trial court's findings of historical fact and credibility determinations will not be disturbed unless they are clearly erroneous. The ultimate determinations based upon those findings of fact and credibility determinations—whether counsel's performance was deficient and prejudicial—are questions of law subject to independent review in this Court. *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801; *State v. Johnson*, 153 Wis. 2d 121, 127–28, 449 N.W.2d 845 (1990); *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

ARGUMENT

I. The trial court properly exercised its discretion to admit the victim's testimony that Gutierrez began sexually assaulting her when she was six years old.

A. A.R.'s testimony about the sexual assault by Gutierrez in the closet at age six was relevant to prove the context of their relationship; it was also probative of Gutierrez's motive and intent to have sexual contact with his stepdaughter in secluded places on three occasions when she was twelve years old during 2011–12.

Evidence must be relevant to be admissible. There are two components to the question of relevance: the evidence must relate to a fact of consequence to the determination of the action, and it must have some tendency to make that consequential fact more or less probable than it would be without the evidence. Wis. Stat. § (Rule) 904.01; *Hurley*, 361 Wis. 2d 529, ¶ 77; *State v. Davidson*, 2000 WI 91, ¶ 64, 236 Wis. 2d 537, 613 N.W.2d 606. S*ee also In re Commitment of*

Talley, 2017 WI 21, ¶¶ 52–54, 373 Wis. 2d 610, 891 N.W.2d 390 (Abrahamson, J., concurring) (the concepts of relevancy and materiality have been used interchangeably; evidence is material if it is probative of a matter in issue, and relevancy is the tendency of that evidence to prove a material proposition).

Assuming it is relevant, the evidence is admissible if its probative value is not substantially outweighed by the danger of unfair prejudice or confusion of the issues. Wis. Stat. § (Rule) 904.03. The evidence is *unfairly* prejudicial "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." *Davidson*, 236 Wis. 2d 537, ¶ 73 (citation omitted).

The trial court properly held on postconviction review that evidence of the sexual assault of A.R. at age six in the closet was relevant and admissible to prove his motive and intent, and to put his relationship with his stepdaughter in its proper context. *Davidson*, 236 Wis. 2d 537, ¶ 53.

1. The evidence was relevant and admissible to put A.R.'s relationship with her stepfather in context.

Both Gutierrez and the trial court erroneously labeled this as "other acts" evidence when it is nothing more than relevant evidence of something that happened between the same two people under similar circumstances in the past, inextricably linking the past event with the charged events. This is unlike the typical "other acts" cases where the prior acts involve a different victim than the one in the charged act(s).

Evidence that is "part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime" is relevant

and admissible. *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515. *See State v. Seefeldt*, 2002 WI App 149, ¶ 23, 256 Wis. 2d 410, 647 N.W.2d 894 (same). Such context evidence is, indeed, not considered "other acts" or "bad character" evidence at all. *State v. Bauer*, 2000 WI App 206, ¶ 7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902.

In *State v. Jensen*, 2011 WI App 3, ¶ 85, 331 Wis. 2d 440, 794 N.W.2d 482, this Court held that, even if inadmissible as other-acts evidence, evidence showing that Jensen left pornographic photographs around the house to torture the victim was admissible as "part of the panorama of evidence" surrounding the victim's murder because it "involved the relationship between the principal actors . . . and traveled directly to the State's theory as to why Jensen murdered [his wife]." *See also United States v. Miller*, 327 F.3d 598, 603 (7th Cir. 2003) ("[U]nder the inextricably intertwined doctrine, testimony relating to the chronological unfolding of events that led to an indictment, or other circumstances surrounding the crime, is not evidence of 'other acts' within the meaning of Rule 404(b)."); *Dukes*, 303 Wis. 2d 208, ¶ 30 (evidence of a prior act was introduced to show the defendant's house was a "drug house," an essential element of the charged offense).

Even if the prior assault is considered "other acts" evidence under Wis. Stat. § 904.04(2), it is relevant and admissible if it establishes the context of the crime and provides a complete explanation of the case. *State v. Hunt,* 2003 WI 81, ¶ 58, 263 Wis. 2d 1, 666 N.W.2d 771; *State v. Clemons*, 164 Wis. 2d 506, 514–15, 476 N.W.2d 283 (Ct. App. 1991).

Evidence that Gutierrez sexually assaulted his six-year-old stepdaughter in a closet was inextricably intertwined with A.R.'s allegations that he continued to sexually assault her in secluded places when she was twelve years old. It put

the nature of their relationship in context. Due to the nature of their familial relationship, A.R. was unlikely to report what happened to her at age six, or to report the two incidents in 2011–12 leading up to the November 1, 2012, assault that finally provoked her to report Gutierrez to her school principal and to police. (R. 117:152–56); *Hurley*, 361 Wis. 2d 529, ¶ 33. "[A]ssaults committed by a stepfather against a young girl constitute a compelling reason for the delay in reporting." *Id.* ¶ 43. Gutierrez "held a position of authority over [A.R.] as her stepfather." *Id.* ¶ 45.

The assault on A.R. at age six in the closet gives context to and completes the story of the charged crimes. It explains that the assaults in 2011–12 did not happen out of the blue. Those acts represented the culmination of similar sexual abuse perpetrated by Gutierrez on A.R. that began six years earlier and ended with her finally mustering up the courage to report her abusive stepfather on November 2, 2012. The fact that A.R. could not specify the precise date or location of the assault in the closet at age six is unimportant. *See Hurley*, 361 Wis. 2d 529, ¶ 42 ("At age six, [the victim] was still a young child. At this young age, it is highly unlikely that she could particularize the dates or the sequences in which the assaults occurred.").

This evidence was also not unfairly prejudicial. If the jury accepted the defense theory that A.R. made up the 2011–12 sexual assault allegations to get back at Gutierrez for grounding her, it would not have believed her trial testimony that Gutierrez also assaulted her when she was six.

2. Assuming the assault on A.R. in the closet when she was six is appropriately labeled "other acts" evidence, it was relevant and admissible to prove Gutierrez's motive and intent.

In exercising its discretion to admit other-acts evidence, the trial court must apply the three-step analytical framework established in *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998). *Hurley*, 361 Wis. 2d 529, ¶ 57.

Step one is for the court to determine whether the other-acts evidence is offered for a permissible purpose under Wis. Stat. § 904.04(2), such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id*. at 772. While the State must prove a proper purpose, that first step is 'hardly demanding." *State v. Payano*, 2009 WI 86, ¶ 63, 320 Wis. 2d 348, 768 N.W.2d 832 (quoting 7 Daniel D. Blinka, *Wisconsin Practice: Wisconsin Evidence Series,* § 404.6 at 180 (3d ed. 2008)) (citations and footnote omitted).

Step two is to determine whether the other-acts evidence is relevant to proving those permissible purposes. The court must determine whether the evidence relates to a fact or proposition that is of consequence to the determination of the action. If so, the court must then determine whether the evidence has probative value in that it has a tendency to make the consequential fact or proposition more or less probable than it would be without the evidence. *Sullivan*, 216 Wis. 2d at 772.

Step three is to determine whether the probative value of the other-acts evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of time, or other similar concerns. *Id*. at 772–73.

The State bears the burden of proving the first two steps in the *Sullivan* analysis, proper purpose for admissibility and relevance. Once the State meets that burden, the defendant must then prove that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and the like. *Hurley*, 361 Wis. 2d 529, ¶ 58. If the probative value of the evidence is close or equal to its unfairly prejudicial impact, it should be admitted. *Payano*, 320 Wis. 2d 348, ¶ 80.

Other-acts evidence is not prohibited if it is offered for a purpose other than as circumstantial proof of the defendant's bad character or to show that the defendant had a propensity to commit the act charged. *Payano*, 320 Wis. 2d 348, ¶ 62. The trial court specifically instructed the jury not to use the sexual assault on A.R. at age six as proof of Gutierrez's bad character or propensity to assault children. (R. 118:91–92.)

Wisconsin courts must permit a greater latitude of proof when considering the admissibility of other crimes, wrongs, or acts evidence in child sexual assault cases. *Hurley*, 361 Wis. 2d 529, ¶ 59. This time-honored rule has developed because of the recognized difficulties child sexual assault victims have in testifying about these very personal offenses, and the difficulties prosecutors face in obtaining admissible corroborative evidence in such cases. *Id.* ¶ 52. The "greater latitude" rule is not a substitute for the three-part *Sullivan* analysis; it is to be applied at each step of the analysis. *Id.* ¶ 53. The "greater latitude" rule is intended to "help[ ] other acts evidence to come in" under Wis. Stat. § 904.04(2). *State v. Hammer*, 2000 WI 92, ¶ 23, 236 Wis. 2d 686, 613 N.W.2d 629. "Other-acts evidence is particularly relevant in child sexual assault cases because an average juror likely presumes

that a defendant is incapable of such an act." *Hurley*, 361 Wis. 2d 529, ¶ 59. It is also admissible to corroborate the child's testimony. *Id.*[4]

Other-acts evidence is, indeed, admissible in child sexual assault prosecutions even when the acts are of a different nature and the victims are of different genders because the prior child sexual assault is probative of the defendant's desire to seek sexual gratification from children. *State v. Tabor*, 191 Wis. 2d 483, 494–95, 529 N.W.2d 915 (Ct. App. 1995).

Other-acts evidence is properly admitted to prove the elements of the charged offenses, even when those elements are not in dispute. *State v. Veach*, 2002 WI 110, ¶ 77, 255 Wis. 2d 390, 648 N.W.2d 447; *Davidson*, 236 Wis. 2d 537, ¶ 65. "Sexual contact" under Wis. Stat. § 948.02(1)(e), requires the State to prove the "intentional touching" of the victim's or defendant's "intimate parts," "for the purpose of . . . sexually arousing or gratifying the defendant." Wis. Stat. § 948.01(5)(a). The assault on A.R. in the closet when she was six years old tended to prove that Gutierrez intended to touch her intimate parts, and to have her touch his, for the purpose of his own sexual arousal and gratification when he assaulted her on multiple occasions at age twelve. *Hurley*, 361 Wis. 2d 529, ¶¶ 73–74.

Closely related, other-acts evidence is properly admitted to establish the defendant's motive and intent. *Hurley*, 361 Wis. 2d 529, ¶¶ 71–73; *Payano*, 320 Wis. 2d 348, ¶ 65; *Hunt*, 263 Wis. 2d 1, ¶ 60. While motive is not an element of the crime, it is circumstantial evidence that is

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

probative of the intent element. *See* Wis. JI–Criminal 175 (2000). Motive is one of the permissible purposes for admissibility listed in Wis. Stat. § 904.04(2). *State v. Normington*, 2008 WI App 8, ¶ 20, 306 Wis. 2d 727, 744 N.W.2d 867. There were "distinct similarities" between the incident in the closet at age six and the charged offenses here. *Davidson,* 236 Wis. 2d 537, ¶ 75.

The assault on A.R. in the closet when she was six tended to prove that Gutierrez's motive and intent when he also touched her intimate parts in 2011–12 was to become sexually aroused and gratified. The passage of roughly six years here is insignificant. *E.g.*, *Hurley*, 361 Wis. 2d 529, ¶ 85 (25 years between offenses); *Veach*, 255 Wis. 2d 390, ¶ 83 (eleven years); *Davidson*, 236 Wis. 2d 537, ¶¶ 6, 10 (nine years).

Other-acts evidence is properly admitted to defeat a defendant's innocent explanation for his conduct. *Veach*, 255 Wis. 2d 390, ¶ 84; *Sullivan*, 216 Wis. 2d at 784. The assault on A.R. when she was six, if believed, tended to disprove Gutierrez's innocent explanation that A.R. made up the accusations in 2011–12 at age twelve because she was mad at him for grounding her on November 1, 2012.

When the evidence is offered for permissible purposes, and is relevant to material issues other than mere propensity, it is admissible unless the defendant proves that its established probative value is substantially outweighed by the danger of unfair prejudice. *Payano,* 2009 WI 86, ¶ 80. It is not enough to prove that the evidence is prejudicial because nearly all relevant evidence is prejudicial to the party opposing it. The issue is whether the resulting prejudice is *unfair*. *Id.* ¶ 88. The issue is whether the other-acts evidence will influence the outcome by causing the jury to draw the forbidden propensity inference despite limiting instructions directing the jury not to do so. *Id.* ¶ 89.

Similarities may render the prior acts highly probative of the charged offenses, thereby outweighing the danger of unfair prejudice. *Davidson,* 236 Wis. 2d 537, ¶ 75. The similarities here were striking and probative of all nine offenses. The sexual conduct was similar. As did the charged acts, the prior act involved taking A.R. into a secluded place – a closet – to engage in sexual contact. Wis. Stat. § 948.07(1). As did the charged acts, the prior act involved sexual contact with A.R. by her stepfather. Wis. Stat. § 948.06(1m).

Cautionary jury instructions also serve to limit the potential for unfair prejudice. *Hurley*, 361 Wis. 2d 529, ¶¶ 89–90; *Payano*, 320 Wis. 2d 348, ¶ 99*; Davidson*, 236 Wis. 2d 537, ¶ 78. Jury instructions limiting the use of this evidence to prove motive, intent, and context were given here. (R. 118:91–92.) The jury presumably followed those limiting instructions. *State v. Johnston*, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994); *State v. Olson*, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998).

The evidence of Gutierrez's sexual assault of A.R. at age six was properly offered for permissible purposes. It was relevant and probative of those permissible purposes. Its "great probative value" was not outweighed by its prejudicial impact. *Hurley*, 361 Wis. 2d 529, ¶ 87. Gutierrez failed to prove that its high probative value was substantially outweighed by the danger of unfair prejudice given the court's limiting jury instruction. The trial court properly exercised its discretion to allow A.R. to testify about the prior act because it was highly probative of the charged acts.

II. The trial court properly exercised its discretion when it did not allow Gutierrez to introduce evidence that unidentified male DNA was found on A.R.'s underwear and on the outside of her mouth.

The trial court properly exercised its discretion when it (a) allowed Gutierrez to introduce evidence that he was excluded as a source of DNA found on A.R.'s underwear and her mouth, but (b) would not allow Gutierrez to introduce proof that DNA of other unidentified males was found on her underwear and mouth. (R. 105:8–11, 41–45.)

As noted above, 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.

Evidence that unidentified male DNA was found on A.R.'s underwear, recovered as it was from a pile of dirty laundry (R. 105:13–14), was irrelevant to the issues in dispute. The same holds true for the unidentified male DNA found on her mouth. (R. 105:4, 8–9.) The crime lab analyst found neither semen nor saliva on any of the tested items. (R. 118:14–15.) There was no evidence that Gutierrez ejaculated on or had any direct oral contact with her underwear. The identity of A.R.'s assailant was not in dispute. She unequivocally testified that Gutierrez, her stepfather, assaulted her and did so repeatedly. She was not mistaken or confused. The defense theory was that A.R. lied: she was mad at Gutierrez for grounding her and she completely made up these false accusations. The absence of Gutierrez's DNA on her underwear and mouth was relevant and properly received. The presence of one or more other unidentified persons' DNA was not relevant to proving whether A.R. made up these accusations.

As the trial court correctly observed, allowing in evidence that unidentified male DNA was found on A.R.'s underwear or mouth could lead to "rampant speculation" by the jury. (R. 105:51.) It certainly would confuse the issues. Wis. Stat. § 904.03. And, it would prejudice the victim by creating the forbidden inference that she may have had sexual contact or intercourse with one or more other men (or boys). Wis. Stat. § 972.11(2)(b). The absence of semen in the underwear also makes the DNA found therein irrelevant under the exception in section 972.11(2)(b)2., allowing for proof of the "source or origin of semen."

Proof that other men (or boys) had contact directly or indirectly with her underwear or mouth at some unspecified time(s), but did not leave semen or saliva behind, proved nothing and would only prejudice and confuse the jury. The trial court properly exercised its discretion to avoid "rampant speculation." (R. 105:51.)

III. Gutierrez failed to prove that trial counsel was ineffective for: (a) not calling Gutierrez's mother, Andrea, as a witness, and (b) not exercising a peremptory strike against Juror Golz.

A. The law applicable to an ineffective assistance of trial counsel challenge

Gutierrez bore the burden of proving at the postconviction hearing that the performance of his trial counsel was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Johnson*, 153 Wis. 2d at 127.

To establish deficient performance, it would not be enough for Gutierrez to prove that his attorney was "imperfect or less than ideal." *State v. Balliette*, 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334. The issue is "whether the attorney's performance was reasonably effective

considering all the circumstances." *Id.* Counsel is strongly presumed to have rendered reasonably competent assistance. *Id.* ¶¶ 25, 27. It is strongly presumed that counsel exercised reasonable professional judgment, and that counsel's decisions were based on sound trial strategy. *State v. Maloney*, 2005 WI 74, ¶ 43, 281 Wis. 2d 595, 698 N.W.2d 583. *See Eckstein v. Kingston*, 460 F.3d 844, 848–49 (7th Cir. 2006) (same). Gutierrez had to present facts sufficient to overcome that strong presumption. *Balliette*, 336 Wis. 2d 358, ¶ 78. "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland,* 466 U.S. at 690).

This Court is not to evaluate counsel's conduct in hindsight, but must make every effort to evaluate counsel's conduct from counsel's perspective at the time. *McAfee*, 589 F.3d at 356. Gutierrez was not entitled to error-free representation. Trial counsel need not even be very good to be deemed constitutionally adequate. *Id.* at 355–56. *Accord State v. Wright*, 2003 WI App 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386. Ordinarily, a defendant does not prevail unless he proves that counsel's performance sunk to the level of professional malpractice. *Maloney*, 281 Wis. 2d 595, ¶ 23 n.11.

Regarding prejudice, Gutierrez bore the burden of proving at the postconviction hearing that counsel's errors were so serious they deprived him of a fair trial, a trial whose result is reliable. *Johnson*, 153 Wis. 2d at 127. He had to prove a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *McAfee*, 589 F.3d at 357. *See Trawitzki,* 244 Wis. 2d 523, ¶ 40; *Johnson*, 153 Wis. 2d at 129. Gutierrez could not speculate. He had to affirmatively prove prejudice. *Balliette,* 336 Wis. 2d 358, ¶¶ 24, 63, 70; *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. "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).

The court need not address both the deficient performance and prejudice components if it is satisfied that Gutierrez failed to make a sufficient showing as to either one of them. *State v. Mayo*, 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115.

B. Counsel had sound strategic reasons for not calling Gutierrez's mother as a witness.

One need only read Andrea Gutierrez's postconviction testimony to see why defense counsel reasonably decided not to call her as a defense witness. Her testimony was rambling nonsense. She could not stay on point and evaded the simplest of answers. She lacked any credibility. (R. 120:34–52.)

Andrea Gutierrez had no idea when A.R. supposedly recanted to her. She could only recall that it occurred "in February" sometime after Gutierrez's arrest in November 2012. (R. 120:47.) She did not bother to tell her son about A.R.'s supposed recantation until July 22, 2014. (R. 114:3.) Defense counsel did not learn of it until August. (*Id.*) Andrea did not explain why she failed to tell anyone as soon as A.R. supposedly recanted "in February." (R. 120:47.) Her credibility would likely have been destroyed on cross-examination at trial, given that it was severely damaged by the limited cross-examination at the postconviction hearing.

The direct harm inflicted on Andrea's credibility would no doubt also indirectly reflect badly on her son's credibility. No reasonably competent defense attorney would have introduced testimony of such dubious credibility. Attorney Haase reasonably decided not to do so. Accordingly, defense counsel's performance was not deficient, and this Court need not address the prejudice prong to affirm.

C. Defense counsel's failure to strike juror Golz did not deny Gutierrez his right to an impartial jury.

Gutierrez bore the burden of proving that a biased juror sat on his jury. *State v. Traylor*, 170 Wis. 2d 393, 400–01, 489 N.W.2d 626 (Ct. App. 1992). Juror Golz is presumed to have been fair and impartial. Gutierrez bore the burden of overcoming that presumption with proof that she was subjectively or objectively biased against him. *State v. Funk*, 2011 WI 62, ¶ 63, 335 Wis. 2d 369, 799 N.W.2d 421; *State v. Smith*, 2006 WI 74, ¶ 19, 291 Wis. 2d 569, 716 N.W.2d 482, (citing *State v. Louis*, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990)).

Subjective bias is a factual determination that will be upheld on appeal unless clearly erroneous. *State v. Tobatto*, 2016 WI App 28, ¶ 17, 368 Wis. 2d 300, 878 N.W.2d 701. The determination whether a particular juror was objectively biased is a matter "best left to the case-by-case discretion of the circuit court." *Smith*, 291 Wis. 2d 569, ¶¶ 17, 23. The issue of objective bias presents a mixed question of fact and law; this Court gives weight to the circuit court's factual determinations on objective bias and should not reverse unless, as a matter of law, a reasonable judge could not have reached such a conclusion. *Id.*; *State v. Kiernan*, 227 Wis. 2d 736, 745, 596 N.W.2d 780 (1999).

Subjective bias is closely related to actual bias. It is revealed by the prospective juror's words and actions during voir dire, exposing her state of mind. *Tobatto*, 368 Wis. 2d 300, ¶ 19. Objective bias occurs if a reasonable juror in the prospective juror's position objectively could not judge the case in a fair and impartial manner. *State v. Mendoza*, 227 Wis. 2d 838, 850, 596 N.W.2d 736 (1999). This test assumes that the prospective juror has formed an opinion or has some knowledge of the case. The question then becomes whether a reasonable person in the prospective juror's position could set

that opinion or that knowledge aside and decide the case in a fair and impartial manner. *Id.*

There is no prejudice if the final panel chosen did not include any juror who was biased against Gutierrez. *State v. Koller*, 2001 WI App 253, ¶ 14, 248 Wis. 2d 259, 635 N.W.2d 838; *State v. Lindell*, 2001 WI 108, ¶¶ 51–53, 131, 245 Wis. 2d 689, 629 N.W.2d 223. "The prejudice issue here is whether [Gutierrez's] counsel's performance resulted in the seating of a biased juror,not whether a differently composed jury would have acquitted him." *Koller*, 248 Wis. 2d 259, ¶ 14.

In denying Attorney Haase's motion to strike Juror Rita Golz for cause, and holding that Haase did not perform deficiently for leaving her on the jury, the trial court implicitly determined that Gutierrez failed to prove that Juror Golz was subjectively or objectively biased. That factual determination is not clearly erroneous. *Tobatto*, 368 Wis. 2d 300, ¶ 17. The record supports the trial court's implicit determination that she was not biased even if its reasoning was incomplete. *Id.*; *see also id.* ¶ 26 ("The record supports the trial court's implicit conclusion that Juror 10 was not subjectively biased.").

Juror Golz was not subjectively or objectively biased. She had no prior knowledge of or opinions about the case. She never stated that she could not or would not remain impartial. She was not unwilling to change her mind. She merely expressed uncertainty: "I don't know if I could be impartial. I work with kids." (R. 116:69.) Juror Golz did not have to unequivocally declare that she would be fair and impartial so long as she was honest about her equivocation. *Tobatto*, 368 Wis. 2d 300, ¶ 22. Because Juror Golz's answer did not "unequivocally reveal[ ] subjective bias," trial counsel was not ineffective for failing to remove her from the jury with a peremptory strike *Id.*

A prospective juror is not subjectively biased merely because she equivocated when answering questions about her

impartiality. A prospective juror need not give "unequivocal assurances" of her ability to set aside her experience as a victim and render an impartial verdict. *State v. Oswald*, 2000 WI App 3, ¶ 19, 232 Wis. 2d 103, 606 N.W.2d 238 (citing *Kiernan*, 227 Wis. 2d at 750 n.10). The trial court is in the best position to determine whether equivocal responses such as "probably" or "I'll try" are sincere. *Id.* "There are no magical words that need be spoken by the prospective juror, and the juror need not affirmatively state that he or she can 'definitely' set the bias aside." *Id.* ¶ 6 (quoting *Ferron*, 219 Wis. 2d at 501). *Accord State v. Jimmie R.R.*, 2000 WI App 5, ¶ 28, 232 Wis. 2d 138, 606 N.W.2d 196. This is so because: "[A] prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality. Indeed, we expect a circuit court to use voir dire to explore a prospective juror's fears, biases, and predilections and fully expect a juror's honest answers at times to be less than unequivocal." *State v. Erickson*, 227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999).[5]

Before Attorney Haase questioned Golz toward the end of voir dire, the trial court struck for cause one person who worked at the jail and knew Gutierrez while he was incarcerated and declared he would "have a hard time" remaining fair and impartial. (R. 116:44–45). The court also struck for cause other jurors: a person who was a close friend of defense counsel and declared he might not be impartial, (R. 116:45–47); a person whose stepson was a victim of sexual

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[5] Few people can honestly tell the court that they are bothered by some of these factors in the case and then absolutely, without equivocation, reassure the judge that they are certain they can disregard their concerns. Most honest people can only commit that they will do their best to be fair.

State v. Ferron, 219 Wis. 2d 481, 507, 579 N.W.2d. 654 (1998) (Geske, J., dissenting), *abrogated on other grounds by State v. Lindell,* 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223. *See Lindell*, 245 Wis. 2d 689, ¶101.

assault and for that reason the juror was unlikely to be fair and impartial, (R. 116:52–54); a person who held religious beliefs against passing judgment on another, (R. 116:63–64); and a person who said his "mind [was] made up" due to the nature of the crimes. (R. 116:67–68.)

Before Attorney Haase questioned Juror Golz, the trial court asked all of the prospective jurors collectively whether anyone had a feeling of bias or prejudice against either side, or had an opinion as to guilt or innocence. No one, including Juror Golz, raised his or her hand. (R. 116:51–52.) The trial court then asked all of them collectively whether anyone cannot or will not try the case fairly and impartially based only on the evidence presented and the law. Again, there were no hands. (R. 116:56.) When he began questioning the jurors, defense counsel reminded them of the presumption of innocence and the State's burden of proving Gutierrez guilty beyond a reasonable doubt. (R. 116:65–66.)

Juror Golz did not raise her hand when asked whether she was in fact biased for or against either side, whether she had an opinion as to Gutierrez's guilt or innocence, and whether she would try the case impartially based only on the evidence and the law presented. Presumably, she heard and understood defense counsel's statement regarding the presumption of innocence and the State's burden of proof. Juror Golz did not speak up when others were dismissed for being biased and not impartial. And she did not feel the need to speak up when finally selected to sit on the jury. Based upon all these facts, it was reasonable for both defense counsel and the trial court to believe that Juror Golz's equivocation during voir dire ultimately did not adversely affect her ability to fairly and impartially decide this case along with the other fair and impartial jurors.

Gutierrez failed to prove subjective or objective bias. *Cf. State v. Carter*, 2002 WI App 55, ¶¶ 3, 8, 15, 250 Wis. 2d 851, 641 N.W.2d 517 (in a sexual assault trial, a prospective juror

said he would be biased against the defendant because his brother-in-law had been sexually assaulted and, when asked whether that would influence his ability to be fair and impartial, the juror unequivocally answered, "yes," but defense counsel did not strike him. *Id.* ¶ 3. Trial counsel was ineffective for not removing this unequivocally subjectively biased juror from the panel. *Id.* ¶¶ 8, 15.)

Moreover, the record supports counsel's testimony, and the trial court's finding, that he likely kept Juror Golz on the panel, even though he unsuccessfully moved to strike her for cause, because he used up his peremptory strikes on other prospective jurors that he preferred to remove ahead of her. The trial court properly credited Attorney Haase's reasonable explanation as to why he likely left Golz on the jury. Gutierrez, therefore, failed to overcome the presumption that trial counsel reasonably decided to keep Golz on the jury.

Gutierrez failed to prove prejudice. He did not call Juror Golz to testify at the postconviction hearing whether she was biased. *See Koller*, 248 Wis. 2d 259, ¶ 15; *see also Funk*, 335 Wis. 2d 369, ¶¶ 15–18 (the juror in question was called to testify at the postconviction hearing to explain why she did not reveal her status as a sexual assault victim during voir dire). He offered nothing to overcome the presumption that Juror Golz was unbiased. He failed to prove that counsel's failure to exercise a peremptory strike resulted in the seating of a biased juror. *Koller*, 248 Wis. 2d 259, ¶ 14. The trial court properly held that Gutierrez failed to prove both deficient performance and prejudice.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 12th day of October, 2018.

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 7,948 words.

Dated this 12th day of October, 2018.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 12th day of October, 2018.

_____
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