STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2364-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DAVID GUTIERREZ,

Defendant-Appellant.

ON PETITION TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Statutes

Other Authorities

ISSUES PRESENTED

1. Did the court of appeals err when it disagreed with the trial court's discretionary decisions: (a) to admit evidence that Gutierrez's DNA was not found on a swab of the outside of the victim's mouth collected 24 hours after the assault, or on a pair of her underwear collected 48 hours after the assault; (b) to exclude evidence that DNA from three unidentified males was found on the oral swab and DNA from five unidentified males was found on the underwear; and (c) to allow examination of the crime lab analyst about how DNA can be transferred, how long DNA might remain on the victim's mouth and underwear, and how easily it can be removed in the interim between the alleged assault and collection of the DNA samples?

The trial court thoroughly exercised its discretion on the record after applying the controlling law to the relevant facts at a hearing held one year before trial. Gutierrez did not ask the court to revisit its pretrial ruling when the DNA analyst testified at trial a year later.

The court of appeals reversed and remanded for a new trial in a split decision. The majority disagreed with the trial court's pretrial ruling because it created a supposedly misleading inference that the victim washed away Gutierrez's DNA after the assault. The inference was misleading, the majority held, because DNA from other unidentified males was found on the oral swab and on the underwear. The majority dismissed the trial court's concern that the jury might speculate about the victim's sexual conduct before and after the assault contrary to the rape shield law.

The dissent criticized the majority for giving no deference to the trial court's reasonable evidentiary ruling. The dissent also pointed out that it is likely the purple pair of underwear the victim said she wore when assaulted by

Gutierrez was not tested for DNA. The two pairs of underwear retrieved by police 48 hours after the assault and tested by the crime lab were not purple and one pair had been laundered.

This Court granted the State's petition for review. It should now reverse and reinstate the judgment of conviction.

2. Did the court of appeals properly uphold the trial court's discretionary decision to admit evidence that Gutierrez began sexually assaulting the victim when she was six years old?

The trial court applied the greater latitude rule and allowed the victim to testify that Gutierrez began sexually assaulting her in secluded places when she was six years old. It was probative of his motive and intent, it bolstered the victim's credibility, and it was not unfairly prejudicial.

The court of appeals deferred to the trial court's decision to admit the other-acts evidence. It agreed that, in light of the greater latitude rule, the evidence was admissible to prove Gutierrez's motive and intent, and it was similar in nature to the charged offenses. The trial court's jury instruction limiting the use of this evidence also reduced the risk of unfair prejudice.

This Court should affirm.

3. Did Gutierrez prove that trial counsel was ineffective for: (a) deciding not to call Gutierrez's mother to testify at trial that the victim supposedly recanted; and (b) not exercising a peremptory strike against a prospective juror who said she was unsure whether she could remain impartial because she works with children?

a. The trial court held that trial counsel's strategic decision not to call Gutierrez's mother was reasonable because she would have been an unfocused, easily

impeachable witness whose testimony might have harmed the defense.

b. The trial court held that counsel's decision not to strike the allegedly biased juror was reasonable. It found to be credible trial counsel's postconviction testimony that, as is his normal practice, counsel likely exercised all of his peremptory strikes against other prospective jurors whom he believed would be more biased against Gutierrez than the equivocating juror. Gutierrez also failed to prove prejudice because the juror was not objectively or subjectively biased.

The court of appeals did not reach this issue.

This Court should affirm the trial court.

POSITION ON ORAL ARGUMENT AND PUBLICATON

The State assumes that, in granting review, this Court has deemed this case appropriate for both oral argument and publication. The State concurs.

STATEMENT OF THE CASE

After a trial held April 13–15, 2015, a Green Lake County jury found Gutierrez guilty of three counts of first-degree sexual assault of a child under age 13, three counts of incest by a stepparent, and three counts of child enticement, all involving his 12-year-old stepdaughter, A.R. The jury also found Gutierrez not guilty of exposing a child to harmful materials. (R. 46; 118:200–02.)

A.R. testified that Gutierrez, her stepfather, sexually assaulted her and did so repeatedly. A.R. described the three separate charged incidents of sexual contact, child enticement and incest by a stepparent committed by Gutierrez during 2011–12, when she was 12 years old. A.R. testified that Gutierrez took her 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, 174–81, 185–87.)

Pertinent here was the incident that occurred on November 1, 2012, at A.R.'s home in the Village of Kingston. (R. 116:150–54.) A.R. testified that she told her cousin and her aunt about it the next day after school. A.R.'s aunt then took her back to school to report it. (R. 116:168–71.) Green Lake County Sheriff Deputy Matthew Vande Kolk briefly interviewed A.R. at school around 5:00 p.m. November 2, 2012, shortly after the school principal reported the assault. (R. 117:119–24, 137–38.) Later, around 5:30 or 6:00 p.m., social worker Jessica Cody interviewed A.R. at the sheriff department. (R. 116:123–24; 117:126–27.) Cody's interview was recorded and played for the jury. It was consistent with A.R.'s trial testimony. (R. 116:121–23, 146–47.)

Later, after 9:00 p.m. on November 2, A.R. described the assault that occurred 24 hours earlier to Sexual Assault Nurse Examiner (SANE) Danielle Meyer who interviewed and examined A.R. at the hospital. (R. 117:127–28, 174–76, 180–82.) A.R. told Meyer that she bathed, washed her face, brushed her teeth, ate, drank fluids, and gargled after Gutierrez ejaculated into her mouth. (R. 117:184–86.) The enzymes in her mouth would also have broken down any biological material. (R. 117:186–87.) If true, it is unlikely that any of Gutierrez's DNA would still be present in A.R.'s mouth 24 hours later. (R. 117:187.)

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

According to SANE nurse Meyer, A.R.'s mother was "verbally aggressive" towards Meyer, "argumentative," and "condescending towards [A.R.]" during the exam. (R. 117:189.) A licensed psychotherapist and expert on child sexual assault, Susan Lockwood, testified about the common behaviors of child sexual assault victims including delayed reporting to family members caused by fear, shame and an unequal power relationship with an abuser they might love. (R. 117:152–56.) Lockwood also testified that it is difficult for a 12-year-old to remember the date and location of an assault that occurred when she was six years old. (R. 117:160–62.)

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.) Gutierrez testified that he was living in Texas and not with A.R. when she was six years old. (R. 118:33.) Gutierrez admitted that he had eleven prior convictions. (*Id*.)

The pretrial ruling

Gutierrez moved before trial to admit State Crime Laboratory test results showing that DNA from three unidentified males was found on a swab taken from the outside of A.R.'s mouth by SANE nurse Meyer late on November 2; DNA from five unidentified males was found on one of the two pairs of her underwear retrieved by police during a search of the victim's home late on November 3; and Gutierrez was excluded as a source of any of the male DNA found on those items. (R. 38, Pet-App. 157–61.) The motion alleged that this evidence was relevant because it tends "to make it more probable that the defendant did not commit the crime than it would be without the evidence" (R. 38:2), and it is "exculpatory." (*Id*.) The State opposed the motion. (R. 39, Pet-App. 162–63.) The motion was thoroughly addressed at a

pretrial hearing held on April 10, 2014, one full year before trial. (R. 105:3–16, 38–51; Pet-App. 122–49.)

Defense counsel argued that he should be allowed to prove that male DNA was found on the oral swab and on A.R.'s underwear and that Gutierrez was excluded as a source of the DNA. (R. 105:45.) He also argued that the evidence was relevant to prove that Green Lake County investigators failed to investigate the sources of the unidentified male DNA once they learned that Gutierrez's DNA was not present. (R. 105:48.)

The prosecutor argued that the presence of unidentified male DNA on the outside of the victim's mouth and on her underwear was irrelevant, it would violate the rape shield law by inviting jury speculation about the victim's sexual conduct with others, and it would confuse the jury because no one knows what it means. (R. 105:8–11.) Also, it was unlikely that either of the two pairs of underwear sent to the crime lab for analysis was worn by A.R. when assaulted by Gutierrez. (R. 105:8–10.) A.R. said the underwear she wore was purple. When police searched her house 48 hours after the assault, A.R.'s mother, who supported Gutierrez throughout, retrieved one wet pair of underwear from the washing machine and another dry pair that A.R. said she wore the day after the assault from a pile of dirty laundry. Neither pair was purple. (R. 105:10.)

The prosecutor argued that the evidence also risked unfairly prejudicing the victim by causing the jury to speculate, in violation of the rape shield law, that A.R. had sexual contact with one or more males other than Gutierrez. (R. 105:11.) The evidence was not relevant because the identity of A.R.'s alleged assailant, her stepfather, was not in issue. (R. 105:48.) Its probative value was further diminished by the fact that no semen or saliva was found on the samples tested. (R. 105:48–49.)

The trial court ruled that the absence of Gutierrez's DNA on the tested items was relevant and admissible (R. 105:41, 44–45), but the presence of DNA from other unidentified males was not (R. 105:41–42). The latter, it held, risked running afoul of the rape shield law (*id.*), inviting "rampant speculation" by the jury (R. 105:51). This was especially so because the identity of A.R.'s alleged assailant was not in issue. (R. 105:50.) It had limited probative value because "[n]o one knows what this is." (R. 105:38–39.) The DNA did not come from saliva or semen, and it could have been transferred from skin cells or hair follicles. (R. 105:39–40.) The only possible inference, the court reasoned, was the one forbidden by the rape shield law: A.R. had sexual contact with other males before or after the alleged assault. (*Id.*)

Given that 24 hours passed between the alleged oral assault by Gutierrez and the collection of the DNA swab from the outside of A.R.'s mouth, and 48 hours passed between the alleged assault and the retrieval of her underwear from the laundry room in her home (R. 105:40–42), the trial court found that this was not a case where DNA samples were collected "immediately" after the assault. There was a "fairly substantial passage of time" in between (R. 105:40). The defense argument–that this evidence was needed to rebut the victim's testimony that she washed away Gutierrez's DNA after the oral assault–"ignores the passage of time . . . we are not just looking back to the moment in time of the alleged assault." (R. 105:41.)

The court also reasoned that admitting this evidence risked violating the rape shield law by causing the jury to speculate that A.R. had sexual contact with other males before or after the alleged assault. (R. 105:41–42.) Its admission "invites speculation into a realm . . . that is just not appropriate for this trial" (R. 105:47), especially given that the unidentified male DNA was not being offered to prove that

the victim was mistaken when she identified Gutierrez as her assailant (R. 105:48–50).

The court, however, allowed Gutierrez to prove through the State Crime Laboratory analyst that his DNA was not present either on the oral swab or on the victim's underwear. The court also allowed both parties to explore with the expert how DNA can be transferred, how long it might remain viable, and how easily after DNA is transferred it can be washed or removed from skin or clothing. (R. 105:41–42, 46.)

The DNA analyst's trial testimony

At trial a year later, Gutierrez called as a defense witness State Crime Laboratory DNA Analyst Samantha Delfosse. She tested two pairs of underwear and the swab from the outside of the victim's mouth. Delfoss's testimony was brief, spanning only six pages. (R. 38:3; 118:9–15; Pet-App. 150–56.)

Delfosse testified on direct by Gutierrez, consistent with the pretrial ruling, that his DNA was not found on any of the items she tested. (R. 118:12.) She also did not find any evidence of semen or saliva on the tested items. (R. 118:14.) Delfosse testified that DNA can be easily transferred from person to person and from a person to an object including clothing. (R. 118:12–13.)

On cross-examination, Delfosse testified that DNA can be scrubbed or wiped off. (R. 118:14.) "[T]he more this is done, the more likely you are removing any kind of DNA that was deposited." (R. 118:15.) Delfosse said she "would have expected [ejaculate] basically to be gone" by the time the victim's mouth was swabbed 24 hours later. This is because the victim likely would have ingested fluids and food, brushed her teeth, and washed her face in the interim. Also, enzymes inside her mouth "would break down material" because "your mouth is always being washed." (*Id.*)

Although Delfosse was Gutierrez's witness, he did not ask any questions in rebuttal. (R. 118:15.) Gutierrez did not take advantage of the opportunity the trial court gave him to "still explore why or why not that evidence may or may not have been found there." (R. 105:41–42.) Gutierrez did not ask the trial court to revisit its ruling from a year earlier.

The court of appeals' decision

The court of appeals reversed and remanded for a new trial in a 2–1 decision. (Pet-App. 101–120.) The majority (Reilly, J.) held that the trial court erroneously exercised its discretion when it excluded evidence that DNA from several unidentified males was found on the victim's underwear and on the outside of her mouth. It was relevant to rebut the inference that the victim washed off Gutierrez's DNA (and semen) and, perhaps, laundered her underwear. This was harmful error that warranted reversal and a new trial. *State v. Gutierrez*, 2019 WI App 41, ¶¶8–12.

The majority upheld the trial court's decision to admit evidence that Gutierrez's DNA was not found on the child's mouth or underwear, and its decision to admit "testimony that washing or cleaning may remove DNA from clothing or body parts." *Gutierrez*, 2019 WI App 41, ¶9. The majority, however, "disagreed" with the exclusion of the unidentified male DNA evidence because it "denied Gutierrez the right to rebut the State's evidence [that A.R. washed away his DNA] by showing that the DNA of several individuals was not washed off." *Id.* "The jury was not allowed to hear that despite showering, cleansing, wiping, and washing, all DNA was not removed, and, in fact, DNA from other persons was present on the underwear provided by A.R. and a swab from the outside of A.R.'s mouth." *Id.* ¶6. This denied Gutierrez the opportunity to rebut the "not true" inference that the victim washed away his DNA with proof that the DNA of other males was present. *Id.* It unfairly diminished the exculpatory

impact of the analyst's admissible testimony that Gutierrez's DNA was not found on the tested items. *Id*. ¶¶5–6, 9. The jury was "incorrectly led to believe" that DNA can be easily washed off, and it was "incorrectly led to believe" that the oral swab and underwear "contained no DNA evidence." *Id*. ¶9. This evidence also could have been used to challenge the credibility of the victim's testimony that Gutierrez "removed her underwear twice, put his mouth on her vagina, and put his penis in her mouth." *Id*. The majority "assume[d]" that the pair of underwear worn by the victim on the night of the alleged assault and examined at the crime lab was the pair police retrieved from the pile of dirty laundry and not the wet pair her mother retrieved from the washing machine. *Id*. ¶3 n.2; (*see* R. 105:10).

The dissent argued that the trial court properly exercised its discretion to keep out confusing and potentially prejudicial evidence, and the majority erred by giving no deference to that reasonable exercise of discretion. *Gutierrez*, 2019 WI App 41, ¶¶16–38 (Hagedorn, J., dissenting).

Gutierrez also presented two other arguments to the court of appeals: (1) the trial court erroneously exercised its discretion in allowing the State to introduce other-acts evidence–A.R.'s testimony that Gutierrez began sexually assaulting her when she was six years old; (2) trial counsel was ineffective for not exercising a peremptory strike against a potentially biased juror, and for not calling A.R.'s grandmother to testify about her supposed recantation.

The court of appeals held that the trial court properly admitted the other-acts evidence. *Gutierrez*, 2019 WI App 41, ¶¶13–15. The majority did not address the ineffective assistance challenges. In dissent, Judge Hagedorn stated that Gutierrez's other challenges were not "persuasive." *Id*. ¶16 n.1 (Hagedorn, J., dissenting).

SUMMARY OF ARGUMENT

1. The trial court properly applied Wis. Stats. §§ 904.01 and 904.03, and the rape shield law, Wis. Stat. § 972.11(2)(b), to the facts. It allowed Gutierrez to prove that his DNA was not found on the oral swab or on A.R.'s underwear. It excluded evidence that unidentified male DNA was found on the swab and the underwear because its limited probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues, especially given that this case did not involve mistaken identity. The trial court also was legitimately concerned that the jury might draw the prohibited inference that A.R. had sexual contact with other unidentified males before or after Gutierrez assaulted her. This was a reasonable exercise of discretion that should not have been disturbed by the court of appeals just because it disagreed with the trial court's ruling.

2. The court of appeals correctly deferred to the trial court's discretionary decision to admit evidence that Gutierrez began sexually assaulting A.R. in secluded places when she was six years old. After applying the greater latitude rule, it agreed with the trial court that the evidence was offered for several permissible purposes, it was relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice to the defense.

3. The trial court properly held that Gutierrez failed to prove ineffective assistance of trial counsel. Counsel made reasonable strategic decisions not to call Gutierrez's mother because she might have harmed the defense, and not to strike a prospective juror during voir dire who equivocated about whether she could be impartial because she works with children.

STANDARD OF REVIEW

1.The trial court's decision to admit or exclude evidence is discretionary and cannot be overturned if there is a reasonable basis for it, and if the trial court relied on accepted legal standards and relevant facts of record. *E.g. State v. Dorsey*, 2018 WI 10, ¶37, 379 Wis.2d 386, 906 N.W.2d 158; *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983). Even when the trial court fails to adequately exercise its discretion, the reviewing court must independently review the record to determine whether it provides a basis for the trial court's discretionary decision. *E.g. State v. Hunt,* 2003 WI 81, ¶¶34, 43–46, 263 Wis.2d 1, 666 N.W.2d 771; *Pharr*, 115 Wis.2d at 343.

2. Evidence of a victim's sexual history or reputation that does not fit within one of the narrow exceptions to Wisconsin's rape shield law, Wis. Stat. § 972.11(2)(b), "is generally barred 'regardless of the purpose.'" *State v. Sarfraz*, 2014 WI 78, ¶38, 356 Wis.2d 460, 851 N.W.2d 235.

3. The decision whether to admit or exclude other-acts evidence is addressed to the trial court's discretion. If there is a reasonable basis for the ruling, the appellate courts will not find an erroneous exercise of discretion. *Dorsey*, 379 Wis.2d 386, ¶24; *State v. Hurley*, 2015 WI 35, ¶28, 361 Wis.2d 529, 861 N.W.2d 174. The reviewing court may consider acceptable purposes for admissibility of the other-acts evidence beyond those relied on by the trial court to uphold its decision. *Dorsey*, 379 Wis.2d 386, ¶29.

4. An ineffective assistance of counsel challenge presents a mixed question of law and fact on review. The trial court's findings of historical fact and credibility determinations will not be disturbed unless clearly erroneous. The issues whether counsel's performance was deficient and prejudicial are questions of law subject to independent review

but in light of the factual findings. *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).

ARGUMENT

I. The court of appeals erred when it disagreed with the trial court's discretionary decision to exclude evidence having little probative value on balance with its great potential to confuse and unfairly prejudice the jury.

A. The court of appeals may not second-guess reasonable evidentiary decisions by trial courts.

This Court has long held that an appellate court must defer to a trial court's thorough and rational exercise of discretion. *E.g. Dorsey*, 379 Wis.2d 386, ¶37; *State v. Gallion,* 2004 WI 42, ¶18, 270 Wis.2d 535, 678 N.W.2d 197. "An appellate court should not supplant the predilections of a trial judge with its own." *McCleary v State,* 49 Wis.2d 263, 281, 182 N.W.2d 512 (1971).

A reviewing court must uphold the trial court's decision to admit or exclude evidence "if it 'examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach.'" *Dorsey*, 379 Wis.2d 386, ¶37 (quoting *Hurley*, 361 Wis.2d 529, ¶28).

When reviewing a circuit court's discretionary ruling, this Court does not determine whether it thinks the ruling was "'right' or 'wrong.'" *State v. Jeske*, 197 Wis.2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). Rather, the discretionary decision "will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *Id.* "It is not important that one trial judge may reach one result and another trial judge a

different result based upon the same facts." *State v. Ronald L.M.*, 185 Wis.2d 452, 463, 518 N.W.2d 270 (Ct. App. 1994).

Evidence must be relevant to be admissible. It 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. § 904.01; *Hurley*, 361 Wis.2d 529, ¶77; *State v. Davidson*, 2000 WI 91, ¶64, 236 Wis.2d 537, 613 N.W.2d 606.

Even if it is relevant, evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. Wis. Stat. § 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). A circuit court has "broad discretion" when applying the balancing test under section 904.03. *Nowatske v. Osterloh*, 201 Wis.2d 497, 503, 549 N.W.2d 256 (Ct. App. 1996).

B. The court of appeals erred in second-guessing the trial court's careful balancing of probative value against the potential for unfair prejudice and confusion.

The court of appeals "disagree[d]" with the trial court's discretionary decision a year before trial to exclude the unidentified male DNA evidence. *Gutierrez*, 2019 WI App 41, ¶9. This was an error of law because the trial court's decision was reasonable. "[T]he test is not whether this court agrees with the ruling of the trial court, but whether appropriate discretion was in fact exercised." *Pharr*, 115 Wis.2d at 342.

The unidentified male DNA evidence obtained 24 hours after the alleged assault (the oral swab) and 48 hours after

the alleged assault (the underwear) had no probative value because the assailant's identity was not in issue, it neither proved nor disproved A.R.'s motive to falsely accuse Gutierrez, and it had a strong tendency to encourage jury speculation about A.R.'s sexual conduct with other males contrary to the rape shield law.

In its pretrial ruling a year before trial, the trial court properly applied the controlling principles of relevance, Wis. Stat. § 904.01, and the rape shield law, Wis. Stat. § 972.11(2)(b), to the facts. It then properly balanced the low probative value of the unidentified male DNA evidence of undetermined origin against its great potential to mislead and confuse the jury, and to cause the jury to speculate about A.R.'s sexual conduct with others in a case where either Gutierrez assaulted her or no one did. Wis. Stat. § 904.03. (R. 105:4–16, 38–51.)

1. The excluded evidence had little probative value.

No one can seriously dispute that the unidentified male DNA evidence found on the facial swab and the victim's underwear was confusing. No one can say with any degree of certainty where it came from, whose it was, or what it means. The only certainties are that Gutierrez's DNA was not present, that his semen and saliva were not present, and that the unidentified male DNA was not transferred to A.R.'s face and underwear in semen or saliva. In the trial court's words:

> No one knows what this is other than a Y chromosome. Apparently, it's not saliva. It's not semen so if we don't know what it is it could be a skin cell, it could be a hair follicle, who knows what, and the relevance of that is extraordinarily limited, especially when the only likely inference that could be drawn is directly related to what the rape shield statute would prohibit otherwise.

(R. 105:39.)

This evidence had no tendency to prove the motive offered by Gutierrez at trial for A.R. to falsely accuse him: retaliation for grounding her. A.R. was not grounded for poor hygiene, for wearing dirty underwear, or for contacting male DNA.

Given its location on the outside of A.R.'s mouth and on her underwear, this DNA evidence's only probative value was for the prohibited proposition that A.R. may have had sexual contact with several unidentified males before or in the 24 to 48 hours after she said Gutierrez orally assaulted her. Counsel for Gutierrez indeed tipped his hand when he argued at the pretrial hearing that he should be allowed to use this evidence to prove that Green Lake County law enforcement failed to investigate the identities of the unidentified males once they determined that Gutierrez's DNA was not present. (R. 105:48.) This is precisely what the trial court was trying to avoid: a mini-trial on the irrelevant issues of who the unidentified males were, how their DNA got transferred to A.R.'s face and underwear, and when. This evidence had no tendency to disprove Gutierrez's identity as the assailant or to provide a motive for A.R. to falsely accuse him. Yet, it had a great tendency to confuse and prejudice the jury.

Gutierrez did nothing at trial to address the supposedly misleading inference that A.R. washed off his DNA after the assault. He did not ask the court to revisit its pretrial ruling a year earlier. He did not challenge A.R.'s testimony that she immediately spat the ejaculate into the kitchen sink and thereafter brushed her teeth, gargled, washed up, drank fluids and ate in the interim between the assault and the SANE examination. (R. 116:154, 180, 187.) Although the trial court allowed him to do so, Gutierrez never asked the crime lab analyst how long transferred DNA might remain if A.R. did not wash up or brush her teeth for 24 hours. He did not

ask whether transferred DNA might remain for 24 hours even if A.R. washed up and brushed her teeth. He did not ask the expert whether transferred DNA would remain on clothing for 48 hours even if it was laundered. Gutierrez also was free to drive home the point, on both direct and rebuttal examination of the analyst, that the absence of his DNA and semen could simply mean that he did not sexually assault A.R. Gutierrez could have, "pursuant to the trial court's pretrial ruling, made the case that following these events [his] DNA would likely remain. But no efforts along these lines were made." *Gutierrez*, 2019 WI App 41, ¶35 (Hagedorn, J., dissenting). Instead, when given the opportunity to explore these points with the expert on rebuttal, Gutierrez stated: "Nothing further." (R. 118:15.)

The majority failed to explain why the trial court's exercise of discretion was irrational. *See State v. Ford*, 2007 WI 138, ¶30, 306 Wis.2d 1, 742 N.W.2d 61 ("This court will not find that the circuit court erroneously exercised its discretion if there is a rational basis for its decision."). The majority failed to explain why the trial court's decision was "completely off-the-wall, one that was made without any rational foundation or thought, indeed one that no minimally competent judge could reach." *Gutierrez*, 2019 WI App 41, ¶17 (Hagedorn, J., dissenting).

Moreover, even when a trial court erroneously exercises its discretion, the appellate court must search the record for reasons to uphold the decision if the governing legal principles as properly applied to the facts of record would have supported it. *E.g. State v. Manuel,* 2005 WI 75, ¶24, 281 Wis.2d 554, 697 N.W.2d 811; *Hunt,* 263 Wis.2d 1, ¶¶34, 43–46; *Pharr*, 115 Wis.2d at 343. The court of appeals did the opposite. It searched the record for reasons to *overturn* the trial court's rational discretionary decision even though the law and the facts, properly applied, strongly supported the

decision. It "ignored the independent review doctrine and its duty independently to review the record in this case." *Hunt*, 263 Wis.2d 1, ¶46.

The trial court made the right call when it allowed Gutierrez to prove through the crime lab analyst that his DNA and semen were not found on the tested items, but it would not let him prove that unidentified male DNA was found on the tested items collected 24 and 48 hours later. This was quintessentially a judgment call for the trial court that should have enjoyed great leeway on appellate review. *E.g. Dorsey*, 379 Wis.2d 386, ¶37.

2. The court of appeals erred when it disregarded the fact that a significant period of time passed between the alleged assault and the collection of DNA samples.

Both Gutierrez and the court of appeals operated under a false premise: that the unidentified male DNA was already on A.R. and her underwear when Gutierrez allegedly assaulted her on November 1, 2012. *Gutierrez*, 2019 WI App 41, ¶6 ("The jury was not allowed to hear that despite showering, cleansing, wiping, and washing, all DNA *was not removed*, and, in fact, DNA from other persons *was present* on the underwear provided by A.R. and a swab from the outside of A.R.'s mouth."). This rendered "not true" the inference that she wiped off Gutierrez's DNA after the assault. *Id*. *See also id*. ¶9 (Gutierrez was not allowed to rebut A.R.'s testimony that she washed off his DNA with proof "that the DNA of several individuals *was not washed off*.").

This premise is illogical. For it to hold up, one must assume all of the following: (a) the DNA of several males was transferred onto A.R. and her underwear at some unknown time before the alleged assault by Gutierrez; and (b) in the

intervening 24 hours after the assault, A.R. did not wash her face, brush her teeth, drink fluids, eat, or have enzymes operating normally inside her mouth. Gutierrez presented no evidence to contradict A.R.'s testimony that she did all of those things. He presented no evidence that A.R. had poor hygiene habits or went off to school the next day filthy.

The unrebutted evidence was that A.R. washed off Gutierrez's DNA shortly after he assaulted her. A.R. both testified and told the SANE nurse that she immediately spat out the ejaculate, then bathed, washed her face, brushed her teeth, drank fluids and ate. The enzymes in her own saliva also would have worked nonstop to eliminate Gutierrez's DNA in her mouth. (R. 116:154, 180, 187; 117:185; 118:14–15.) A.R. certainly could have both eliminated Gutierrez's DNA and semen immediately after he orally assaulted her and have male DNA transferred onto her afterwards. It is not inconsistent at all that, during the 24 hours after A.R. washed away Gutierrez's DNA, she had direct or indirect contact with boys or adult males inside or outside of her crowded home–such as at school the next day–or with clothing or objects anywhere that contained male DNA.

Admittedly, it is also conceivable that DNA from unidentified males was transferred onto the outside of A.R.'s mouth *after* the assault, while DNA from unidentified males was transferred onto her underwear at some unknown time *before* the assault. This, however, does nothing to enhance probative value. As she testified, A.R. washed her face and brushed her teeth, yet male DNA could easily be transferred onto her face directly or indirectly in the following 24 hours. She might, for example, have been hugged by a teacher, a counselor, or male friends when she disclosed the assault the next day at school. If it is true that male DNA was transferred to her dirty underwear *before* the assault by unknown persons at unknown times by unknown means, the sketchy probative

value and risk of jury speculation into A.R.'s sexual history should be obvious.

When balancing the limited probative value of this confusing evidence against its great potential to mislead and prejudice the jury, the trial court emphasized the critical fact that 24 hours passed between the alleged assault and the collection of the facial swab, and 48 hours passed before the underwear was collected. Obviously, much can happen in 24 to 48 hours. As the circuit court reasoned, "You also have all that passage of time with which to collect . . . whether it's skin cells or hair cells or Lord only knows what other contributions might have been made." (R. 105:40.) "It is a rabbit hole from which we never escape." (*Id*.) "[T]hat ignores the passage of time . . . we are not just looking back to the moment in time of the alleged assault. That there are other ways that . . . D.N.A. mixture could have been found to be in this place." (R. 105:41.) That sensible logic was lost on the court of appeals.

Moreover, Gutierrez did not challenge on rebuttal the expert's testimony that DNA can be washed away when there is a significant time lag between the assault and collection of samples. Gutierrez did not explore the likelihood that his DNA would have remained had he deposited it even if A.R. washed up afterward. He did not offer any expert opinion testimony to counter the analyst's opinion.

It is a matter of plain common sense that one can both immediately wash off DNA directly transferred onto her during a sexual assault and have other DNA transferred onto her and her clothing from direct or indirect contact with a variety of sources in the succeeding 24 to 48 hours. The court of appeals erred by relying on the illogical evidentiary theory that the unidentified male DNA was already on A.R.'s face and underwear when Gutierrez orally assaulted her, and it remained on her face for 24 hours and on her underwear for 48 hours. The court erred by rejecting the logical evidentiary

theory relied on by the trial court that the unidentified male DNA was transferred onto A.R. and her underwear during the 24 to 48-hour interim between the assault and the collection of DNA samples.

3. It is likely that the purple underwear worn by A.R. during the assault was never tested.

It is highly unlikely that either of the two pairs of underwear retrieved by police and tested by the crime lab was the purple pair that A.R. said she wore when Gutierrez assaulted her. (R. 39:2; 105:10.)

Police searched Gutierrez's home late on November 3, 2012, nearly 48 hours after the assault. (R. 117:52, 65.) They found a chaotic situation and saw A.R. on a bed sobbing with her head covered. All the while, A.R.'s mother was yelling at her in Spanish. (R. 117:54.) Detective Patty Crump asked for the purple underwear that A.R. told Jessica Cody she wore when assaulted by Gutierrez. (R. 117:61–62.) No one produced purple underwear. (R. 117:62.) At the time of the search, the washing machine was running and there were large piles of dirty laundry on the floor. A.R.'s mother pulled a wet pair of underwear out of the washing machine and told Crump that this was the pair her daughter wore on November 1. (R. 117:62–63.) While doing so, she angrily chastised A.R. in Spanish, causing her daughter to cry. (*Id.*). The wet pair that A.R.'s mother pulled out of the washer was yellow with multi-colored hearts. (R. 117:63.) A.R.'s mother then pulled from a pile of dirty laundry a second pair, also not purple, that A.R. said she wore to school and to the SANE exam on November 2, the day after the assault. (R. 117:63, 100–01.)

Three conclusions can reasonably be drawn from these facts: (1) neither pair of underwear retrieved from the laundry room and tested at the crime lab was the purple pair worn by

A.R. when Gutierrez assaulted her; or (2) the pair that A.R. wore when Gutierrez assaulted her on November 1 was the wet pair her mother pulled out of the washing machine, and any DNA that Gutierrez might have transferred onto that pair was laundered out; and (3) the presence of unidentified male DNA on the pair A.R. wore the day *after* the assault proves nothing with regard to whether Gutierrez deposited DNA on the pair she wore *during* the assault. (R. 105:110)

The presence of unidentified male DNA on underwear *not* worn by the victim when she was assaulted is obviously irrelevant, misleading and inadmissible for any reason. Gutierrez received a windfall, therefore, when the trial court allowed him to prove that his DNA and semen were not found on either of the two pairs of underwear tested at the crime lab.

Also, there was no evidence that Gutierrez ejaculated on or had any direct oral contact with the victim's underwear. The absence of any semen in the tested underwear also makes the unidentified male DNA found in one pair irrelevant under the rape shield exception in section 972.11(2)(b)2., allowing for proof of the "source or origin of semen." Its absence still allowed Gutierrez to argue to the jury that he did not assault A.R., otherwise his semen and DNA would have been found in the underwear. And, as discussed below, if unidentified male DNA was transferred to A.R.'s underwear some time *before* the assault, it is "prior sexual conduct" evidence prohibited by the rape shield law.

The trial court was correct: This confusing DNA evidence would have proven nothing regarding Gutierrez's guilt or innocence, or A.R.'s motive to falsely accuse him, yet it posed a serious risk of causing the jury to speculate about whether the 12-year-old child had sexual contact with three men (around her mouth), or five men (around her underwear), before the assault or during the 24 to 48 hours after.

The court of appeals erred when it reversed for no reason other than that it "disagree[d]" with the trial court's rational discretionary decision. *Gutierrez*, 2019 WI App 41, ¶9. This Court would be hard-pressed to find a more thorough and reasonable exercise of discretion.

C. The court of appeals erred as a matter of law in disregarding the trial court's legitimate concerns about violating the rape shield law.

The court of appeals' decision significantly diminishes the protections of the rape shield law to the detriment of testifying sexual assault victims and to the State's ability to prosecute their abusers.

The rape shield law, Wis. Stat. § 972.11(2)(b), is a "broad evidentiary shield." *Sarfraz*, 356 Wis.2d 460, ¶38.

> The rape shield law expresses the legislature's determination that evidence of a complainant's prior sexual conduct has low probative value and a highly prejudicial effect. *State v. Gavigan,* 111 Wis. 2d 150, 156, 330 N.W.2d 571 (1983); *State v. Penigar,* 139 Wis. 2d 569, 585, 408 N.W.2d 28 (1987).

State v. DeSantis, 155 Wis.2d 774, 784–85, 456 N.W.2d 600 (1990). "The rape shield law 'reflect[s] the . . . view that generally evidence of a complainant's prior sexual conduct is irrelevant or, if relevant, substantially outweighed by its prejudicial effect.' *Pulizzano,* 155 Wis.2d at 644." *State v. Burns,* 2011 WI 22, ¶32, 332 Wis.2d 730, 798 N.W.2d 166 (alteration in original).

The rape shield law applies here regardless whether the unidentified male DNA was transferred onto A.R. or her underwear before or after the assault. Although the statute refers to "*prior* sexual conduct," it encompasses A.R.'s "sexual conduct prior to the conclusion of the sexual assault trial."

State v. Gulrud, 140 Wis.2d 721, 729, 412 N.W.2d 139 (Ct. App. 1987).

The majority simply tossed aside the trial court's legitimate concern that the jury might speculate about the victim's sexual history with the cryptic, unhelpful observation that Gutierrez did not offer the unidentified male DNA evidence for that purpose. *Gutierrez*, 2019 WI App 41, ¶¶9–10. Even if Gutierrez did not intend to use it for that prohibited purpose, the trial court was legitimately concerned that *the jury* would be misled to improperly speculate about her prior sexual conduct. That is why evidence of the victim's sexual history "is generally barred 'regardless of the purpose.'" *Sarfraz*, 356 Wis.2d 460, ¶38 (citation omitted). After all, "sexual conduct" is broadly defined in the statute as "any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style." Wis. Stat. § 972.11(2)(a). The trial court could reasonably find that the presence of male DNA on A.R.'s underwear might involve her "behavior relating to sexual activities" and her "prior experience of sexual intercourse or sexual contact," and cause the jury to improperly speculate about her behavior. *C.f. State v. Vonesh*, 135 Wis.2d 477, 480–81, 490, 401 N.W.2d 170 (Ct. App. 1986) (the victim's writing notes expressing her sexual desires or describing the rejection of a sexual overture is not "prior sexual conduct"); *id.* at 490 ("Books, movies, conversations, or observing others engaged in sexual activity are said to be sources of information as to sexual matters 'other than personal experience,' and not sexual conduct." (citation omitted)).

It appears, however, that Gutierrez intended to introduce the evidence for the impermissible purpose of questioning the failure of police to investigate the identities

of the men or boys who contributed the DNA once they determined that Gutierrez's DNA was not present. (R. 105:48.) Also, neither Gutierrez nor the court of appeals relied on any exception to the rape shield law that would have allowed this evidence to come in.

By dismissively rejecting the trial court's legitimate rape shield concerns, the court of appeals erred as a matter of law. This is especially so given that the court of appeals assumed the unidentified DNA was present *before* the alleged assault. This runs headlong into the law's proscription against introducing evidence of a victim's "prior sexual conduct" with others. Wis. Stat. § 972.11(2)(b). The court disregarded the rape shield law's *requirement* that evidence of this ilk not be admitted unless it fits within one of the narrow exceptions to the rule, *Sarfraz*, 356 Wis.2d 460, ¶38, or unless the defendant proves that its probative value substantially outweighs its *legally presumed* prejudicial impact. *Id.* ¶39.

The decision does violence to the rape shield law. It requires A.R. to needlessly endure the ordeal of another trial with confusing evidence that the jury may well use to speculate about whether she had sexual contact with several unidentified males before or after the assault by Gutierrez. This Court should reverse.

II. The trial court properly exercised its discretion when it allowed A.R. to testify that Gutierrez began sexually assaulting her when she was six years old.

A. Other-acts evidence is admissible in child sexual assault cases under the greater latitude rule if it satisfies the three-part *Sullivan* test.

In deciding whether to admit other-acts evidence, the trial court must apply the three-step analytical framework this Court adopted in *State v. Sullivan*, 216 Wis.2d 768, 772–73, 576 N.W.2d 30 (1998). *Hurley*, 361 Wis.2d 529, ¶57. *See Dorsey*, 379 Wis.2d 386, ¶39 ("The lodestar of admissibility of other-acts evidence is the three-prong analysis promulgated in *Sullivan*").

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." *Sullivan*, 216 Wis.2d 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 (citation 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. 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.

Wisconsin law allows for a greater latitude of proof when considering the admissibility of other-acts evidence in child sexual assault cases. *Hurley*, 361 Wis.2d 529, ¶59. "Thus, the term 'greater latitude' is a term of art in the context of other-acts evidence and its application is well-established in the common law." *Dorsey*, 379 Wis.2d 386, ¶32. This time-honored rule developed in response to 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. *Hurley*, 361 Wis.2d 529, ¶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.* ¶59; *Dorsey*, 379 Wis.2d 386, ¶33. The 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 therefore admissible to corroborate the child's testimony. *Id.*[1]

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.

Other-acts evidence is admissible to prove the elements of the charged offenses, even when those elements are not in dispute. *Dorsey*, 379 Wis.2d 386, ¶48; *State v. Veach*, 2002 WI 110, ¶77, 255 Wis.2d 390, 648 N.W.2d 447; *Davidson*, 236 Wis.2d 537, ¶65. The "sexual contact" element 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).

Closely related, other-acts evidence is admissible 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 probative of the intent element. *Dorsey*, 379 Wis.2d 386, ¶48; *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.

Other-acts evidence is admissible if it establishes context and helps to provide a complete explanation of the crime. *Hunt,* 263 Wis.2d 1, ¶58.

---

[1] 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.*

Other-acts evidence is admissible to bolster the victim's credibility especially in a he-said/she-said case. *Dorsey*, 379 Wis.2d 386, ¶50.

Other-acts evidence is admissible to defeat a defendant's innocent explanation for his conduct. *Veach*, 255 Wis.2d 390, ¶84; *Sullivan*, 216 Wis.2d at 784.

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.

When the evidence is offered for permissible purposes, and is relevant to material issues other than propensity, it is admissible unless the defendant proves that its probative value is substantially outweighed by the danger of unfair prejudice. *Payano,* 320 Wis.2d 348, ¶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, because it will cause the jury to draw the forbidden propensity inference despite limiting instructions directing it not to do so. *Id*. ¶89. If its probative value is close or equal to its potential for unfair prejudice, the evidence must be admitted. *Dorsey*, 379 Wis.2d 386, ¶54.

Cautionary jury instructions help reduce the potential for unfair prejudice. *Dorsey*, 379 Wis.2d 386, ¶55; *Hurley*, 361 Wis.2d 529, ¶¶89–90; *Payano*, 320 Wis.2d 348, ¶99*; Davidson*, 236 Wis.2d 537, ¶78. The jury presumably follows those limiting instructions. *Dorsey*, 379 Wis.2d 386, ¶55.

B. The court of appeals properly upheld the trial court's decision to admit the other-acts evidence.

The State filed pretrial motions to introduce evidence that Gutierrez began sexually abusing A.R. when she was six years old. (R. 33; 40.) The trial court allowed A.R. to testify that Gutierrez began sexually assaulting her when she was six years old because that was when Gutierrez began grooming her for escalated sexual activity later on, proving his motive and intent. (R. 110:29–35; 105:51–54.)

The trial court properly exercised its discretion in applying the *Sullivan* three-step analysis. This evidence was offered for permissible purposes and it was relevant to proving those purposes. This evidence tended to prove Gutierrez's motive and intent to become sexually aroused when he took A.R. into secluded places against her will in 2011–12. *Davidson*, 236 Wis.2d 537, ¶53. There were "distinct similarities" between the incident in the closet at age six and the charged offenses. *Id.* ¶75. Like 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). Like the charged acts, the prior act involved sexual contact with A.R. by her stepfather. Wis. Stat. § 948.06(1m). As the court of appeals observed, the prior act at age six was

> similar to the current charge: it is the same child; the location of the sexual assault, a closet, is consistent with the current allegations as they were either in the home or in a secluded location; Gutierrez took actions to conceal his behavior from A.R.'s mother and said it was a secret; and the sexual conduct was similar in that A.R.'s allegations are not more or less extreme than the current charges.

Gutierrez, 2019 WI App 41, ¶15.

The assault in the closet at age six tended to prove Gutierrez's intent to touch A.R.'s intimate parts, and to have

her touch his, for the purpose of his sexual arousal and gratification when he had sexual contact with her on multiple occasions at age 12. *Hurley*, 361 Wis.2d 529, ¶¶73–74.

The assault on A.R. at age six tended to prove that the assaults at age 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 him on November 2, 2012. Until then, A.R. did not report what happened to her at age six or report the two incidents in 2011–12 leading up to the November 1 assault, due to fear, shame and family pressure. (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 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.").

The passage of five or six years between the prior act and the charged offenses is insignificant. *E.g.*, *Hurley*, 361 Wis.2d 529, ¶85 (25 years); *Veach*, 255 Wis.2d 390, ¶83 (11 years); *Davidson*, 236 Wis.2d 537, ¶¶6, 10 (nine years).

The assault on A.R. at age six also tended to disprove Gutierrez's innocent explanation that A.R. made up the accusations in 2011–12 because she was mad at him for grounding her on November 1, 2012.

Turning to the third *Sullivan* prong, the trial court properly held that this evidence was not unfairly prejudicial. If the jury believed the defense theory that A.R. made up the

2011–12 allegations to get back at Gutierrez for grounding her, it would not have believed her testimony that Gutierrez began assaulting her when she was six years old. Any potential for unfair prejudice was further reduced when the trial court 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, limiting its use to proving motive, intent, and context. (R. 118:91–92.) The jury presumably followed those limiting instructions. *Dorsey*, 379 Wis.2d 386, ¶55. In the words of the court of appeals, this instruction "served to counteract the potential for unfair prejudice." *Gutierrez*, 2019 WI App 41, ¶15.

This Court should affirm.

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

A. The relevant facts

1. The grandmother's recantation testimony

Defense counsel, Attorney Jeffrey Haase, disclosed at a pretrial hearing 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. Haase did not learn about it until he finally contacted Andrea Gutierrez before the September pretrial hearing. (R. 114:3.) 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 as a witness even

though she attended the trial. He said that Andrea could not specify when A.R. recanted, why A.R. was with her in Texas, who brought her there, why Andrea did not report her recantation immediately, or why it took so long for anyone to tell Haase about it. (R. 120:14–15.) Haase could not verify her information; it was only A.R.'s word against Andrea's.[2] 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 desperate ploy by the defense. (R. 120:17.)

Haase decided not to call Andrea after he met with her in person before trial. Haase believed he could control her on direct, but he feared how she might perform on cross-examination. (R. 120:27–28.) Haase noted that the State also had negative information about the relationship between Gutierrez and his mother that might come out on cross-examination. (R. 120:31.)

Andrea Gutierrez testified by telephone at the postconviction hearing. Suffice it to say that counsel's fears about her trial 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 cross-examination, Andrea said she did not know the date of her granddaughter's birthday (R. 120:46–47); she said A.R. recanted on a visit to her Texas home "in February," but did not know what year (R. 120:47), only that it was some time after her son was arrested in late 2012 (R. 120:48–49); before A.R.'s visit to Texas in 2012 or later, Andrea said she last saw

---

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

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.) The nature of the child's alleged recantation was also suspect. A.R. supposedly started crying because she missed her family. According to Andrea, A.R. recanted only after she reminded the child 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 found that she veered off on tangents, and her credibility would have been hurt on cross-examination at trial, just as Attorney Haase feared. (R. 120:81–84.) Andrea's testimony "didn't make a whole lot of sense" (R. 120:82–83), and the jury would have "gotten lost." (R. 120:83.)

2. The potentially biased juror

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 answered that she had already made up her mind and was excused by the court for cause. (R. 116:67–68.) Prospective juror 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. 116:69.) 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.

Haase testified that he could not recall why he did not strike Golz peremptorily after the court failed to 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 because he used up his strikes on other prospective jurors who he wanted off of the jury ahead of her. It would be his usual practice to exercise peremptory strikes against those who he believed would most likely be biased against the defense, even though there may be others he would also want removed if he had more peremptory strikes. (R. 120:10, 30–31.)

The trial court ruled that juror Golz's answer was "hardly a definitive 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.)

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

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

Counsel is strongly presumed to have exercised reasonable professional judgment and to have made sound strategic decisions. *State v. Balliette*, 2011 WI 79, ¶¶25, 27, 336 Wis.2d 358, 805 N.W.2d 334; *State v. Maloney*, 2005 WI

74, ¶43, 281 Wis.2d 595, 698 N.W.2d 583. "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland,* 466 U.S. at 690).

Gutierrez was not entitled to error-free representation. Counsel need not even be very good to be deemed constitutionally adequate. *McAfee*, 589 F.3d. at 355–56; *see State v. Wright*, 2003 WI App 252, ¶28, 268 Wis.2d 694, 673 N.W.2d 386 (same). 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.

Gutierrez bore the burden of proving prejudice: 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. There is only a "slight" difference between this prejudice standard and a more-likely-than-not standard. *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011).

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

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

Andrea had no idea when A.R. supposedly recanted to her. She could only recall that it occurred "in February"

sometime after her son'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. 120:48–49, 73.) Defense counsel did not learn of it until August 2014. (R. 120:12) Andrea did not explain why she failed to tell anyone as soon as A.R. supposedly recanted "in February."

The direct harm inflicted on Andrea's credibility no doubt also would have indirectly harmed 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. His performance was not deficient and this Court need not address the prejudice prong.

In any event, for the same reasons, there is no reasonable probability that Gutierrez would have been acquitted had his mother testified at trial. A poor defense witness "may impress the jury unfavorably and taint the jury's perceptions of the accused" and "may prompt jurors to draw inferences unfavorable to the accused." *Lema v. United States*, 987 F.2d 48, 54 (1st Cir. 1993). Those concerns ring true here. Gutierrez's credibility would not have been helped, and likely would have been harmed, by her testimony.

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

The record supports Attorney Haase's testimony, and the trial court's finding, that he likely kept Juror Golz on the panel, even after he unsuccessfully moved to strike her for cause, because he had used up his peremptory strikes on other prospective jurors that he wanted removed ahead of her. Gutierrez failed to overcome the presumption that trial counsel reasonably decided to keep Golz on the jury.

Gutierrez failed to prove prejudice because Juror Golz was not biased. 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)). 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; *see also State v. Lindell*, 2001 WI 108, ¶¶51–53, 131, 245 Wis.2d 689, 629 N.W.2d 223. "The prejudice issue here is whether his 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 holding at the postconviction hearing that Haase did not perform deficiently for leaving Golz on the jury, the trial court implicitly found that Gutierrez failed to prove that she was subjectively or objectively biased. This factual determination was not clearly erroneous. *State v. Tobatto*, 2016 WI App 28, ¶17, 368 Wis.2d 300, 878 N.W.2d 701. The record supports the trial court's implicit determination that she was not biased. *Id.*; *see also id.* ¶26 ("The record supports the trial court's implicit conclusion that Juror 10 was not subjectively biased.").

Gutierrez did not call Juror Golz to testify at the postconviction hearing to determine whether she was biased. *See Koller*, 248 Wis.2d 259, ¶15 (defendant had burden at postconviction stage to show that trial counsel's error resulted in seating of biased juror); *see also Funk*, 335 Wis.2d 369, ¶¶15–18 (the juror in question explained at the postconviction hearing why she did not reveal her status as a sexual assault victim during voir dire). Gutierrez offered nothing at the

hearing to overcome the presumption that Golz was unbiased. He failed to prove that counsel's decision not to strike Golz resulted in the seating of a biased juror.

Juror Golz had no prior knowledge of or opinions about the case. She was honest about her equivocation. *See Tobatto*, 368 Wis.2d 300, ¶22. Her equivocation was neither uncommon nor proof of bias. "[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) (citation omitted).

Because 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. *Tobatto*, 368 Wis.2d 300, ¶22. The trial court properly held that Gutierrez failed to prove both deficient performance and prejudice.

CONCLUSION

This Court should reverse and reinstate the conviction.

Dated this 12th day of December 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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 10,914 words.

Dated this 12th day of December 2019.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of December 2019.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

Appendix
State of Wisconsin v. David Gutierrez
Case No. 2017AP2364-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 this 12th day of December 2019.

_____

DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 12th day of December 2019.

_____
DANIEL J. O'BRIEN
Assistant Attorney General