STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,
Plaintiff- Respondent

vs.

Appeal No. 2018AP001507 - CR

Case No. 2015CF005197

JEFFREY D. LEE,
Defendant- Appellant

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. MARK A. SANDERS, PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. MARK A. SANDERS, PRESIDING

BRIEF OF DEFENDANT- APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS OF APPENDIX

Trial Exhibits

TABLE OF AUTHORITIES

Page

State Cases

Statutes

Criminal Instructions

STATEMENT OF ISSUES PRESENTED

1. Q. Were the specific other acts evidence that were received at the trial of this matter irrelevant and improperly admitted, and was the probative value of that evidence completely outweighed by the tremendous prejudicial effect they had on the defendant's right to a fair trial?

   A. The Circuit Court answered no.

2. Q. Were the Court's instructions regarding the use of the other acts evidence confusing to the jury and were they unduly prejudicial to the defendant?

   A. The Circuit Court answered no.

3. Q. Was the defendant's sentence of 60 years unduly harsh and excessive for the actual crime of which the defendant had been convicted and should his sentence be modified to a lesser sentence?

   A. The Circuit Court answered no.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

It is not requested that this appeal be published and oral arguments are not necessary because the issues in this matter may be decided on established principles of law in the State of Wisconsin.

STATEMENT OF THE CASE-PROCEDURAL

1. This criminal case commenced with the filing of a Criminal Complaint against the defendant on December 4, 2015, charging him with Sexual Assault of a Child under age 12 in the first degree. (Record, pp. 1-2; Appendix, pp. A1- A2). The allegation involved J.L., from February 13, 2008- February 13, 2009. The defendant had just been released from prison on December 1, 2015, involving another matter that had allegedly occurred long after the incidents involved in this matter.

2. The defendant was arrested in this matter on December 9, 2015 and the initial appearance was held on December 10, 2015. (R77, pp. 1-10). The Preliminary Hearing was waived on December 17, 2015. (R78, pp. 1-16; R6, p. 1, App. p. A3).

3. On December 17, 2015, an Information was filed, charging the defendant with Repeated Sexual Assault of a Child, alleging that from February 13, 2008 to February 13, 2009, he committed repeated sexual assaults against the same child, J.L., the assaults being in violation of §948.02(1)(b) or (c), contrary to §948.025(1)(a) and §939.50(3)(b). (R5, p. 1; App. p. A4).

4. This offense was a Class B felony, with a maximum sentence of 60 years. The Information also invoked §939.616(1), which stated that upon conviction for this offense, there was a mandatory minimum sentence in prison of at least 25 years. He was arraigned on the Information on January 19, 206 and entered a plea of not guilty. (R79, pp. 1-17).

5. The jury trial commenced in this matter in the Circuit Court of Milwaukee County, the Hon. Mark A. Sanders, presiding, on January 9, 2017. The state was represented by Michael C. Schindhelm, Assistant District Attorney. The defendant was represented by Eamon C. Guerin. The trial continued until January 13, 2017, at which time the jury rendered its verdict, finding the defendant guilty of the charge in the Information. (R45, p. 1; App. A30).

6. On March 3, 2017, the defendant appeared in the Circuit Court of Milwaukee County, the Hon. Mark A. Sanders, presiding, for sentencing. The state was represented by Mr. Schindhelm and the defendant was represented by Mr. Guerin. The Court sentenced the defendant to 60 years, with 40 years of initial confinement and 20 years of extended supervision. (R103, p. 44).

7. A Written Explanation of Determinate Sentence was filed on March 3, 2017. (R49, p. 1; App. p. A31). A Judgment of Conviction was filed on March 7, 2017. (R52, pp. 1-2; App. pp. A32- A33). A Notice of Intent to pursue Postconviction Relief was filed on March 7, 2017. (R54, pp. 1-2; App. pp. A34- A35). On April 7, 2017, an Order Assigning Counsel was filed on April 7, 2017, appointing Esther Cohen Lee as appellate counsel to represent the defendant in regard to this appeal.

8. On July 23, 2018, a Postconviction Motion to Vacate the Defendant's Judgment of Conviction and for a New Trial, or, in the alternative, to Modify his Sentence, and an Appendix, were filed in the Circuit Court of Milwaukee County on behalf of the defendant. The Hon. Mark A. Sanders considered the Motion and issued a Decision and Order denying the Motion on July 27, 2018. (R73, pp. 1-2; App. pp. A36- A37).

9. A Notice of Appeal was filed on August 6, 2018. (R74, p. 1, App. p. A38). An Order Appointing Counsel was filed on August 7, 2018, assigning Esther Cohen Lee as appellate counsel to represent the defendant in the Court of Appeals, District I. (R---, p. 1; App. p. A39).

STATEMENT OF THE CASE- FACTUAL

The Alleged Incidents Involving the Victim, J.L. at age 6, and the Defendant

The alleged victim in this case is J.L., date of birth, February 13, 2002, who testified at the trial of this matter when she was 14 years old. She testified that when she was 6 years old, in 2008, she would go to a daycare run by her Aunt Shirley L. She said that she was in the second grade and that after school, at 3:00 p.m., she would go to the daycare and would stay there until her mother got out of work. (R96, p. 120). The date alleged was from February 13, 2008 to February 13, 2009, however, the defense noted that it could not have occurred after August, 2008 because the defendant had been in jail beginning August, 2008.

The daycare was in the main level of a three story house on 4th Street and Locust Street in Milwaukee, with a basement, main level and upstairs. (R97, p. 9). All of the 6-9 children who went there were members of Shirley's family. (R97, p. 9). Shirley lived upstairs with the defendant, who was then 45 years old, and was her boyfriend. They shared a bedroom together. (R97, pp. 13-14). J.L. testified that on 10-20 occasions, when Shirley was not home, the defendant would call for her to go upstairs and he would take her to the bedroom. (R97, p. 113).

She said that he would have her lay on the bed, take off her underwear, and then lick her vaginal area. (R97, pp, 115-116). J.L.'s brother, Anthony L., testified that when he was 4 years old, he and J.L. would go to the daycare and that, at times, he would see the defendant go upstairs with J.L. (R96, p. 134).

J.L. said that at the time this occurred, she did not tell anyone about it. (R97, p. 121). Then, when she was 13 years old, a friend of hers told her about something that had happened to her when she was younger. J.L. told her that the same thing had happened to her. Her friend told her to tell her mother about it. (R97, p. 109). J.L.'s mother, Shannon L., testified that on

July 9, 2015, she noticed that J.L. was showing a lot of anger and that she had been staying in her room. When she asked J.L. what was happening, J.L. told her about her friend and what had happened to her, and then she told her mother that the defendant had molested her, although she did not go into any details at that time. (R97, p.p. 15-16). After contacting Shirley and asking her about this, Shannon L. reported the incidents to the police. (R97, p. 17).

On July 14, 2015, Officer Louise Bray, of the Milwaukee Police Department, said that Shannon L. brought her 13 year old daughter, J.L., to the police station. At that time, Bray said, J.L. told her that when she was 6 years old, she would go to her Aunt Shirley's daycare, and that the defendant would sometimes take her upstairs, take her clothes off, and touch and put his mouth on her vagina. (R97, p. 52). J.L. told her that this happened 10-20 times. (R97, p. 53).

B. The Evidence Presented by the State Regarding Defendant's Alleged Prior Bad Acts

Prior to the trial, on May 18, 2016, the state filed a Motion to Introduce Other Acts Evidence. (R11, pp. 1-17; App. pp. A7- A23). The state indicated that it intended to introduce evidence of alleged prior sexual assaults by the defendant of six young girls:

1. Alexis, alleged sexual assaults against her between April 6, 2007 – August 6, 2008 – it was alleged that the defendant touched her vagina with his hand, under her underwear, when she was 6 or 7 years old
    a. the defendant was convicted in Case No. 2008CF3993 of Repeated Sexual Assault of a child in the first degree, and was eventually sentenced to 7 years, 5 months in prison and 8 years, 4 months of extended supervision
2. Brittany, alleged sexual assaults against her between February 13, 2007- August 6, 2008 – it was alleged that the defendant placed his hands on her vagina, under her clothing, when she was 8 years old
    a. the defendant was convicted in Case No. 2008CF3993 of Repeated Sexual Assault of a child in the first degree; this conviction was later reversed and the count was dismissed upon his plea of guilty to the charge regarding Alexis
3. Lynita, alleged sexual assaults against her in the mid-2000's – the defendant was accused of touching her vagina with his hand, when she was 14 years old
    a. the defendant was never charged with this offense
4. Cheryl, alleged sexual assault against her in the mid-2000's – the defendant was accused of touching her vagina outside her clothing, when she was 10 or 11 years

old
   a. the defendant was never charged with this offense
5. Ashley, alleged incident in the mid-2000's – the defendant was accused of placing her on his lap and squeezing her behind
   a. the defendant was never charged with this offense
6. Ernasia, alleged sexual assault against her in 2007- the defendant was accused of touching her vagina
   a. the defendant was never charged with this offense

A hearing was held on August 26, 2016 in the Circuit Court of Milwaukee County, the Hon. Mark A. Sanders, presiding, to determine the admissibility of the evidence of the above other acts. The arguments will be discussed below. Mr. Schindhelm represented the state and Mr. Eamon represented the defendant. After the state had put forth its arguments to allow evidence of all of those other acts to be introduced, Mr. Eamon objected to all of them. The Court held that:

1. the defendant's conviction for Repeated Sexual Assault of a child in the first degree in regard to Alexis could be introduced,
2. the defendant's conduct in regard to Brittany could be introduced, even though his conviction for that conduct had been reversed on appeal,
3. the defendant's conduct in regard to Lynita could be introduced due to the similarity of the conduct with the within charge,
4. the defendant's conduct in regard to Cheryl could be introduced due to the similarity of the conduct and the age of the victim with the within charge,
5. in regard to the conduct involving Ashley, the Court held that due to the dissimilarity of the conduct with the within charge, that conduct could not be introduced,
6. the defendant's conduct in regard to Ernasia could be introduced due to the similarity of the conduct with the within charge

At the trial, the state introduced the following evidence to prove past bad acts:

1. in regard to the conviction for Repeated Sexual Assault of a child in the first degree in regard to Alexis, the state introduced the following documents, all of which were received in evidence over objection by defense counsel (R97, pp. 68-72):
   a. the Criminal Complaint in Case No. 2008CF3993, charging the defendant with two counts of Sexual Assault of a Child in the first degree, in regard to Alexis and Brittany, filed August 18, 2008 (R27, pp. 1-3; App. pp. A41-A43),

b. the Amended Information in Case No. 2008CF3993, charging the defendant with 2 counts of Repeated Sexual Assault of a Child, relating to Alexis, and 2 counts of Repeated Sexual Assault of Child relating to Brittany, filed June 3, 2013 (R28, pp. 1-2; App. pp. A44- A45),

c. the Plea Agreement in Case No. 2008CF3993, following the reversal on appeal of that case, indicating that the defendant agreed to plead guilty to Count 1, charging Sexual Assault of a Child in the first degree, in regard to Alexis, with Counts 2 and 3 being dismissed but read in, with a sentence of 89 months of initial confinement and 100 months of extended supervision, signed by the defendant (R20, pp. 1-3; App. pp. A46- A48),

d. the Judgment of Conviction of the defendant in Case No. 2008CF3993, (R30, pp. 1-3; App. pp. A49- A51),

e. the Judgment roll (CCAP Record) of the defendant in Case No. 2008CF3993, including all notations of Court appearances in regard to the original conviction, the return of the case after reversal on appeal, and the final conviction (R32, pp. 1-19; App. pp. A52- A70),

f. the certified medical records of Alexis at Aurora Sinai Medical Center, dated August 4, 2008 (R33, pp. 1- 10; App. A71- A80),

1. the testimony of Officer Colleen Sturma, reading from that medical record, that on August 3, 2004, Alexis had complained that her lower area was bothering her and that the defendant had touched her both in her frontal area and in her behind (R97, p. 76),

g. the certified medical records of Alexis at Children's Hospital, dated August 8, 2008 (R36, pp. 1- 15; App. pp. A81- A95),

2. in regard to the allegations made by Brittany, the state introduced the following:

a. the certified medical records of Brittany at Children's Hospital, dated August 6, 2008 (R37, pp. 1- 10; App. pp. A108- A117),

b. the certified medical records of Brittany at Aurora Sinai Medical Center, dated August 4, 2008 (R37, pp. 1-12; App. pp. A96- A107),

1. the testimony of Officer Sturma, reading from that medical record that Brittany had said that the defendant would take her to his room and that then he would do things that children should not do, like "humping" (R97, p. 77),

c. the Criminal Complaint in Case No. 2008CF3993, stating her allegations,

d. the Judgment roll (the CCAP records) in that case, stating the charges relating to Brittany,

3. in regard to the other accusations, the state brought those into the trial by asking the defendant, who testified in his own behalf, about them during his cross-examination (R100, pp. 27-30). Specifically, the state asked him:

a. whether Lynita had accused him of touching her vagina with his hand, to which he answered yes (R100, p. 29),

b. whether Cheryl had accused him of touching her vagina outside her clothing, to which he answered yes (R100, p. 29),

c. whether Ernasia had accused him of touching her vagina, to which he answered yes (R100, p. 29).

C. The Defense at Trial

At the trial, the defense called Shirley's son, Brandon, who testified that he also lived in the house with the daycare and that he lived upstairs. He said that he never saw the defendant with J.L. upstairs and that he never saw him in the bedroom he shared with Shirley during daycare hours. (R99, p. 15). Shirley also testified that if the defendant stayed overnight with her in the bedroom, he would leave in the morning before the daycare began. (R99, p. 46). She also said that she had never seen J.L. with him and that she did not allow the children to go upstairs. (R99, p. 50).

The defendant testified in his own behalf and vehemently denied having ever gone upstairs with J.L. (R100, p. 13). He also vehemently denied that he had ever taken J.L.'s pants off of her or licking her vagina. (R100, p. 32). He said that he did not go into the daycare when it was open. (R100, p. 32). In regard to the case involving Alexis and Brittany, he stated that he had been accused of assaulting both of them but that he was only convicted in regard to Alexis. He denied having had sex with Brittany. (R95, p. 30). When he was asked about having signed the plea questionnaire in regard to the charge involving Alexis, he stated that he had only agreed to plead guilty in that case to get a reduced sentence but that he had not sexually assaulted her. (R100, pp. 16, 18).

POINT I

THE SPECIFIC OTHER ACTS EVIDENCE THAT WERE RECEIVED AT THE TRIAL OF THIS MATTER WERE NOT RELEVANT AND WERE NOT PROPERLY ADMITTED, AND THE PROBATIVE VALUE OF THAT EVIDENCE WAS COMPLETELY OUTWEIGHED BY THE TREMENDOUS PREJUDICIAL EFFECT THEY HAD ON THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

A. The General Rules Regarding the Admission of Other Acts Evidence

In 1967, in *Whitty v. State*, 34 Wis. 2d 278, 291, 149 N.W.2d 557, the Supreme Court stated that the basic rules regarding the admission of other acts in a criminal trial. First, the Court recognized the "character rule" which states that prior criminal acts are not admissible in evidence

> for the purpose of proving general character, criminal propensity or general disposition on the issue of guilt or innocence because such evidence, while having probative value, in not legally or logically relevant to the crime charged. Id. at 291-292.

The Court recognized that, among other things, prior crimes evidence would lead to an "overstrong tendency to believe the defendant guilty of the charge merely because he is the person likely to do such acts" and "the confusion of issues which might result from bringing in evidence of other crimes." Id. at 292. The Court recognized that the admission of such evidence would deny the defendant a fair trial, which would mean he would be denied due process of law. Id. at 297.

The Court also recognized that evidence of prior crimes may be admissible "when such evidence in particularly probative in establishing the elements of the crime charged, including "intent, identity, system of criminal activity, to impeach credibility, and to show character…". Id. at 292. The Court held that the prior crime need not be in the form of a conviction and that "evidence of the incident, crime or occurrence is sufficient." Id. at 293. Its probative value, the

Court held, depends upon "its nearness in time, place and circumstances to the alleged crime…". Id. at 294. In the end, the Court held that it was up to the court's discretion as to whether the evidence should be excluded because its probative value was outweighed by the "danger of undue prejudice", confusion of the issues, or "misleading the jury". Id. at 294.

These principles have been codified in §904.04 Wis. Stats., which provides that:

> (1) Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion except"…
>
> > (a) character of accused. Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same…
>
> (2)(a) Except as provided in paragraph (b)(2), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Further, in 1998, to clarify the role of the trial court in determining whether other acts evidence should be admitted, the Supreme Court, in *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30, established a three step test. First, "is the other acts evidence offered for an acceptable purpose under §904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.?" Id. at 772.

Second, "Is the other acts evidence relevant?" That is, does it relate to a fact that is "of consequence to the determination of the action." And does it have a tendency to make that fact "more probably or less probable than it would be without the evidence." Id. at 772. That language was taken, in part, from §904.01. Under this step, the Court stated that "the greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." Id. at 787.

Third, "Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury…? Id. at 772-773. That language was taken in part, from §904.03. The Court also held that if the trial court "erroneously exercised its discretion in weighing the probative value of the other acts evidence against the danger of unfair prejudice…", it may be found that the other acts evidence should not have been admitted. Id. at 789.

There is another important general rule involving other acts evidence in sex crimes cases, especially in sex crimes cases involving children, and that is the "greater latitude" rule. That rule is defined in §904.04(2)(b) and it provides that under certain crimes, including crimes under Chapter 948, "evidence of any similar acts by an accused is admissible, and is admissible without regard to whether the victim of the crime is the subject of the proceeding is the same as the victim of the similar act." Recently, in *State v. Dorsey*, 2018 WI 10, the Supreme Court held that, "Under the common law, the greater latitude rule allows for more liberal admission of other acts evidence." The Court also noted that that rule was applied in 1883 and in hundreds of cases since then. Id. at 32.

The greater latitude rule is to be applied in all three steps of the *Sullivan* analysis. *State v. Davidson*, 236 Wis. 2d 537, 559, 613 N.W.2d 606 (2000). The Supreme Court held in *State v. Friedrich*, 135 Wis. 2d 1, 29, 398 N.W.2d 763 (1987), that the rule justified to establish the defendant's scheme or plan "to achieve sexual stimulation or gratification from the young, the most sexually vulnerable to our society, that allows trial courts in the exercise of discretion to order the evidence of past similar acts to show a scheme or plan to exploit children."

However, in *Davidson*, the Court also made it very clear that, "The greater latitude standard does not relieve a court of the duty to ensure that the other acts evidence is offered for a

proper purpose under §904.04(2)… Nor does it relieve a court of the duty to ensure the other acts evidence is admissible under §904.03 and the other rules of evidence." In other words, the Court held, "courts still must apply the three-step analysis set forth in *Sullivan.*" Id. at 564. The Court also held that in cases where the greater latitude applies, that does not "overcome the prohibition against admitting other crimes evidence to establish a defendant's character, disposition, or criminal propensity." Id. at 563.

B. Applications by the Circuit Court of the General Rules to this Case

In this case, the state's Motion to Introduce Other Acts Evidence, filed on May 18, 2016, argued that information regarding the sexual assaults against the six other alleged victims should be allowed to be admitted for various reasons. (R11, pp. 1- 17; App. pp. A7- A23). In regard to Alexis, the state argued that the allegations in regard to her led to a conviction for Sexual Assault of a Child in the first degree in Case No. 2008CF3993. In regard to that alleged victim and the other five alleged victims, the state argued it was going to introduce these other acts to establish motive, intent, opportunity, plan, knowledge and absence of mistake or accident.

The state argued that the other acts evidence were similar to the act alleged in this case for the following reasons: first, the defendant targeted the young daughters or relatives of his various girlfriends, second, they all took place in Milwaukee over a three year period of time (March, 2005 to August, 2008), third, they were all young girls, most of them between the ages of 6-8 and others the ages of 11 and 14, and fourth, the sexual contact was similar, involving the fondling of the victims' vaginas.

The state argued that these other acts showed a pattern of behavior by the defendant and helped to establish the credibility of the victim, J.W. Under the greater latitude test, the state argued, these other acts were admissible.

At the hearing of this motion on August 26, 2016 in the Circuit Court of Milwaukee County, the Hon. Mark A. Sanders, presiding, the defense argued that all of these other acts were unduly prejudicial and he raised an objection to the admission of them. (R90, p. 27).

The Court held that the defendant's conviction in regard to Alexis was admissible because it was similar to the offense charged, pursuant to §904.04(b)(2). The Court held that the allegations were being offered to prove the permissible purposes of motive, intent, plan and lack of mistake, and that, therefore, the first prong of *Sullivan* had been established. (R90, p. 15).

In regard to the second prong of *Sullivan*, which requires the state to prove the relevancy of the other acts evidence, the Court held that all of the other acts in this case were related to identify, plan and motive, and that the evidence had a tendency to make a fact more probable. (R90, p. 16). The Court held that relevancy deals with the issue of the similarity between the act alleged and the other acts.

The Court held that that similarity was shown in this case by nearness of time, place and the circumstance between this act and other acts. (R90, p. 16). Some of the similarities in this case, the Court noted, were the similarity in age between some of the other alleged victims and the victim in this case, the time frames and locations being in Milwaukee, and the alleged sexual contact being the touching of the vagina of the victims. (R90, pp. 18, 20).

In regard to the third prong of *Sullivan*, which requires the Court to determine whether the probative value of the other acts evidence is outweighed by the prejudice it would cause to the defendant, the Court noted that there was certainly a risk of prejudice to the defendant by the admission of this evidence. (R90, p. 24). The Court stated that the jury could ignore the evidence and convict him because he was a danger to children. (R90, p. 24). The Court held

that that risk could be reduced by a cautionary instruction, which, it believed, the jury would follow. (R90, p. 24).

For all of these reasons, the Court held that it would allow evidence of sexual assaults against Alexis, Brittany, Lynita, Cheryl, and Ernasia. It did not allow the assault against Ashley because it felt that the conduct, involving squeezing her behind while she sat on his lap, was not similar enough. (R90, p. 27).

C. The Other Acts Evidence that were Admitted in this Case were not Relevant and were not Properly Admitted

One of the most important factors in regard to the issue of relevancy under *Sullivan*, is whether the state has proven that the defendant had actually committed the other act that was being introduced. It has been held that under §904.04(2), "other acts evidence is relevant only when a jury could find by a preponderance of the evidence that the defendant had committed the other act." *State v. Bustamante,* 201 Wis. 2d 562, 570, 549 N.W. 2d 746 (1996); *State v. Gribble*, 248 Wis. 2d 409, 443, 636 N.W. 2d 488 (2001).

It has been held that the receipt into evidence of a prior conviction is admissible. *State v. Silva,* 266 Wis. 2d 906, 927, 670 N.W. 2d 385 (2003). See also, §908.03(22), which provides that "evidence of a final judgment, after a trial or upon a plea of guilty, adjudicating a person guilty of a felony…" is not excluded by the hearsay rule. In regard to the other acts evidence where there is not a conviction, there must be sufficient proof that the defendant had committed the offense.

In this case, as noted above, the state offered the following evidence to establish Alexis' allegation: the Criminal Complaint in Case No. 2008CF3993, the Amended Information, the Plea Agreement, the Judgment of Conviction, the Judgment roll (the CCAP record), and her certified medical records at Aurora Sinai Medical Center and at Children's Hospital. It was

argued in the Postconviction Motion that the two most serious problems with the admission of this evidence dealt with Judgment roll (the CCAP record) and Alexis' medical records and the statements contained in them. These documents were hearsay and even hearsay within hearsay.

Section 908.01 Wis. Stats. provides that, " Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 908.02 provides that, "Hearsay is not admissible except as provide by these rules or by other rules adopted by the supreme court or by statute." It has been held that before hearsay may be admitted in the criminal trial, it must fit within one of the recognized exceptions to the hearsay rule. *State v. Norman*, 2003 WI 72, 262 Wis.2d 506, 522, 664 N.W.2d 97.

Section 908.03 sets forth the statements that are "not excluded by the hearsay rule, even though the declarant is available as a witness":

> (4) Statements made for purposes of medical diagnosis or treatment and describing medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The statute also states, under subsection 6, that reports or records of "acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, all in the course of regularly conducted activity" are not excluded by the hearsay rule if they are testified to by "the custodian or other qualified witness, or by certification…". However, the exception to that rule is when "the sources of information or other circumstances indicated lack of trustworthiness."

Finally, §908.05 deals with hearsay within hearsay. It provides that, "Hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in this chapter."

In regard to the Judgment roll, which was the 19 pages of CCAP records (R32, pp. 1-19; App. pp. A52- A70), defense counsel objected to this being received. The Court overruled that objection and received it in evidence. (R97, p. 70). This became particularly important because it had been specifically requested by the jury during its deliberations. (R100, p. 85). Defense counsel objected to allowing the jury to have all 19 pages of the CCAP records because its contents did not relate to the issues in the case. (R100, p. 87).

The Court held that it would allow the jury to see all 19 pages except it would delete the notation that the maximum sentence for that offense was 40 years. (R100, p. 89). The Court allowed the entire 19 pages to be given to the jury, with some limited redactions, to allow the jury to understand that the defendant had been convicted of a crime that was reversed on appeal and then pled guilty to a lesser crime. (R101, pp. 7-8).

It was argued in the Postconviction Motion that the problem with the receipt of the CCAP records in evidence was that the entire record consisted of hearsay statements noted by the various clerks of the Court and that there is no hearsay exception under §908.03 for such records. Further, there was no reason for the jury to know all of the many details of that case. The fact that the case resulted in a conviction of the defendant for Repeated Sexual Assault of a Child was the only relevant fact that was necessary.

In regard to Alexis' medical records (R33, pp. 1- 10; App. A71- A80, and R36, pp. 1-15; App. A81- A95), and in particular, the reading, by an officer, of Alexis' statements to the medical staff that the defendant had touched her in her frontal area and in her behind, that is hearsay within hearsay. Defense counsel objected to the records themselves on the grounds that they were irrelevant, redundant and hearsay. The Court overruled the objection and allowed them to be received as patient's records. ((R97, p. 82). Defense counsel also objected to the

reading of those statements by the officer on the ground that they were hearsay but the Court overruled that, pursuant to §908.03(4). (R97, p. 75).

As the Postconviction Motion pointed out, the problem with the receipt into evidence of Alexis' medical records and the statements she made to the medical staff about the defendant is that most of the records wee completely irrelevant to the issues in the case concerning her allegations against the defendant and the statements made by the patient to the medical staff did not have sufficient indicia of trustworthiness for the jury to rely upon them.

Further, in regard to Brittany's allegations against the defendant, those were not proven by a criminal conviction, since the original conviction for that offense had been reversed and since the defendant had not them pled guilty to any crime relating to them. The state introduced the Criminal Complaint in Case no. 2008CF3993, which contained Brittany's allegations, and it introduced the Judgment roll (the CCAP records) of that case which also contained information about those allegations.

All of the statements in both of those documents are hearsay. Neither the Criminal Complaint nor the CCAP records are considered exceptions to the hearsay rule under §908.03, and therefore, there was no basis for the admission of them into evidence at the trial. Defense counsel had objected to their receipt into evidence but the Court overruled those objections and received them into evidence. (R97, pp. 68, 70).

Brittany's medical records were also received in evidence. (R97, p. 75). Again, defense counsel objected and the Court overruled that and received them into evidence. (R97, p. 75). The officer's reading of Brittany's statements to the medical staff was of very grievous concern because they included completely unsubstantiated allegations that the defendant would take her into his room and "do things that children should not do – like humping." (R97, pp. 77-78).

That was actually an allegation of sexual intercourse. Besides being completely irrelevant to the issues in this case, there simply had not been sufficient indicia of trustworthiness of those allegation to be received in evidence.

In regard to the allegations relating to Lynita, Cheryl, and Ernasia, which were allegations that the defendant had touched them in their vaginal area, there had been virtually no evidence presented by the state, at any time during the trial, that the defendant had committed those acts. All the state did was to ask the defendant whether he had been aware of those allegations, which he said he was. (R100, pp. 29-30). That does not come close to the requirement that in order to establish that the other acts were relevant under the second step of *Sullivan*, the state must show that a jury could find, by a preponderance of the evidence that the defendant had committed those acts.

It was argued in the Postconviction Motion that, for all of these reasons, it had been an erroneous exercise of the Court's discretion to admit into evidence all of the other acts evidence that has been set forth.

In a very short Decision and Order, filed July 31, 2018, the Circuit Court of Milwaukee County, the Hon. Mark A. Sanders, presiding, denied the Postconviction Motion. (R73, pp. 1-2; App. pp. A36- A37). The Court did not address any of the issues raised as to the impropriety of allowing the specific other acts evidence to be received at the trial, but merely held that under the "greater latitude" doctrine, "the court stands by its ruling on the state's motion for the admission of other acts evidence." The Court also held that it "stands by its ruling on defense counsel's objections to the use of this evidence at trial." (R73, p. 1; App. p. A36). For all of the reasons set forth above, that ruling constituted error and the defendant is entitled to have both the denial of his Postconviction Motion and his conviction reversed and to have a new trial ordered.

D. The Probative Value of the Other Acts Evidence Admitted in this Case was Completely Outweighed by the Tremendous Prejudicial Effect it had on the Defendant's Right to a Fair Trial

As set forth above, the third step under *Sullivan* is for the Court to determine whether the probative value of the other acts evidence was outweighed by the danger of unfair prejudice to the defendant which could cause the jury to convict him, not on the basis of the evidence in the case, but on the basis of other acts evidence. At the hearing on August 26, 2016, the Court recognized that the other acts evidence could constitute a risk of prejudice in this case and could cause the jury to ignore the evidence and convict him because the jurors could believe he was a danger to children. (R90, p. 24).

As early as March 16, 2016, defense counsel had filed a Motion to prohibit the state from introducing evidence of other acts evidence on the ground of undue prejudice to the defendant. Indeed, considering that the Court allowed five accusations of sexual contact relating to five other young girls to be received in evidence, no amount of cautionary instruction could prevent the jury from convicting the defendant of the crime charged based, in large part, on the basis of the other acts evidence.

As it was argued in the Postconviction Motion, the importance of this evidence to the jury can be seen by the fact that the two exhibits that it requested during its deliberations were the defendant's plea agreement and the Judgment roll (the CCAP record) in the case involving Alexis and Brittany. It did not request any exhibits relating to the allegations made by the victim, J.W., in this case.

In denying the Postconviction Motion, the Circuit Court did not address this issue at all. However, for all of the reasons set forth herein, the Court erroneously exercised its discretion in weighing the probative value of the other acts evidence against the danger of unfair prejudice.

As a result, the defendant was denied a fair trial and denied due process of law. For that reason, both the denial of the Postconviction Motion and his conviction should be reversed and a new trial ordered.

POINT II

THE COURT'S JURY INSTRUCTIONS REGARDING THE USE OF THE OTHER ACTS EVIDENCE WERE CONFUSING TO THE JURY AND WERE UNDULY PREJUDICIAL TO THE DEFENDANT.

In instructing the jury at the close of the trial, the Court repeatedly discussed the other acts evidence presented in the case. The Court stated:

> Evidence has been received that Jeffrey Lee has been convicted of Repeated Sexual Assault of a Child relating to Alexis Flynn. Additional evidence was presented regarding the defendant's conduct in having sexual contact with Alexis… and/or others. The evidence of the conviction and evidence of the conduct are separate and may be considered for separate purposes.
>
> With respect to the evidence of the conviction, based on this evidence, you may, but are not required to, conclude that the defendant has a certain character. Based on this evidence you may also conclude, but are not required to, that the defendant acted in conformity with that character with respect to the offense charged in this case. You should give this evidence the weight you believe it is entitled to receive.
>
> With respect to the evidence presented regarding the defendant's conduct in having sexual contact with Alexis… Brittany… and/ or others, if you find that this conduct did occur, you may only consider it on the issues of motive, lack of mistake and intent…
>
> With respect to the evidence presented regarding the conduct involving Alexis… Brittany… or others, you may not consider this evidence to conclude that the defendant has a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case…
>
> The evidence of the conviction and/or the evidence of the conduct are not to be used to conclude that the defendant is a bad person and for that reason guilty of the offense charged. Before you may find the defendant guilty of the offense charged in this case, the state must satisfy you beyond a reasonable doubt that the defendant is guilty based on all the evidence. (R100, pp. 52-54).

These instructions were derived from the Criminal Jury Instructions, Form 275 and Form 276. It was argued in the Postconviction Motion that the problem with the manner in which the Court instructed the jury is that the instructions were completely contradictory and confusing to the jury. On the one hand, the Court told the jury that, based on the conviction relating to Alexis, it could believe that the defendant had a certain character and that he had acted in this case in conformity with that character.

On the other hand, it also told the jury that the evidence relating to the sexual contact with Alexis, Brittany, and the others, could only be considered for the purpose of determining motive, lack of mistake and intent. And it said that the jury could not consider that testimony to conclude that he had a certain character trait. The jury could wonder, well, which is it, can we consider the evidence about Alexis to conclude he has a certain character or not?

It was argued in the Postconviction Motion that to make things even more confusing, the court told the jury that the evidence of the other acts were not to be used to determine that he was a bad person and therefore, was guilty of the crime. Again, the jury could wonder, well, are we allowed to determine that he has a bad character and take that into account in making our decision or not?

In denying the Postconviction Motion on this ground, the Circuit Court stated that "evidence of the defendant's prior conviction involving a different child victim and evidence of his prior sexual contact with that victim and with other child victims were separate and were to be considered for separate purposes." (R73, p. 1; App. p. A36). The Court also noted that it had followed the jury instructions in Forms 275 and 276. It found that the idea that "the instructions could have left the jury to wonder how to consider this evidence amounts to nothing more than speculation." (R73, p. 2; App. p. A37).

The fact is that the jury instructions, on their face, were contradictory and made it impossible for the jury to actually properly consider the evidence of the other acts evidence. Due to the obvious confusion caused by these instructions relating to the use of the other acts evidence in determining whether the defendant should be found guilty or not guilty, the defendant was denied a fair trial. The Decision denying the Postconviction Motion on this ground and the defendant conviction should be reversed and a new trial ordered.

POINT III

THE DEFENDANT'S SENTENCE OF 60 YEARS WAS UNDULY HARSH AND EXCESSIVE FOR THE ACTUAL CRIME OF WHICH THE DEFENDANT HAD BEEN CONVICTED AND HIS SENTENCE SHOULD BE MODIFIED TO A LESSER SENTENCE.

The defendant was convicted of Repeated Sexual Assault of a Child, in violation of §948.025(1)(a) Wis. Stats. That offense is a Class B felony and has a maximum sentence of 60 years. Further, the Criminal Complaint invoked §939.616(1) which provides that, "If a person is convicted of a violation of §948.02(1)(b) or (c)… the court shall impose a bifurcated sentence under §973.01. The term of confinement in the prison portion of the bifurcated sentence shall be at least 25 years."

On March 3, 2017, the defendant appeared in the Circuit Court of Milwaukee County, the Hon. Mark A. Sanders, presiding, for sentencing. The state was represented by Mr. Schindhelm and the defendant was represented by Mr. Guerin. (R103, pp. 1- 46). At the hearing, J.L., her mother, and her grandfather spoke. The prosecutor went into great detail about the alleged conduct of the defendant in regard to Alexis and Brittany, the fact that he had been convicted in regard to both victims, how he had been sentenced to 25 years, how those convictions had been reversed on appeal, and how he ended up pleading guilty only to the conduct relating to Alexis and being sentenced to only 7 years. (R103, pp. 19-21).

He also discussed the details of the defendant's alleged conduct in regard to Lynita, Cheryl, Ashley, and Ernasia, for which he had not been charged of convicted. (R103, pp. 18-19). He also discussed the details of a case in 1995, involving Glenda, for which he had been charged with sexual assault but for which he had been acquitted. (R103, pp. 16-17).

The prosecutor recommended the maximum sentence of the defendant's conviction regarding J.L., with 40 years of initial confinement and 20 years of extended supervision. He

noted that the statute required a mandatory minimum prison sentence of 25 years. (R103, pp. 25, 29). The defendant spoke on his own behalf and denied that he was guilty of the offense of which he had been charged. He noted that he would not have been found guilty if the "other acts evidence" had not been allowed to be introduced. (R103, pp. 33-35).

The Court stated that it believed the victim, not the defendant. (R103, p. 37). It stated that it believed he was guilty of this crime and the other crimes of which he had been convicted. (R103, p. 37). The Court noted that although there were factors that could have made this case more aggravated, it was still an aggravated case and that the defendant had an aggravated criminal history, including another sexual assault case. (R103, p. 40). In regard to the other allegations for which he had been charged but not convicted, the Court noted that it did not know if those allegations were true and that it was not assuming they were true. (R103, p. 41).

The Court then found that due to the need to protect children, it was sentencing the defendant to the maximum sentence of 60 years, with 40 years of initial confinement and 20 years of extended supervision. The Court concluded the sentencing by stating, "That is the maximum sentence I can give – I would give you a longer sentence if I could." (R103, p. 44).

The agent who had prepared the presentence report had recommended that the defendant be sentenced to as little as 32 years, with 25 years of initial confinement and 7 years of extended supervision, to as much as 50 years, with 40 years of initial confinement and 10 years of extended supervision. The Court, however, accepted the state's recommendation of 60 years, with 40 years of initial confinement and 20 years of extended supervision. (R103, p. 44).

It was argued in the Postconviction Motion that the basic problem in the sentencing of the defendant was summed up by the Court in almost the last statement at the sentencing. The Court stated, "That's the maximum sentence I can give. Candidly, Mr. Lee, I'd give you a longer

sentence if I could." (R103, p. 44). The fact of the matter, it was argued, was that the Court did not sentence the defendant for the crime of which he had been convicted. That crime involved the alleged conduct of licking the vagina of a six year old girl approximately 10-20 times. As heinous as that alleged crime was, there was no sexual intercourse, that is, penis to vagina sexual contact, involved. It was for that reason that the Court had indicated that although the defendant's conduct had been aggravated, it could have been more aggravated.

The defendant's sentence of 60 years was, therefore, not only for the crime of which the defendant had been convicted but also for all of his alleged other sexual conduct that the state had described at the hearing. It even included the sexual conduct involving Alexis, for which the defendant had already been convicted and had already served a lengthy prison sentence.

It has been held that, "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). It has further been held that, "In exercising discretion, sentencing courts must individualize the sentence of the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives." *State v. Harris*, 326 Wis.2d 685, 699, 786 N.W.2d 409 (2010).

It was argued in the Postconviction Motion that the sheer length of the defendant's sentence was excessive and, for the crime of Repeated Sexual Assault of a Child, it was unusual. The test as to whether a sentence is unduly excessive and severe is whether it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the

circumstances." *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457 (1975); *State v. Taylor*, 2006 WI 22, 289 Wis. 2d 34, 53, 710 N.W.2d 466.

The Court in this case made it clear that it felt that the defendant had a "poor character" and that he had a "complete lack of acceptance of responsibility in this case and in other cases…". (R103, pp. 39, 41). The Court pointed out that there was a series of "other allegations regarding sexual assaults of children." (R103, p. 41). The Court noted that the defendant had been diagnosed with bipolar disorder for which he was taking lithium, a very strong drug used to treat various mental illnesses. (R103, p. 40). The Court concluded that society needed to be protected from him, and that children, in particular, needed to be protected from him. (R103, p. 42).

It was argued in the Postconviction Motion that the entire tone of the sentencing on the part of the Court showed that it was most concerned, not with the crime of which the defendant had been convicted, but for all of those other acts of sexual assault that the state had described in detail at the sentencing hearing. It was requested that if the defendant's conviction was not vacated that, in the alternative, his sentence should be modified to a lesser sentence.

In its Decision denying the Postconviction Motion on this ground, the Court stated that the Court had "an obligation to consider the defendant's background, including his prior sexual assault conviction and the allegations of prior sexual assault, as part of its duty to acquire full knowledge of his character and behavior." (R73, p. 2; App. p. A37). The Court also held that, "The sentence imposed is stiff, but the court finds that it is the only acceptable response to the aggravated nature of the defendant's conduct in this case, his poor character, and the strong interest in incarcerating persons who victimize children in this fashion." (R73, p. 2; App. p. A37).

The Court concluded that, "In sum, the court finds that it appropriately considered the relevant sentencing factors in this case and that the sentence imposed is not unduly harsh or excessive under the circumstances." (R73, p.2; App. p. A37).

However, especially taking into account the defendant's ongoing mental illness, the sentence of 60 years for the crime of Repeated Sexual Assault of a Child as described by the victim at the trial had been unduly harsh and severe. The Court's own words in denying the Postconviction Motion made it clear that in determining the defendant's sentence, it was relying in large part on his past sexual assault conviction and his past sexual assault allegations. The defendant was entitled to be sentenced for the crime of which he was convicted, not for his past sexual assault conviction, for which he had already served a seven year sentence, and not for past sexual assault allegations for which he had not been convicted.

For all of these reasons, it is respectfully requested that if the defendant's conviction is not reversed, that this Court reverse the denial of the Postconviction Motion on this ground and order that his sentence of 60 years be modified to a lesser sentence.

CONCLUSION

The defendant respectfully requests that this Court reverse the denial of the Postconviction Motion by the Circuit Court of Milwaukee County and reverse his conviction for Repeated Sexual Assault of a Child. If the conviction is not reversed, then, in the alternative, the defendant respectfully requests that this Court order the defendant's sentence to be modified to a lesser sentence.

Dated: September 28, 2018
Milwaukee, Wisconsin

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) Wis. Stats. for a brief produced with a proportional serif font.

The brief contains 8,760 words.

Dated: September 28, 2018

_____

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CERTIFICATION AS TO COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

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