

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

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OF WISCONSIN**

Case No. 2018AP159-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

MARCO A. LOPEZ, SR.,  
Defendant-Appellant.

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APPEAL FROM A JUDGMENT OF  
CONVICTION ENTERED IN THE CIRCUIT  
COURT FOR MILWAUKEE COUNTY, THE  
HONORABLE JEFFREY WAGNER, PRESIDING

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**BRIEF OF THE PLAINTIFF-RESPONDENT**

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## **ISSUE PRESENTED**

Did the circuit court properly exercise its discretion in admitting other acts evidence that Marco A. Lopez sexually assaulted two children in addition to the victims in the offenses of conviction?

The circuit court implicitly answered “yes.”

This Court should answer “yes.”

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State requests neither. Oral argument would add little to the arguments in the briefs. Publication is unnecessary because this case involves application of established legal principles to the facts of record.

## **INTRODUCTION**

From the time Eric<sup>1</sup> was five years old until the age of 11, his father Marco Lopez engaged in penis-to-mouth and penis-to-anus intercourse with him. The sexual intercourse began during an innocent game of hide and seek. Eric was looking for his brother and when he saw movement under the covers in his parents’ room, he dove under the covers and exclaimed, “I found you!” Except it was not his brother, it was his father Lopez who was angry to be awakened from his sleep. His father shut the door, told Eric to close his eyes and then put his penis into Eric’s mouth until he ejaculated.

By the time Eric was eight years old, Lopez would get Eric in the middle of the night and carry him into the

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<sup>1</sup> A gender-specific pseudonym, used in accordance with Wis. Stat. § (Rule) 809.86(4). Lopez’s brief identifies the victim as M.A.L.

basement where he put him face down on the floor. Lopez would lie on top of Eric and perform penis-to-anus intercourse. Eric cried because it hurt so much and prayed to God for it to stop. But it didn't stop. It happened nearly every week, sometimes two or three times a week. Eric never told anyone as a child because Lopez said he would shoot Eric's mother if Eric ever said anything.

When Beth<sup>2</sup> was five years old, her father Lopez carried her downstairs where she remembers seeing blankets on the floor. Lopez put her down, unbuttoned her pants and pulled them down to her ankles. They heard a noise outside and Lopez pulled up Beth's pants and told her not to say anything about what happened. Next, Lopez waited for Beth to take a shower when no one else was at home. He waited on the bed outside the bathroom. He called her to come see him. Lopez opened his robe and rubbed his hard, clothed penis over her body. He also performed oral sex on Beth, using his mouth on her vagina. During the oral intercourse, Lopez put a pillow over Beth's eyes to keep her from looking. Beth never told anyone because she did not want to hurt her mother.

While growing up, Beth and Eric thought each one was the only person Lopez sexually assaulted. Both were adults when they learned that Lopez did the same thing regularly to each of them. When they learned they weren't the only ones, they concluded the right thing to do was to go to the police. The complaint in this case is the result.

Prior to trial, the State sought to introduce evidence of prior sexual assaults by Lopez to establish Lopez's motive and plan. In two separate motions, the State proffered

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<sup>2</sup> A gender-specific pseudonym, used in accordance with Wis. Stat. § (Rule) 809.86(4). Lopez's brief identifies the victim as O.B.L.

evidence that Lopez sexually assaulted his niece Tess<sup>3</sup> beginning when she was five years old until she was about 12. Similarly, the State proffered evidence that Lopez sexually assaulted his biological daughter Sara<sup>4</sup> beginning when she was seven years old and continuing until she was about 10 years old.

At a hearing on the State's motion, the court held that the probative value of the other acts evidence of Tess outweighed any unfair prejudice. The State argued the similarities in the current case and the other acts evidence made the evidence highly probative. The circuit court agreed with the State in a hearing on the motion of other acts evidence of Tess. The circuit court did not reach a formal decision on the other acts evidence of Sara. However, the circuit court admitted that evidence at trial.

On appeal, Lopez argues that the other acts evidence had no probative value because Lopez did not dispute motive and intent. Lopez's argument is that he did not do the things alleged in the complaint. Thus, the State had no need to prove Lopez's motive and intent was for purposes of sexual arousal or gratification. Lopez also argues the State had sufficient evidence without piling on the other acts evidence. However, the State has the burden of proof and must proceed at trial to prove each of the elements charged. The circuit court was correct to allow the State to introduce other acts evidence because it was offered for an allowable

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<sup>3</sup> A gender-specific pseudonym, used in accordance with Wis. Stat. § (Rule) 809.86(4). Lopez's brief identifies the victim as T.R.

<sup>4</sup> A gender-specific pseudonym, used in accordance with Wis. Stat. § (Rule) 809.86(4). Lopez's brief identifies the victim as S.L.L.

purpose, it was relevant, and the probative value outweighed any unfair prejudice.

## **STATEMENT OF THE CASE**

### **The charges against Lopez and the state's motions to admit other acts evidence.**

The State charged Lopez with four counts of sexual assault of a child: three counts of sexual intercourse with a child under 13 years of age and one count of sexual contact with a child under 13 years of age. (R. 1; 23; 24.) The charges involved Lopez's children, Eric and Beth, who were biological siblings. (*Id.*) Two counts of sexual intercourse involve Lopez performing oral sex multiple times (R. 68:63–66) and penis-to-anus intercourse multiple times on Eric. (R. 68:71–73.) One count of sexual intercourse involves Lopez performing oral sex multiple times on Beth. (R. 68:31, 33–34.) The one count of sexual contact involves Lopez using his hand to touch Beth's vagina (R. 68:36–37) and Lopez, rubbing his erect clothed penis on Beth's body. (R. 68:32–33.)

Before trial, the State moved to admit other acts evidence for the purpose of establishing motive and plan. (R. 7:1.) The proffered evidence was that Lopez sexually assaulted his niece, Tess, beginning at age five and continuing until she was about 12 years old. Lopez covered Tess's face with a pillow and his hands while he used his penis on her vagina. (R. 69:35–36.) When Tess was about eight years old, Lopez started penetrating her vagina with his penis and ejaculating. (R. 69:42–44.) Lopez threatened to kill Tess, if she ever said anything about the sexual abuse to anyone else. (R. 7:3; 69:37.) Lopez's trial counsel filed an objection to the State's motion to use other acts evidence. (R. 14.)

The circuit court held a hearing on the State's motion. (R. 62.) The court considered the evidence's similarities with



the facts of the current complaint. It determined that the evidence was admissible to show motive and plan, acceptable purposes under Wis. Stat. § 904.04(2). (R. 62:10–12.) The court also concluded the other acts evidence was relevant to lend credence to the statements of the two children in the current case. (R. 62:11.) Finally, the court acknowledged the other acts evidence to be prejudicial to Lopez, but not unfairly prejudicial given the probative value in showing motive and plan. (R. 62:11–12.)

The State also sought to introduce other acts evidence that Lopez sexually assaulted Sara, the biological sister of Eric and Beth, and the cousin of Tess. (R. 17:1.)<sup>5</sup> Sara reported that Lopez sexually assaulted her from when she was about seven or eight years old until she was ten. Sara reported that she would wake up in her bed and Lopez would be touching her vagina over her clothing. Lopez would take her pajamas and underwear off, lie on top of her, and grind his clothed penis on her body. Sara recalled seeing her father's penis and feeling penetration when he lay on top of her. (R. 17:3–4.)

As to the State's second proffer of other acts evidence of Sara, Lopez's counsel aptly points out that the court did not hold a hearing. (Lopez's Br. 8 n.7.) The court also did not make a ruling on the admissibility of Sara's testimony concerning other acts. (*Id.*) Lopez's counsel filed an Objection to Motion to Allow Other Acts Evidence concerning Sara. (R. 18:1.) At a pretrial hearing, the State informed the court of the outstanding motion stating that it was certain the court would "be prepared to make a ruling at the final pretrial." (R. 65:4.)

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<sup>5</sup> This motion is duplicated in the record. (*See* R. 17; 19). The State will cite the record at (R. 17) when referencing this motion.

At the final pretrial, the court did not rule on the State's outstanding motion. (R. 66.) Rather, both parties indicated they were ready to proceed with trial. (R. 66:2.) When the court inquired if there were "any issues," the State replied, "No. We had completed a final pretrial in—on June 12th of 2015. I had filed my pretrial documents with the Court. Defense and I had gone over them. So I think that we're ready for trial on April 25th." (R. 66:3.) On appeal, Lopez's counsel admits that the "most logical way to address this situation is to assume that, since the court admitted the evidence, the court's ruling on the second set of other acts evidence would have been the same as on the first set of other acts evidence." (Lopez's Br. 6–7 n.3.) The bottom line is that the State's proffered other acts evidence of Sara was admitted at trial. (R. 69:3–32.)

**Trial testimony from the  
victims of the charged crimes.**

At trial, Eric testified that when he was five or six years old, his father Lopez told him to close his eyes, put his erect penis in Eric's mouth and ejaculated. (R. 68:63–65.) The penis-to-mouth intercourse occurred with frequency in their home and once in the car. (R. 68:65–67, 90.) Eric testified that when the family moved to a different house, Lopez would wake him in the middle of the night and take him to the basement to make him perform oral sex or have penis-to-anus intercourse with him. (R. 68:70–71.) Eric testified that each time after this happened, he would be bleeding from his butt because there was blood in his stool. (R. 68:72.) Eric stated the sexual assaults occurred nearly every week when Lopez drank alcohol. (R. 68:73.)

Eric did not say anything about the sexual assaults because Lopez threatened to kill his mother with a gun if he ever told anyone about the abuse. (R. 68:66, 75.) Eric was afraid of Lopez and he didn't want to break his mother's

heart. (R. 68:66–67.) Eric reported the sexual assaults to the police as an adult. (R. 68:61.)

At trial, Beth testified that when she was five years old, she remembers her father Lopez put his hand down her pants, touched her bare vagina and laughed. Beth testified it was the first time her father touched her inappropriately. (R. 68:36–37.) Beth testified that on a different occasion, Lopez took her into the basement where blankets were laid out on the floor. (R. 68:26.) Beth stated that Lopez unbuttoned her pants and brought them down to her ankles. Then, they heard a noise, like the side gate being opened, and he pulled up her pants and told her not to say anything. (R. 68:27.)

Beth testified that after the family moved to a different house, Lopez engaged in mouth-to-vagina intercourse with her after she showered. (R. 68:31.) Beth testified that Lopez would put a pillow over her eyes and the upper part of her head. (R. 68:33–34.) In addition, Beth testified that her father would lie on top of her wearing underwear and grind his clothed, hard penis on her body. (R. 68:32–33.) Beth stated that she started to wet the bed during the time period that Lopez sexually assaulted her. (R. 68:37–38.) Beth testified the bed wetting continued until she was about 12 years old. (R. 68:38.)

Beth explained that she never told anyone about Lopez sexually assaulting her because she knew it would hurt her mom, and she did not want to break up her family. (R. 68:34.) Beth reported the sexual assaults to the police as an adult. (R. 68:40–42, 54.)

### **Trial testimony from the other acts witnesses.**

The State also called Tess, Lopez’s niece, as a witness. Tess testified that, Lopez sexually assaulted from when she was five until she was 11 or 12 years old, when she started her menstrual cycle. Tess testified that it “happened a

million times.” (R. 69:36, 40–41.) Tess stated that Lopez woke her up, took her into the basement, put a pillow over her face, and used his penis on her vagina, but did not penetrate her vagina (R. 69:35.) When Tess turned eight years old, Lopez started penetrating her vagina. (R. 69:42.) She distinctly remembered the first-time penetration because there was wet stuff and she didn’t know where it came from. (R. 69:43.) Lopez told her not to tell anybody because if she did Lopez would kill her and kill Tess’s mother. (R. 69:37.)

Sara testified that when she was seven or eight years old, Lopez came into her bedroom and took off her clothes. (R. 69:8.) Sara stated that he then got on top of her and touched her vagina with his penis, moving back and forth. (R. 69:10–11.) Sara testified that her mother got up from her bedroom to use the bathroom, and Lopez left Sara before her mother came out of the bathroom. (R. 69:9.) Sara testified that Lopez did the same thing again when she was sleeping in her sister’s bedroom. (R. 69:12–13.) Sara stated that she remembered being sexually assaulted two times by Lopez before she was about 12 years old. (R. 69:13.)

Sara stated that she never told anyone because she was afraid of Lopez. (R. 69:15.) She further testified that she kept the assault a secret because someone else in the family had reported being sexually assaulted by Lopez, and nobody believed her. (R. 69:14.) At that time, someone asked Sara if her father ever sexually assaulted her and she said no because she was afraid. Lopez was living in the house with her. (R. 69:15.) Sara testified that after the sexual assaults, she had anxiety and problems wetting her bed until she was 15. (R. 69:15, 18.)

### **Lopez’s defense.**

Lopez contended that he did not sexually assault his children. (R. 70:53, 57, 59–61; 71:13–16, 21.) He testified

that each one of his children who accused him of sexual assault, sexual intercourse, and sexual contact was lying. (R. 71:14.)

### **The jury instructions and verdicts.**

At the conclusion of the trial, the circuit court instructed the jury concerning use of the other acts evidence: “If you find that this conduct did occur, you should consider it only on the issues of motive and preparation and/or plan. You may not consider this evidence or conclude that the defendant has a certain character or a certain character trait, and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.” (R. 71:36–37.) The court told the jury it could not use the other acts evidence to conclude that Lopez was a bad person or had a certain character trait. (R. 71:37.)

The jury found Lopez guilty on all four counts of sexual assault of a child under 13 years of age. (R. 71:68.) The court sentenced him to a total of 44 years in prison. (R. 72:27.)

### **STANDARD OF REVIEW**

A court’s decision to admit other acts evidence involves an exercise of discretion, which should be upheld unless the trial court erroneously exercised its discretion. *State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis. 2d 686, 613 N.W.2d 629. This Court will affirm if the lower court applied the relevant facts to the proper legal standards, and reached a conclusion a reasonable judge could reach. *State v. Sullivan*, 216 Wis. 2d 768, 780–81, 576 N.W.2d 30 (1998).

This Court should look for reasons to sustain, not reverse, the circuit court’s exercise of discretion. *Burkes v. Hales*, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (1991). The circuit court’s decision should be upheld “unless it can be said that no reasonable judge, acting on the same facts and

underlying law, could reach the same conclusion.” *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

## ARGUMENT

### **The circuit court properly exercised its discretion in admitting the other acts evidence.**

#### **A. Controlling principles of law.**

It is an accepted rule in prosecution that the State is entitled to prove its case by evidence of its own choice. *Old Chief v. United States*, 519 U.S. 172, 186–87 (1997). This includes proving all of the elements of the charged crimes beyond a reasonable doubt as the State sees fit. *State v. Veach*, 2002 WI 110, ¶ 77, 255 Wis. 2d 390, 648 N.W.2d 447.

Other acts evidence is generally inadmissible to prove a person’s character or that the person acted in conformity therewith. However, other acts evidence is admissible when offered for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Wis. Stat. § 904.04(2)(a).

The admissibility of other acts evidence requires courts to use a three-step analytical process: 1) Is the other acts evidence offered for an acceptable purpose? 2) Is the other acts evidence relevant under Wis. Stat. § 904.01? 3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion to the jury, or needless delay under Wis. Stat. § 904.03? *Sullivan*, 216 Wis. 2d at 772–73.

The party seeking to admit the other acts evidence has the burden to establish that prongs one and two of the *Sullivan* test are met by a preponderance of the evidence. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399. If the first two prongs are established, the burden then shifts to the opposing party to show that the

probative value of the evidence is outweighed by prejudice or confusion to the jury. *Id.*

Evidence of a perpetrator's uncharged conduct or other acts evidence plays a central role in child sexual assault cases. See John E.B. Myers, *Myers on Evidence of Interpersonal Violence*, § 8.04 at 86–87 (6<sup>th</sup> ed. 2016). Wisconsin law has adopted the longstanding principle that in sexual assault cases, particularly those involving the sexual assault of a child, courts permit a “greater latitude” of proof as to other similar occurrences. *State v. Davidson*, 2000 WI 91, ¶ 36, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted). In *State v. Friedrich*, the supreme court relied on the greater latitude rule when it defined “plan” to include a “system of criminal activity” comprised of multiple acts of a similar nature. *State v. Friedrich*, 135 Wis. 2d 1, 19–20, 24, 398 N.W.2d 763 (1987). The supreme court recognized the inherent difficulties in prosecuting child sexual assault cases and the importance of allowing circuit courts to admit evidence of past similar acts to show plan or motive. *Id.* at 29.

**B. The circuit court correctly admitted the other acts evidence.**

**1. The State offered the other acts evidence for proper purposes.**

“Identifying a proper purpose for other-acts evidence is not difficult and is largely meant to develop the framework for the relevancy examination.” *State v. Hurley*, 2015 WI 35, ¶ 62, 361 Wis. 2d 529, 861 N.W.2d 174. “The proponent need only identify a relevant proposition that does not depend upon the forbidden inference of character as circumstantial evidence of conduct.” *Id.* (citation omitted). When applied, this rule favors admissibility in that it mandates exclusion of other crimes evidence when offered to prove the propensity

of the defendant to commit similar crimes. *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993).

Here, the circuit court considered the State's proffer of other acts evidence for the purpose of proving Lopez's motive and plan. (R. 62:7–8.) The court noted the similarities between the victims in the current case and the other acts evidence; that they're all small children and relatives of the defendant. The sexual assaults took place in the home and in a vehicle, all places that Lopez had control over the small children. (R. 62:10.) The court reasoned that the State's proffered evidence was for an acceptable purpose. (R. 62:11.)

Proof of plan, motive, and intent are allowable exceptions to the general prohibition of admitting other acts evidence under Wis. Stat. § 904.04(2)(a). Motive speaks to the reason why a defendant desired the result of the crime charged. *Friedrich*, 135 Wis. 2d at 21. This is important when an element of one of the charges requires proof of “an intentional touching of the complainant's genital parts for the purpose of sexually arousing or gratifying the defendant.” *Id.* (emphasis omitted). The one count of sexual contact requires proof of the intentional touching with the purpose for sexual gratification or arousal. (R. 33:3.)

Lopez's counsel asks how the State can claim the other acts evidence is “reasonably necessary” to establish motive when motive, intent, and plan are not in dispute. (Lopez's Br. 14–15.) The simple answer is that it is for the State to decide how it will prove its case. Lopez's flat denial of the sexual assault charges against him does not alleviate the State of its burden of proof. It is not for Lopez's counsel to decide that there is “no need” for the other acts evidence. That is the province of the court to determine. *Friedrich*, 135 Wis. 2d at 23. And here, the circuit court correctly concluded the other acts evidence was admissible for a proper purpose.



## 2. The other acts evidence was relevant.

The other acts evidence was relevant to demonstrate Lopez's opportunity, motive, and plan to sexually gratify himself by assaulting his prepubescent children and then manipulating them through fear and isolation from telling anyone. (R. 71:44–46.)

The probative value of other acts evidence turns on the similarities between the other acts and the charged offenses. The stronger the similarity, the greater the probability that the like result was not repeated by mere chance or coincidence. *Sullivan*, 216 Wis. 2d at 786–87. The supreme court in *Friedrich* concluded that this was particularly true in child sexual assault cases. *Friedrich*, 135 Wis. 2d at 18.

The circuit court correctly concluded that the other acts evidence of Tess was relevant to show motive and plan, due to the similarities between Lopez's sexual assaults of Tess and the victims in the current complaint. (R. 62:10–11.) The circuit court pointed out the similarities: the children Lopez assaulted were between five and ten years old; the children were all relatives of Lopez; and all the assaults occurred in the home where Lopez had control over the small children. Finally, like Eric, Lopez threatened to kill Tess's mother if she told anyone. (R. 62:10.)

As to the other acts evidence of Sara, she testified at trial that Lopez sexually assaulted her from the time she was seven or eight until she was ten years old. (R. 69:3–32.) She reported that Lopez came into her bedroom, took off her clothes, got on top of her and touched her vagina with his penis, going back and forth. (R. 69:8–11.) Sara stated that another time Lopez came into her sister's bedroom where Sara was sleeping in another bed and he did the same thing. (R. 69:12–13.) Like Beth, Lopez did not threaten to kill Sara's mother if she told anyone. Rather, both Beth and Sara chose to be silent out of fear of Lopez and fear of

hurting their mother. (R. 68:40–41; 69:15.) Finally, both Beth and Sara began wetting their beds after the sexual abuse stopped. (R. 68:38; 69:18.)

On appeal, Lopez admits that sexual gratification is the underlying reason for his alleged behavior. In fact, Lopez states that if the alleged behavior is true, there could be only one motive or plan and that would be to seek sexual gratification. (Lopez’s Br. 14–15.) But Lopez’s admission of sexual gratification to certain acts, if true, does not relieve the State of proving the element of sexual gratification. *Davidson*, 236 Wis. 2d 537, ¶ 65. The circuit court properly determined that the other acts were relevant to prove motive and plan.

### **3. The circuit court properly applied the relevance-prejudice balancing test.**

The circuit court concluded that while the other acts evidence was prejudicial to Lopez, it was not unfairly prejudicial. (R. 62:11–12.) That was a manifestly reasonable decision.

The probative value of other acts evidence depends in part upon its nearness in time, place and circumstances to the alleged crime sought to be proved. *Speer*, 176 Wis. 2d at 1114. (citing *State v. Rutchik*, 116 Wis. 2d 61, 68, 341 N.W.2d 639 (1984). The circuit court pointed out the probative value of the other acts evidence of Tess because of its proximity in time to the current charges, with one charge only nine years away from the other charge. (R. 62:11.) The circuit court reasoned that even with an intervening period of some six years, it was not too remote to be considered by the jury. (R. 62:11.)

When the trial concluded, the circuit court gave instructions to the jury to use in reaching their verdicts. (R. 71:30.) The circuit court stated, “Specifically, evidence had been presented that the defendant sexually abused two other

children. If you find that this conduct did occur, you should consider it only on the issues of motive and preparation and/or plan.” (R. 71:36.) Further, the circuit court admonished, “You may consider this evidence only for the purposes I have described giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person.” (R. 71:37.) Courts presume that juries follow the instructions they are given. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

Cautionary instructions to the jury help limit any unfair prejudice that may result from the admissibility of other acts evidence. *Hurley*, 361 Wis. 2d 529, ¶¶ 88–89. On review, juries are presumed to comply with properly given limiting and cautionary instructions. *Id.* at ¶ 90.

A trial court’s determination of admissibility will be upheld where the court exercised its discretion according to accepted legal standards and in accordance with the facts of record. The record must reflect that discretion was exercised, including evidence that the trial judge undertook a reasonable inquiry and examination of the facts as the basis for his decision. *Speer*, 176 Wis. 2d at 1116.

Recall that the circuit court conducted a hearing on the State’s Motion to Introduce Other Acts Evidence for the purpose of demonstrating Lopez’s motive and plan for sexually assaulting young, prepubescent children and manipulating them through fear and duress to keep the assaults secret. (R. 62:7.) The circuit court considered the proffered evidence and concluded the other acts evidence was greatly similar to the current allegations of sexual intercourse with his own children in the home where Lopez had control over the children. The other acts evidence included a threat to kill the victim and her mother just as one of the current allegations. (R. 62:10.)

All of the State's evidence is offered to the prejudice of the party against whom it is offered. The test for admissibility turns on whether the resulting prejudice is fair or unfair. *State v. Payano*, 2009 WI 86, ¶ 88, 320 Wis. 2d 348, 768 N.W.2d 832. Lopez argues that the unfair prejudice of the State's other acts evidence cannot be outweighed by its probative value. (Lopez's Br. 17.) The circuit court properly concluded the probative value of the other acts evidence was not unfairly prejudicial to Lopez. The other acts evidence was probative in that it provided credence to the statements of Eric and Beth in contrast to the tendency to not believe children victims. (R. 62:11.) The circuit court weighed the competing probative and prejudicial values of the other acts evidence and concluded the proximity in time was not too remote to be considered by the jury. (R. 62:11.)

In this case, the similarities in the other acts evidence greatly enhances its probative value. (R. 62:11.) Here, the other acts evidence of Tess and Sara share common elements for establishing motive and intent. Like Eric and Beth, the other acts evidence occurred when Tess and Sara were in the same prepubescent age range (R. 69:9, 36); both were part of Lopez's family (R. 69:4–5, 33); and the nature of the other acts evidence involved sexual intercourse and sexual contact occurring in various places in the home, all places where Lopez exercised control over the small, vulnerable children. (R. 69:9–14, 34–36, 40–44, 46.) Further, the other acts evidence included the use of a pillow over Tess's face like Lopez used with Beth (R. 69:34–36, 47) and the bed wetting problems that Sara had after the sexual assaults like Beth. (R. 69:18; 68:37–38.) Finally, the other acts evidence involved threats to kill Tess and Tess's mother if she told anyone, (R. 69:37) similar to the threats to Eric, that Lopez would kill Eric's mother with a gun if Eric ever told anyone (R. 68:66, 75); effectively silencing the victims through fear and intimidation.

The circuit court did not err in admitting the evidence.

**C. Any error in admission of the other acts evidence was harmless.**

If this Court disagrees with the foregoing analysis, it should nonetheless conclude that any error in admitting the evidence was harmless. Error is harmless if the reviewing court can determine beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *State v. Harvey*, 2002 WI 93, ¶¶ 46–49, 254 Wis. 2d 442, 647 N.W.2d 189.

The State presented compelling direct evidence to support the jury's verdict, even in the absence of the other acts evidence. The testimony of the two victims fully supports the jury's verdict. Eric and Beth are siblings and children of Lopez. Both victims testified in detail about Lopez repeatedly sexually assaulting them from when they were about five years old to the age of 12. Both victims were afraid to tell anyone—Eric because Lopez threatened to kill Eric's mother and Beth because she didn't want to hurt her mother. The jury had ample opportunity to consider the credibility of both victims against the flat denials of Lopez. The State's direct evidence by itself was compelling enough for the jury to reach a guilty verdict. The circuit court's admission of the other acts evidence was harmless.

## CONCLUSION

This Court should affirm Lopez's convictions.

Dated at Madison, Wisconsin, this 30th day of July, 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 5,099 words.

Dated this 30th day of July, 2018.

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 30th day of July, 2018.

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