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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
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CASE NO. 2019AP001876-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2010 CF 222**
(Juneau County)

DONALD P. COUGHLIN,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN JUNEAU COUNTY CIRCUIT COURT, THE HONORABLE JOHN ROEMER (JURY TRIAL), JAMES EVENSON (SENTENCING), AND STACY SMITH (POSTCONVICTION MOTION) PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

BY:

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STATEMENT OF ISSUES

I. WHETHER A SUFFICIENT FACTUAL BASIS FOR PRESENTED AT TRIAL TO SUPPORT A CONVICTION FOR EACH COUNT.

This issue was not raised at trial. On 9/10/19, the trial court concluded there was a sufficient factual basis for each conviction (309:9-20, App. at 101-12). On 9/13/19, an order denying postconviction relief was entered (312, App. at 114).

II. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PROPERLY ARGUE INSUFFICIENCIES OF THE EVIDENCE TO SUPPORT EACH COUNT.

The trial court found trial counsel was not ineffective at trial (309:20-21, App. at 112-113). On 9/13/19, an order denying postconviction relief was entered (312, App. at 114).

III. WHETHER DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE REAL CONTROVERSY HAS NOT BEEN TRIED.

The trial court found the real controversy had been tried (309:21, App. at 113). On 9/13/19, an order denying postconviction relief was entered (312, App. at 114).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication is requested.

STATEMENT OF THE CASE

On 9/13/10, defendant Donald Coughlin was charged in Juneau County Circuit Court with the commission of the offenses of: (1) 2nd degree sexual assault of a child (John Doe 1, 8/1/90-5/91 offense date); (2) 2nd degree sexual assault of a child (John Doe 2, 7/1/89-12/31/89 offense date); (3) child enticement (John Doe 2, 11/10/90-1/31/91 offense date); (4) 2nd degree sexual assault (John Doe 4, 12/1/98-3/31/99 offense date); and (5) child enticement (John Doe 2, 2/1/08-2/28/08 offense date) (1).

On 1/31/11, a preliminary hearing was held (263). At the conclusion of the hearing, defendant was bound over for trial (263:115).

On 3/1/11, an information was filed which alleged 23 counts, including: (1) 2nd degree sexual assault of a child (John Doe 1, 9/1/89-12/31/89 offense date); (2) 2nd degree sexual assault of a child (John Doe 1, 2/1/90-5/14/90 offense date); (3) 2nd degree sexual assault of a child (John Doe 1, 9/1/90-12/31/90 offense date); (4) 2nd degree sexual assault of a child (John Doe 1, 2/1/91-5/14/91 offense date); (5) 2nd degree sexual assault of a child (John Doe 1, 9/1/91-12/31/91 offense date); (6) 2nd degree sexual assault of a child (John Doe 1, 2/1/92-5/14/92 offense date); (7) 1st degree sexual assault of a child (John Doe 2, 9/1/89-11/19/89 offense date); (8) 2nd degree sexual assault of a child (John Doe 2, 9/1/90-12/31/90 offense date); (9) 2nd degree sexual assault of a child (John Doe 2, 9/1/91-12/31/91 offense date); (11) 2nd degree sexual assault of a child (John Doe 2, 9/1/92-11/19/92 offense date); (12) 1st degree sexual assault of a child (John Doe 3, 9/1/89-12/31/89 offense date); (13) 1st degree sexual assault of a child (John Doe 3, 2/1/90-5/14/90 offense date); (14) 1st degree sexual assault of a child (John Doe 3, 9/1/90-12/31/90 offense date); (15) 1st degree sexual assault of a child (John Doe 3, 2/1/91-5/14/91 offense date); (16) 1st degree sexual assault of a child (John Doe 3, 9/1/91-12/31/91 offense date); (17) 2nd degree sexual assault of a child (John Doe 3, 2/1/92-5/14/92 offense date); (18) 2nd degree sexual assault of a child (John Doe 3, 9/1/92-12/31/92 offense date); (19) 2nd degree sexual assault of a child (John Doe 3, 2/1/93-5/14/93 offense date); (20) 2nd degree sexual assault of a child (John Doe 3, 9/1/93-12/31/93 offense date); (21) 2nd degree sexual assault of a child (John Doe 3, 2/1/94-5/31/89 offense date); (22)

repeated sexual assault of a child (John Doe 3, 9/1/94-11/9/94 offense date); and (23) child enticement (John Doe 4, 2/1/08-2/21/98 offense date) (11). The first 21 counts consistently alleged defendant had touched each victim on the penis during a specific time frame (11). On 3/1/11, defendant stood mute and not guilty pleas were entered on his behalf (264:3).

On 6/1/15, a jury trial commenced (272). On 6/11/15, the jury found defendant guilty of all counts except Count 10 of the information (272:4-21). Bond was revoked and defendant was remanded for sentencing (272:29-30). On 11/23/15, defendant's trial counsel, Attorney Daniel Berkos, filed a motion for a new trial, asserting that a juror had lied about material matters during the voir dire process (104). On 6/28/16, the court orally granted defendant's motion a new trial (289:30-31).

On 3/19/17, Attorney Berkos filed a motion to dismiss under double jeopardy grounds (127). On 4/12/17, the court denied the motion to dismiss (297:19).

On 4/28/17, the second jury trial commenced on Counts 1-9 and 11-23 (298). On 5/9/17, at the conclusion of trial, defendant was found guilty of Counts 1-9 and 11-22 (199). Defendant was acquitted of Count 23 (199:22). On 10/24/17, a sentencing hearing was held (308). Defendant was sentenced to a total of 48 years in prison under old law (308). Defendant filed a timely notice on intent to seek postconviction relief (222).

STATEMENT OF FACTS

Defendant Donald Coughlin was convicted of 21 counts (199). Counts 1-6 involved G.F. (John Doe 1) (199:1-6). Each of the verdicts found defendant guilty of touching G.F.'s penis during specified time periods (199:1-6). Counts 7-9 and 11 involved J.C. (John Doe 2) (199:7-10). Each of the verdicts found defendant guilty of touching J.C.'s penis during specified time periods (199:7-10). Counts 12-22 involved A.F. (John Doe 3) (199:11-21). For Counts 12-22, defendant was found guilty of touching A.F.'s penis during specified time periods (199:11-20).

During trial, each of the victims testified about numerous instances of sexual contact between defendant and each of them, almost all contacts consisting of hand-to-penis contact, either by defendant touching a victim, or a victim touching defendant. The victims provided testimony regarding the relevant time periods.

On 5/1/17, G.F. testified (299:122-294). He testified he was born 8/23/76 (299:122). He testified the first sexual contact between him and defendant occurred when he was 7 (229:158). It involved him rubbing baby powder on defendant's genitals (299:158-60). He said this became a common occurrence, happening up to two times per week for an unspecified period (299:160). He testified defendant performed oral sex on him about once per month for an unspecified period (299:162). He testified that in the fall of 1989, he and defendant engaged in sexual activities at least one time (299:173). He testified sexual activity took place in the spring of 1990 (299:180), the fall of 1990 (299:186), the spring of 1991 (299:190-91), the fall of 1991 (299:193) and the spring of 1992 (299:194). He testified it took place about three times per week during this time period (299:193).

The prosecutor, Assistant Attorney General Richard Defour, had G.F. define "sexual activity" during his testimony:

> Q: What type of sexual activity would the defendant have you engage in?
>
> A: So the masturbation where he would have me masturbate his penis until he ejaculated. He would masturbate my penis until I ejaculated, or he would perform oral sex on me.

> Q: Would he also ask you to masturbate yourself?
>
> A: Yes.
>
> Q: All right. So would there be occasions where basically everyone would masturbate themselves?
>
> A: Yes (299:168).

On 5/4/17, J.C. (John Doe 2) testified (303:11-68). He testified he was born 11/20/76 (303:11). He testified the first sexual contact with defendant was at the firehouse when he was 12 or 13 (303:19). It involved defendant measuring his penis, as well as the penises of G.F. and A.F. (303:18). He testified they masturbated to get erections to measure them, or afterwards they may have masturbated (303:19). The prosecutor then asked him whether this was the only time defendant had him engage in "some type of sexual activity" (303:22). J.C. said no (303:22). The following question and answer session took place:

> Q: What other types of locations did the defendant have you engage in some type of sexual behavior?
>
> A: We would park on their land.
>
> Q: Would you be doing anything before you parked on the land?
>
> A: Shining deer.
>
> Q: And was that something you'd do just with the defendant, or would you be with other people as well?
>
> A: We would usually be—when I was young I would never go with Donny alone, it would be [G.F.] and [A.F.], or [G.F.] or [A.F.], but never just me and [defendant].
>
> Q: So either of the two boys, or both, and you?
>
> A: Yes.

Q: And what would—after you shined deer and you parked, what would happen?

A: We would park and we would measure penises and masturbate. And when that was all done then we would—I would get dropped off at home or wherever, and they would go home, or I would spend the night at their house.

Q: Whose idea would it be that you would stop and park and masturbate?

A: [Defendant].

Q: And was it each person masturbating themselves or would something else happen?

A: He would either masturbate whoever was in the front seat, or he would try to, and himself.

Q: Would he ask somebody—would he ask somebody to masturbate him on occasion?

A: Yeah. He would ask, but I never saw anyone actually do it.

Q: Okay. So that never happened when you were along?

A: No.

Q: But you observe him masturbating some in the front seat?

A: Yeah.

Q: Did he ever masturbate you while you were in the front seat?

A: Yes.

Q: And [G.F.]?

A: Yes.

Q: And [A.F.]?

A: Yes.

Q: All right. What would happen after—would the defendant ejaculate?

A: Yes.

Q: Would you guys ejaculate?

A: Not when it first started, no.

Q: Eventually, you would?

A: Eventually. …

Q: Okay. And were you able to observe where the defendant's attention was while he was masturbating? Was he watching you guys? Was he watching himself? Was he watching something else?

A: While he was masturbating?

Q: Yes.

A: Well, if everyone was still doing it then he would watch them. But a lot of times we would do it, and then he would do it.

Q: Okay. And how often did you go shining with defendant and [G.F.] and/or [A.F.]?

A: A lot of times over the years. But I couldn't say how many times per given year.

Q: Okay, Was it something that happened once a month, more than once a month, less than once a month?

A: I would say more than once a month during last summer and fall.

Q: Okay. And would it always end up with you guys parking somewhere and having everybody masturbate?

A: Definitely usually (303:22-25).

J.C. testified the sexual activity occurred at least one time in the fall of 1989 before his thirteen birthday (303:28). It happened at least one time in the fall of 1990 when he would have been 13 (303:29). It would have happened at least one time in the fall of 1991 when he would have been 14 (303:29). It would have happened in the fall of 1992 before he was 16 (303:29).

On 5/3/17, A.F. (John Doe 3) testified (301:24-270). He testified he was born 11/10/78 (301:24-111). He testified sexual behavior occurred between defendant and him, starting when he was seven (301:38). Sometimes he would masturbate defendant (301:42). Sometimes defendant would masturbate him (301:41). He testified he saw defendant masturbate [G.F.] and [G.F.] masturbating defendant (301:42). He testified he saw defendant masturbate [J.C.] and [J.C.] masturbating defendant (301:42). He testified he saw defendant perform oral sex on [G.F.] at least once (301:44). The following question and answering took place regarding the first incident:

> Q: What happened—you drove around, what happened?
>
> A: [Defendant] had pulled into a secluded area, wooded area, and I don't know exactly where that was, but he parked there and started talking about our penises, that he wanted to see them.
>
> Q: And so you're 7 or 8. What do you think about that at that point?
>
> A: Well, I didn't really know what to think, so we showed him, and then he wanted to see them erect.
> Q: What did you do?
>
> A: He wanted me to rub it, or masturbate it, I didn't know what it was at the time, but—so I did that.
>
> Q: And how about [G.F.], was he along?
>
> A: Yes.
>
> Q: What was [G.F.] doing?
>
> A: Same thing, he showed him his penis and was masturbating.

Q: What was defendant doing while you were doing that?

A: He was watching us and masturbating himself.

Q: And then what happened?

A: We got done, [defendant] ejaculated, and that was it. And then we left there.

Q: When he ejaculated, did he have anything to take care of cleaning that up?

A: I don't remember at that time what he cleaned that up with.

Q: Okay. Now, was this the only time this happened?

A: No.

Q: Did it happen fairly often?

A: Yes.

Q: All right. Let's talk about some things that you would be doing that might lead to this type of activity. Did you go shining?

A: Yes, we did.

Q: How often would you go shining deer?

A: In the fall of the year, we would go once, twice a week.

Q: And if you went shining deer in the fall, what would happen after you went shining deer?

A: He would eventually stop somewhere and make us masturbate.

Q: Same that you just described as that first occasion?

A: Yes (301:38-40).

A specific incident was recounted by A.F. where he sat on a pile of drywall and masturbated with defendant at a building site in Lyndon Station on Industrial Avenue (301:50-51). He testified there was at least one occasion where the defendant had him engage in sexual activity in the spring of 1990 (301:58), the fall of 1990 (301:59), the spring of 1991 (301:59), the fall of 1991 (301:60), the spring of 1992 (301:60), the fall of 1992 (301:60-61), the spring of 1993 (301:61), the fall of 1993 (301:61), the spring of 1994 (301:61) and the fall of 1994 (301:61-62).

ARGUMENT

I. THE CONVICTIONS RELATED TO COUNTS 1-9 AND 11-22 SHOULD BE VACATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT THEM.

IV. Standard of review.

In *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752, 757-58 (1990), the court set forth the test to use to determine whether sufficient evidence was presented to support a criminal conviction:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. (citation omitted). If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

In *State v. Hayes,* 2004 WI 80, ¶4, 273 Wis.2d 1, 681 N.W.2d 203, the Wisconsin Supreme Court recognized issues related to the sufficiency of the evidence to support a conviction can be raised for the first time on appeal.

V. Relevant facts.

Defendant was charged with first and second-degree sexual assault offenses. On 5/2/17, during trial, the prosecutor orally moved to the court to amend the information to conform to the evidence at trial (300:248-49). An amended information was filed on 5/4/17 (136). For Counts 1-9 and 11-22 of the amended information, the sexual conduct alleged remained "by the defendant touching the victim's penis" (199). Notwithstanding the specific sexual conduct alleged in the majority of the counts of the amended information, the definition of sexual contact was expanded in the jury instructions (198). For second-degree sexual assault, the jury was advised as to the definition of sexual contact:

> Sexual contact is the intentional touching of the penis of [the victims] by the defendant, Donald P. Coughlin. The touching may be of the penis directly, or it may be through the clothing. The touching must be done by any body part or any object, but it must be intentional touch. Sexual contact also requires the defendant acted with the intent to become sexually aroused or gratified.
>
> Sexual contact is an intentional touching of the victim of the penis of Donald P. Coughlin, if the defendant intentionally caused or allowed the victim to do that touching. The touching of the penis directly or it may be through the closing. Sexual contact also requires the defendant had the intent to become sexually aroused or gratified (305:70-71).

A similar, two-part instruction was read for first-degree sexual assault (305:80-81).

Interestingly, during the jury instruction conference, it appears the prosecutor had in mind an even more expansive definition of what conduct constituted sexual contact:

> I still am requesting the other change that we discussed, that is, the intentional touching by the individuals of the own penises. I believe even under the statutory definition of sexual contact as it existed in-at all appropriate—at all relevant times to this case, as it relates at least to the sexual assault counts, it would apply because it does talk about the intentional touching

> of the intimate parts of another person, but it does not specifically say it has to be by the defendant. It only says the intentional touching of another person. You know, so I think that that would apply if that was at the request or at the insistence of the defendant. You know, the same language, specifically if the defendant intentionally caused the victim to touch his own penis, I think that comes under sexual contact as it existed at all appropriate times. So for that reason, I'd ask the Court to supplement 2101-A, both in the first degree and second degree sexual assault counts, to include the intentional touching of the—by the victims at the –that was caused by the defendant (304:4-5).

The trial court declined the State's request (304:6-7).

VI. The only sexual contact alleged in the relevant counts of the information involved defendant allegedly touching the victims' penises on numerous occasions.

The State clearly had the right to amend the information to conform to the evidence, even during trial. *See* Wis. Stat. §971.29(2). Notwithstanding the amendment of the information during trial, the only specific sexual conduct alleged against defendant related to Counts 1-9 and 11-22 of the information, was that he had touched the victims' penises during various time periods (136). Regardless of the jury instructions, this was the only sexual conduct alleged in the verdict forms for the relevant counts (199).

VII. The evidence introduced at trial was insufficient to support convictions for Counts 1-9 and 11-22.

G.F., Counts 1-6

G.F. was the alleged victim in Counts 1-6 (136). When he testified at trial, the prosecutor asked him about sexual activity occurring between him and defendant:

> Q: What type of sexual activity would the defendant have you engage in?
>
> A: So the masturbation where he would have me masturbate his penis until he ejaculated. He would masturbate my penis until I ejaculated, or he would perform oral sex on me.

> Q: Would he also ask you to masturbate yourself?
>
> A: Yes.
>
> Q: All right. So would there be occasions where basically everyone would masturbate themselves?
>
> A: Yes (299:168).

He testified "sexual activity," as defined by the prosecutor, occurred between him and defendant during the six time periods alleged in Counts 1-6. The prosecutor's definition of "sexual activities" included (1) defendant touching G.F.'s penis; (2) G.F. touching defendant's penis; (3) defendant having oral contact with G.F.'s penis; and (4) defendant urging G.F. to touch his own penis in defendant's presence. As previously indicated, the **only** sexual conduct charged in Counts 1-6 of the amended information was (1), that defendant had touched G.F. on the penis.

The sexual activities described in (2) and (3) above, were not charged in any count for purposes of this trial. The sexual activity described in (4) above, defendant urging G.F. to touch his own penis, did not constitute first or second-degree sexual assault of a child.

While G.F. confirmed sexual activity occurred during each time period, he was vague in describing which of the four sexual activities took place during each time period. The jury had no way of knowing for sure which specific sexual activity occurred during each time period. The jury had no way to determine the frequency of each of the four sexual activities described by G.F. If the only sexual activity that occurred during any of the time periods included that described in (2), (3) or (4) above, there was an insufficient basis for the jury to conclude first or second-degree sexual assault had been committed.

From the trial record, the jury had no reasonable basis to conclude the activities described in (1) above, that defendant had touched G.F.'s penis, had in fact occurred during each relevant time period for Counts 1-6. For this reason, the convictions related to Counts 1-6 should be vacated.

J.C., Counts 7-9, 11

J.C. was the alleged victim in Counts 7-9 and 11 (136). He testified his first sexual contact with defendant was at the firehouse when he was 12 or 13 (303:19). It involved defendant measuring his penis, as well as the penises of G.F. and A.F. (303:18). He testified they masturbated to get erections to measure them, or afterwards they may have masturbated (303:19). The prosecutor then asked him whether this was the only time defendant had him engage in "some type of sexual activity" (303:22). J.C. said no (303:22). The following question and answer session took place:

> Q: What other types of locations did the defendant have you engage in some type of sexual behavior?
>
> A: We would park on their land.
>
> Q: Would you be doing anything before you parked on the land?
>
> A: Shining deer.
>
> Q: And was that something you'd do just with the defendant, or would you be with other people as well?
>
> A: We would usually be—when I was young I would never go with Donny alone, it would be [G.F.] and [A.F.], or [G.F.] or [A.F.], but never just me and [defendant].
>
> Q: So either of the two boys, or both, and you?
>
> A: Yes.
>
> Q: And what would—after you shined deer and you parked, what would happen?
>
> A: We would park and we would measure penises and masturbate. And when that was all done then we would—I would get dropped off at home or wherever, and they would go home, or I would spend the night at their house.

Q: Whose idea would it be that you would stop and park and masturbate?

A: [Defendant].

Q: And was it each person masturbating themselves or would something else happen?

A: He would either masturbate whoever was in the front seat, or he would try to, and himself.

Q: Would he ask somebody—would he ask somebody to masturbate him on occasion?

A: Yeah. He would ask, but I never saw anyone actually do it.

Q: Okay. So that never happened when you were along?

A: No.

Q: But you observe him masturbating some in the front seat?

A: Yeah.

Q: Did he ever masturbate you while you were in the front seat?

A: Yes.

Q: And [G.F.]?

A: Yes.

Q: And [A.F.]?

A: Yes.

Q: All right. What would happen after—would the defendant ejaculate?

A: Yes.

Q: Would you guys ejaculate?

A: Not when it first started, no.

Q: Eventually, you would?

A: Eventually. …

> Q: Okay. And were you able to observe where the defendant's attention was while he was masturbating? Was he watching you guys? Was he watching himself? Was he watching something else?
>
> A: While he was masturbating?
>
> Q: Yes.
>
> A: Well, if everyone was still doing it then he would watch them. But a lot of times we would do it, and then he would do it.
>
> Q: Okay. And how often did you go shining with defendant and [G.F.] and/or [A.F.]?
>
> A: A lot of times over the years. But I couldn't say how many times per given year.
>
> Q: Okay, Was it something that happened once a month, more than once a month, less than once a month?
>
> A: I would say more than once a month during last summer and fall.
>
> Q: Okay. And would it always end up with you guys parking somewhere and having everybody masturbate?
>
> A: Definitely usually (303:22-25).

J.C. testified about "sexual behavior." His definition of sexual behavior included (1) defendant touching J.C.'s penis; and (2) defendant urging J.C. to touch his own penis in defendant's presence. As previously indicated, the **only** sexual conduct charged in Counts 7-9 and 11 of the amended information was (1), that defendant had touched J.C. on the penis. The sexual behavior of defendant urging J.C. to touch his own penis was not charged in any of the counts.

While J.C. confirmed sexual behavior occurred during each time period, he was very general in describing the sexual behavior that occurred during each time period. The jury had no way of knowing for sure which specific sexual activity occurred during each time period. The jury had no way to determine the frequency of the sexual behaviors described by J.C. If the only sexual activity that occurred during any of the time periods included that described in (2) above, there was an insufficient basis for the jury to conclude defendant was guilty of Counts 7-9 and 11 of the amended information. For this reason, the convictions related to Counts 1-6 should be vacated.

A.F., Counts 12-22

On 5/3/17, A.F. testified sexual behavior occurred between defendant and him, starting when he was seven (301:38). Sometimes he would masturbate defendant (301:42). Sometimes defendant would masturbate him (301:41). He testified he saw defendant masturbate G.F. and G.F. masturbating defendant (301:42). He testified he saw defendant masturbate J.C. and J.C. masturbating defendant (301:42). He testified he saw defendant perform oral sex on G.F. at least once (301:44). The following question and answering took place regarding the first incident:

> Q: What happened—you drove around, what happened?
>
> A: [Defendant] had pulled into a secluded area, wooded area, and I don't know exactly where that was, but he parked there and started talking about our penises, that he wanted to see them.
>
> Q: And so you're 7 or 8. What do you think about that at that point?
>
> A: Well, I didn't really know what to think, so we showed him, and then he wanted to see them erect.
> Q: What did you do?
>
> A: He wanted me to rub it, or masturbate it, I didn't know what it was at the time, but—so I did that.
>
> Q: And how about [G.F.], was he along?

A: Yes.
Q: What was [G.F.] doing?

A: Same thing, he showed him his penis and was masturbating.

Q: What was defendant doing while you were doing that?

A: He was watching us and masturbating himself.

Q: And then what happened?

A: We got done, [defendant] ejaculated, and that was it. And then we left there.

Q: When he ejaculated, did he have anything to take care of cleaning that up?

A: I don't remember at that time what he cleaned that up with.

Q: Okay. Now, was this the only time this happened?

A: No.

Q: Did it happen fairly often?

A: Yes.

Q: All right. Let's talk about some things that you would be doing that might lead to this type of activity. Did you go shining?

A: Yes, we did.

Q: How often would you go shining deer?

A: In the fall of the year, we would go once, twice a week.

Q: And if you went shining deer in the fall, what would happen after you went shining deer?

A: He would eventually stop somewhere and make us masturbate.

Q: Same that you just described as that first occasion?

A: Yes (301:38-40).

A.F.'s definition of "sexual activity" included (1) defendant touching A.F.'s penis; (2) A.F. touching defendant's penis; and (3) defendant urging A.F. to touch his own penis in defendant's presence. As previously indicated, the **only** sexual conduct charged in Counts 12-22 of the amended information was (1), that defendant had touched A.F. in the penis.

The sexual activities described in (2) and (3) above, were not charged in any count for purposes of this trial.

While A.F. confirmed sexual activity occurred during each time period, he too was vague in describing which of the three sexual activities took place during each time period. The jury had no way of knowing for sure which specific sexual activity occurred during each time period. The jury had no way to determine the frequency of each of the three sexual activities described by A.F. If the only sexual activity that occurred during any of the time periods included that described in (2) or (3) above, there was an insufficient basis for the jury to conclude first or second-degree sexual assault had been committed.

From the trial record, the jury had no reasonable basis to conclude the activities described in (1) above had in fact occurred during each relevant time period for Counts 12-22. For this reason, the convictions related to Counts 12-22 should be vacated.

E. Defendant was accused of committing the specific offense of touching the victims on the penis for each conviction.

Finally, as pointed out above, in the amended information, defendant Coughlin was accused of a specific type of sexual conduct in each of the relevant counts, that is that he touched the penis of the victims during various time periods (136). Notwithstanding this fact, the State at the postconviction proceedings asserted that **any** sexual conduct between defendant and a victim during the relevant time period was sufficient to support the convictions (253:5-11). The State is wrong in its assertion. That position runs afoul of defendant's right to a unanimous verdict.

In *State v. Lomagro,* 113 Wis.2d 582, 335 N.W.2d 583 (1983), the court addressed the concept of duplicitous charging. In *Lomagro,* the defendant and a co-defendant abducted a woman and sexually assaulted her several times over a two-hour period. Even though defendant committed several sexual assaults against the victim during that time period, the State charged a single count of first-degree sexual assault. On appeal, defendant argued he was denied his right to a unanimous verdict. In addressing the issue, the court said:

> Duplicity is the joining in a single count of two or more separate offenses. (citations omitted). The purposes of the prohibition against duplicity are: (1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity. (citations omitted).
>
> The first step in determining whether a criminal complaint is duplicitous is to examine its factual allegations to determine whether it states more than one offense. The complaint involved here alleged that the two co-defendants forced C.G. to engage in three acts of sexual intercourse. The complaint characterizes the actions of the co-defendants in committing these sexual assaults as one continuous course of conduct resulting in one charge of first-degree sexual assault. This court has consistently held that acts which alone constitute separately chargeable offenses, "when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense" without violating the rule against duplicity. *Huotte v. State*, 164 Wis. 354, 356, 160 N.W. 64 (1916); *Blenski v. State*, 73 Wis.2d 685, 695, 245 N.W.2d 906 (1976).
>
> If the defendant's actions in committing the separate offenses may properly be viewed as one continuing offense, it is within the state's discretion to elect whether to charge "one continuous offense or a single offense or series of single offenses." (citations omitted). …

> However, this prosecutorial discretion to join separately chargeable offenses into one count is not unlimited. Rather, this discretion to join offenses is limited by the purposes of the prohibition against duplicity as discussed above. …
>
> We also adopt this flexible rule that it is initially up to the state to determine the appropriate charging unit for a particular criminal episode. When separate criminal offenses of the same type occur during one continuous criminal transaction, the prosecutor may join these acts in a single count if they can properly be viewed as one continuous occurrence without violating the protections afforded the defendant by the rule against duplicity. The prosecutor must have this discretion at the charging stage to issue charges which coincide with the evidence available and the gravity of the particular course of conduct involved.
>
> If a complaint joins several criminal acts which can properly be characterized as a continuing offense in one count and is challenged by the defendant on grounds of duplicity, the trial court must examine the allegations in light of the purposes of the prohibition against duplicity. Such a complaint may be found to be duplicitous only if any of these dangers are present and cannot be cured by instructions to the jury. If the complaint is found to be duplicitous, the state must then either elect the act upon which it will rely or separate the acts into separate counts.
>
> Applying this analysis to the instant case, we find that the complaint was not duplicitous. The acts alleged in the complaint were committed by the same two co-defendants in a short period of time and as part of one continuous criminal transaction. We believe that it was proper for the state to charge the defendant with one offense. *Id.* at 586-89, 335 N.W.2d 587-88.

Lomagro authorizes the joining of several acts of sexual assault committed over a short time during the same criminal episode. It does not authorize the joining of various acts of sexual abuse committed over days, weeks or months into a single count. Counsel for defendant has not found a Wisconsin case that upholds such a charging decision by a prosecutor.

From this record, one cannot possibly what predicate act was committed by defendant to lead the jury to find defendant guilty of each of the relevant counts. While for each count of the information, there was an allegation defendant had touched the victim's penis, no more specificity was provided. For the reasons set forth in *Lomagro,* the sifting through the trial record to try to find *any* sexual act committed between defendant and the victims, as opposed to the acts charged in the amended information, is misplaced.

II. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PROPERLY ARGUE INSUFFICIENCIES IN THE EVIDENCE TO THE JURY.

If the court determines there is a factual basis for some of the counts, the court should grant defendant a new trial on any unvacated counts based on ineffective assistance of counsel.[1] Ineffective assistance of counsel is defined in many cases, including *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305:

> In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's representation was deficient. (citation omitted). The defendant must show that he or she was prejudiced by deficient performance. Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. (citation omitted). When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." (citation omitted). Counsel need not be perfect, indeed not even very good, to be constitutionally adequate. (citation omitted). In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (citation omitted). Id. at ¶¶18-20.

[1] Trial counsel died on 8/26/19, shortly before the trial court ruled on the postconviction motions. This obviously makes a *Machner* hearing impossible going forward.

From the evidence adduced at trial, jurors could have reasonably inferred that the majority of the alleged sexual activity occurring between defendant and the victims involved uncharged sexual behavior. Defendant was not charged with having the victims touch his penis. Defendant was not charged with cajoling the victims to masturbate in his presence. As is usually the case[2], the evidence was closed when the parties made their closing argument. The State avoided detail in its closing. The State argued:

> There's no question he is guilty of all 22 counts that he's charged with, because their testimony establishes beyond a reasonable doubt that the defendant is guilty. The only way defendant is not guilty is if those young men got up there and intentionally lied. That's the only way that the defendant is not guilty, is if they got up there an intentionally lied. There's no other reasonable argument. There's no other reason that this would not be—the defendant could be not guilty, except that they lied (305:110-11)

Unfortunately, trial counsel failed to identify the issue raised above, the State's expansion of the concept of "sexual behavior" to include sexual conduct not alleged in Counts 1-9 and 11-22. Had trial counsel done so, he may have been able to convince the trial court to dismiss some of the counts before the counts even went to the jury.

During closing argument, trial counsel could have effectively argued that for each of the relevant time periods the State had failed to prove beyond a reasonable doubt that defendant had engaged in the charged sexual conduct, that is touching the victims' penises, as opposed to engaging in other, uncharged sexual activity with the victims. Trial counsel's failure to inform the jury that the charged sexual contact was not interchangeable with a broader concept of sexual activity advocated for by the prosecutor was deficient performance.

[2] Rare exceptions to this rule do exist.

Trial counsel's failure was prejudicial in that the argument would have provided the defense with the ability to effectively argue that if the jury had reasonable doubts that the charged sexual behavior had not occurred in any given time period, it should have found defendant not guilty for that time period. It would have also allowed the defense to diffuse the State's argument that the only way defendant could be found not guilty of the charges is if the victims had all lied. Even if the victims had not lied, defendant could still have been not guilty of most of the counts in this situation. There is a reasonable probability the results of the proceeding would have been different had counsel performed effectively. A new trial should be ordered.

III. DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE REAL CONTROVERSY HAS NOT BEEN TRIED.

In *State v. Burns,* 2011 WI 22, ¶24, 332 Wis.2d 730, 798 N.W.2d 166, the court said:

> We have the ability to set aside a conviction through the use of our discretionary-reversal powers. There are two categories of cases in which we may reverse in the interest of justice: (1) when the real controversy has not been fully tried and (2) when it is probable that justice has miscarried for any reason. *State v. Schumacher*, 144 Wis.2d 388, 417, 424 N.W.2d 672 (1988). We established the analyses for a motion to set aside a conviction based on our discretionary reversal powers in Schumacher. We explained that under the "real controversy not fully tried" category, two different situations were included: (1) Either the jury was not given an opportunity to hear important testimony that bore on an important issue in the case, or (2) the jury had before it testimony or evidence which had been improperly admitted, and this material obscured a crucial issue and prevented the real controversy from being fully tried. Under the second prong of the discretionary-reversal statute, the "miscarriage of justice" prong, the case law made clear that, in order to grant a discretionary reversal under this prong, the court would have to conclude that there would be a substantial probability that a different result would be likely on retrial.

Defendant was sentenced to 48 years in prison. Defendant received several consecutive sentences. The fact defendant was convicted of many counts directly impacted on his sentence.

If defendant is not granted relief as sought above, defendant asserts he should be granted a new trial in the interest of justice. The term "sexual activity" was inappropriate used interchangeably with "sexual contact" during trial. This action by the State was misleading to the jury. Further aggravating the situation was the fact the jury instructed that defendant could have committed sexual assault in two separate ways; either by touching the victims' penises or by having the victims touch his penis. However, the relevant verdicts only included allegations defendant had touched the penises of the victims. The presented evidence was truly ambiguous and incomplete as to whether defendant actually committed each the offenses charged. Because the jury was never advised of legal difference between "sexual contact" and "sexual activity," as well as charged versus uncharged sexual behavior, its conclusions are suspect. There is reason to doubt the reliability of jury's verdict. There is a real likelihood the result of the proceedings would have been different had this issue been developed by trial counsel in his closing argument.

CONCLUSION

For the reasons set forth above, defendant's convictions should be vacated as argued above. He should be granted an acquittal on any vacated counts. In the alternative, defendant Coughlin should be granted a new trial based on ineffective assistance of counsel or in the interest of justice.

Dated: 12/28/2019

_____

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CERTIFICATION AS TO FORM AND LENGTH

I certify this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. This brief is 6901 words.

Dated: 12/28/19 _____
Philip J. Brehm

APPENDIX CERTIFICATION

I certify that filed with this brief, as part of this brief, an appendix complying with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court entries; (3) the findings or opinions of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning related to those issues.

I further certify 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: 12/28/19 _____
Philip J. Brehm

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify I have submitted an electronic copy of this brief, excluding the appendix, if any which complies with the requirements of Rule 809.19(12). I certify: This electronic brief is identical in content and format to the printed form of the brief filed on or after this date and that 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: 12/28/2019 _____
Philip J. Brehm

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