STATE OF WISCONSIN

IN SUPREME COURT

No. 2019AP1876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DONALD P. COUGHLIN,

Defendant-Appellant.

PETITION FOR REVIEW

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INTRODUCTION

This Court should grant this petition and review a court of appeals' decision that reversed 15 child sexual assault convictions. A jury had found Donald Coughlin guilty of four counts for sexually assaulting his stepsons' cousin, identified as John Doe 2.[1] And the jury found Coughlin guilty of 11 counts for sexually assaulting his stepson, identified as John Doe 3.

This petition satisfies the criteria for review on two independent grounds. First, the court of appeals' decision identified a novel question that it left unanswered. The novel question concerns how a court should consider the theory of guilt when an inconsistency exists between a jury instruction and verdict. Second, the court of appeals' decision conflicts with controlling opinions of this Court and other court of appeals' decisions. Precedent establishes that any vagueness in testimony is an issue of credibility and weight with the jury deciding such issues. But here, the court of appeals broke from precedent by concluding such vagueness rendered the evidence insufficient, thereby substituting reasonable inferences drawn by the jury for its own judgment. Evidence sufficiency is an issue of constitutional law appropriate for this Court's review.

This Court should grant the petition to answer a novel question, resolve a conflict between controlling opinions and the court of appeals' decision, and review whether sufficient evidence exists to sustain these 15 sexual assault convictions.

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[1] The State identifies the victims in this petition by the "John Doe" designations used in the information and amended information (R. 11; 136). *See* Wis. Stat. § (Rule) 809.86(4) (victim deidentification).

STATEMENT OF THE ISSUES

1. How does a court consider the theory of guilt in an evidence sufficiency claim when an inconsistency exists between a jury instruction and verdict?

The circuit court never considered this issue because Coughlin hadn't alleged any error in the jury instructions or verdict forms in the trial or postconviction proceedings.

The court of appeals identified this novel question but left it unanswered.

This Court should grant review to resolve this novel question as to how a court reviews the theory of guilt when such an inconsistency exists.

2. Must a court accept a jury's resolution of any vagueness in testimony as jury credibility and weight determinations and must a court then adopt the reasonable inferences that a jury may have drawn from the evidence?

The circuit court did not specifically answer this question, though the court recognized that it must assume the jury relied on the testimony to support its verdicts.

The court of appeals concluded that vagueness precluded the jury from finding guilt, thereby rendering the evidence insufficient.

This Court should grant review to resolve a conflict between the court of appeals' decision and controlling precedent.

3. Has Coughlin, as the defendant challenging the sufficiency of the evidence, met his heavy burden to overcome the great deference this Court gives to the jury and its verdict to satisfy that the evidence, viewed most favorably to the State and the convictions, was insufficient to sustain the 15 guilty verdicts relating to his sexual assaults of John Doe 2 and John Doe 3?

The circuit court concluded the evidence was sufficient and Coughlin had not shown otherwise.

The court of appeals concluded that the evidence was insufficient. But it was silent as to burden, never articulating whether Coughlin satisfied his burden.

This Court should grant review and reverse the decision of the court of appeals on this presented issue.

STATEMENT OF THE CASE

Nature of the Case.

The State petitions this Court for review of a court of appeals' decision that reversed 15 convictions for child sexual assault.[2] A jury had found Coughlin guilty of four counts for sexually assaulting John Doe 2 and 11 counts for sexually assaulting John Doe 3. (R. 199:7–21.) After the convictions, Coughlin claimed the evidence was insufficient. (R. 242:10–13.) The circuit court denied Coughlin's motion after finding there "was more than enough evidence to properly convict" him. (R. 309:19–20.) Coughlin appealed. (R. 257.) The court of appeals stated the evidence was insufficient and reversed the 15 child sexual assault convictions. *State v. Coughlin*, No. 2019AP1876–CR, 2021 WL 822223, ¶ 37, (Wis. Ct. App., March 4, 2021) (unpublished).

Charges.

The State charged Coughlin with 15 counts relevant to this petition. (R. 11 (information); 136 (amended information).) Four counts charged Coughlin with sexually

[2] This petition relates to the 15 convictions that pertain to John Doe 2 and John Doe 3. Because the court of appeals' decision affirmed the counts that pertain to John Doe 1, these six counts are beyond the scope of this petition. *See State v. Coughlin*, No. 2019AP1876–CR, 2021 WL 822223, ¶¶ 1–2 (Wis. Ct. App., March 4, 2021) (upublished) (concluding the evidence was sufficient related to John Doe 1).

assaulting John Doe 2 and eleven counts charged Coughlin with sexually assaulting John Doe 3 between a period from 1989 to 1994:

	Count	Statute	Violation Date Range	Victim Age
John Doe 2	7	Wis. Stat. § 948.02(1)	September 1, 1989, and November 19, 1989	Under 13
	8	Wis. Stat. § 948.02(2)	September 1, 1990, and December 31, 1990	Under 16
	9	Wis. Stat. § 948.02(2)	September 1, 1991, and December 31, 1991	Under 16
	11	Wis. Stat. § 948.02(2)	September 1, 1992, and November 19, 1992	Under 16
John Doe 3	12	Wis. Stat. § 948.02(1)	September 1, 1989, and November 19, 1989	Under 13
	13	Wis. Stat. § 948.02(1)	February 1, 1990, and May 14, 1990	Under 13
	14	Wis. Stat. § 948.02(1)	September 1, 1990, and December 31, 1990	Under 13
	15	Wis. Stat. § 948.02(1)	February 1, 1991, and May 14, 1991	Under 13
	16	Wis. Stat. § 948.02(2)	September 1, 1991, and November 9, 1991	Under 16
	17	Wis. Stat. § 948.02(2)	February 1, 1992, and May 14, 1992	Under 16
	18	Wis. Stat. § 948.02(2)	September 1, 1992, and December 31, 1992	Under 16

John Doe 3	19	Wis. Stat. § 948.02(2)	February 1, 1993, and May 14, 1993	Under 16
	20	Wis. Stat. § 948.02(2)	September 1, 1993, and December 31, 1993	Under 16
	21	Wis. Stat. § 948.02(2)	February 1, 1994, and May 14, 1994	Under 16
	22	Wis. Stat. § 948.025(1)	September 1, 1994, and November 9, 1994	Under 16

(*Compare* R. 11:3–5 (information), *with* 136:3–7 (amended information.)[3]

The State does not address additional counts beyond the scope of this petition.[4]

Jury Trial.

The case proceeded to trial in the spring of 2017. During jury selection, the court instructed the jury about each charge in the information. (R. 298:46–58.) In 14 of the 15 counts

[3] The amended information had a drafting error in Count 12. (*Compare* R. 11:3 (information), *with* 136:4 (amended information). The record demonstrates Count 12 proceeded as charged in the original information without the drafting error. (*Compare* R. 11:3 (information), *with* 199:11 (verdict form); 298:52 (charge); 305:77 (jury instruction); 307:11 (verdict instruction).) Hereinafter, the State only cites in this petition to the amended information filed on May 4, 2017, assuming Count 12 proceeded as charged in the original information without the drafting error.

[4] Counts 1 thru 6 as well as 10 and 23 are not relevant to this petition. Here it is sufficient to know that: (1) the State charged Coughlin in the first six counts with sexually assaulting his elder stepson, identified as John Doe 1, (R. 136:1–3), with the jury finding him guilty on Counts 1 thru 6 (R. 199:1–6), (2) the court dismissed Count 10 based upon a stipulation of the parties (R. 284:24), and (3) the jury acquitted Coughlin of Count 23 (R. 199:22).

related to this petition, the court explained that the counts charged Coughlin with having sexual contact by touching the victims' penises. (R. 298:50–57.) The court also explained that the final related count charged Coughlin with committing three or more sexual assault violations against John Doe 3. (R. 298:57.)

The jury heard testimony about how Coughlin groomed the victims by normalizing the touching of a child's genitals. (R. 299:152–54, 289; 301:87–88, 155–58.) John Doe 3 explained Coughlin "grubb[ed]" by "giv[ing] your testicles a squeeze . . . and hurt[ing] them, but not until he got a good feel of what he was grabbing on to." (R. 301:87–88.) John Doe 3 explained that Coughlin "would grab it in a way that I think he was trying to arouse me." (R. 301:107.) John Doe 3's older brother, John Doe 1, said Coughlin made a game out of "grubbing" the children, and that the children started doing it with one another. (R. 299:152–54.)

Each victim testified Coughlin had a recurring interest in the size of penises that included Coughlin measuring the children's penises. (R. 299:165–66; 301:48–49; 303:17–19, 23.) Coughlin measuring penises stood out to John Doe 2 because it was the first instance of sexual activity between Coughlin and him. (R. 303:17–19.) John Doe 2 described multiple instances of measuring penises. (R. 303:17–19, 23.) John Doe 3 testified that Coughlin "frequently" measured his penis. (R. 301:48–49.)

John Doe 2 testified that Coughlin repeatedly sexually assaulted him between the autumn of 1989 and the autumn of 1992. (R. 303:28–29.) John Doe 2 said, besides measuring penises, the only sexual activity that Coughlin directly engaged in with him was Coughlin masturbating on John Doe 2's penis. (R. 303:23–24.) John Doe 2 explained that the sexual activity took place during visits with his cousins when Coughlin was alone with the boys. (*See* R. 303:12–13, 19–20,

22–23.) John Doe 2 said that masturbation became such a common occurrence that Coughlin kept paper towels nearby to clean up after ejaculation. (R. 303:24.)

John Doe 3 testified that Coughlin touched his penis repeatedly during sexual activity that occurred during a ten-year period from the mid-1980s until the fall of 1994. (R. 301:25, 37–38, 94–95.) John Doe 3 testified that the first sexual abuse happened when he was seven years old. (R. 301:25, 37–38.) It happened often thereafter throughout his childhood. (R. 301:39–40.) John Doe 3 said, "[t]here were many of them" (R. 301:44), with Coughlin "always" asking to engage in masturbation, (R. 301:45), such that masturbating with Coughlin became "like a normal day" (R. 301:64). It was a common—even a weekly—occurrence. (R. 301:45, 59, 62, 84.) Some of the instances involved Coughlin touching and masturbating on John Doe 3's penis. (R. 301:41, 45, 47–48.) And other instances involved John Doe 3 touching and masturbating on Coughlin's penis under Coughlin's direction. (R. 301:42.)

The victims testified that they did not report Coughlin's sexual abuse when they were children. John Doe 3 described Coughlin as an "unstable character" and "very abusive, angry person" who was physically, sexually, and mentally abusive. (R. 301:29–30, 66.) John Doe 3 recalled Coughlin threatening to kill him on multiple occasions if he ever told anybody about the abuse. (R. 301:65–66.) John Doe 2 agreed that Coughlin had "definitely made it known that we shouldn't tell people." (R. 303:20.) John Doe 3's older brother, John Doe 1, was the first to report the sexual abuse after he was an adult. (R. 299:166–67, 239–40.)

Coughlin denied ever sexually assaulting any of the victims. (R. 304:152.) Coughlin acknowledged being familiar with "grubbing," but he alleged that he never engaged in the activity. (R. 304:175–77.) Coughlin acknowledged that people

talked and acted in a sexual manner within the home. (R. 304:67.) When asked whether Coughlin participated in sexual language within the house, he replied, "Very little, no." (R. 304:67.) Coughlin acknowledged sometimes being alone with the victims, but described it as "very seldom" and "very little." (R. 304:166–70.) Coughlin denied sexually molesting any of the victims. (R. 304:82, 85–86, 88.)

The State provides additional information in the argument section about the testimony related to the relevant counts in this petition.

Jury instructions and verdicts.

After the close of evidence, the circuit court instructed the jury and also read each verdict form to the jury prior to its deliberation. (R. 305:64–69, 77–79, 83–85; 307:4–18.)

In instructing the jury about the first 14 counts related to John Doe 2 and John Doe 3, the court identified that the charges alleged Coughlin "did have sexual contact with a child . . . by the defendant touching the victim's penis." (R. 305:66–69, 77–79.) But in defining sexual contact, the court stated it included *either* Coughlin touching the victims' penises *or* the victims touching Coughlin's penis. (R. 305:70–71, 80–81.)

In instructing the jury about the final count related to John Doe 3, the court identified that the charge alleged Coughlin "did commit three or more sexual assaults" (R. 305:83), by having sexual contact with the victim (R. 305:84). The court defined sexual contact to include the intentional touching of the victim's penis or "an intentional touching by the victim of the penis of Donald P. Coughlin, if the defendant intentionally caused or allowed the victim to do that touching." (R. 305:85.)

The court explained that the jury had two verdict forms for each count—one guilty and one not guilty. (R. 307:4–18.) The court read each of the guilty forms for the 14 counts,

including: "We, the jury, find the defendant, Donald P. Coughlin, guilty of having sexual contact . . . by the defendant touching the victim's penis." (R. 307:8–17.) The court then read the guilty form for the final count related to John Doe 3: "We, the jury, find the defendant, Donald P. Coughlin, guilty of committing three or more sexual assaults of [John Doe 3]." (R. 307:17.)

The jury deliberated and later returned guilty verdicts against Coughlin. (R. 199:1–20.) The 14 verdict forms each explicitly stated Coughlin was guilty of having sexual contact "by the defendant touching the victim's penis." (R. 199:7–20.) The final verdict form related to John Doe 3 stated Coughlin was guilty of committing three or more sexual assaults of John Doe 3 during the relevant period charged in the count. The court then confirmed with the jury that it found Coughlin guilty of the 14 counts for having sexual contact "by the defendant touching the victim's penis" and the count for "committing three or more sexual assaults" of John Doe 3. (R. 307:52–58.)

Conviction and sentencing.

The court entered judgments of conviction on the 15 counts related to this petition and adjourned the case for a sentencing hearing. (R. 307:70, 72.) Thereafter, the court imposed prison for each count. (R. 308:119–22.) The combined sentences on the counts equated to a 48-year prison sentence. (R. 308:119–22.) The court entered the sentence in a judgment of conviction. (R. 220.)

Postconviction.

Coughlin filed a postconviction motion that alleged there was an insufficient factual basis to support a conviction on each count. (R. 242:10–13.)[5]

Coughlin did not raise any concern relating to the jury instructions that defined sexual contact. He explained in his motion that the court advised the jury correctly that sexual contact meant either Coughlin having intentionally touched the victims' penises or the victims having intentionally touched Coughlin's penis (R. 242:11; 309:8), explaining that the court had embraced his interpretation as to the meaning of sexual contact (R. 254:2).

Coughlin argued that vagueness in the victims' description of the sexual activity rendered the evidence insufficient. (R. 242:12–13.) Coughlin observed that the victims had testified to several acts of sexual activity. (R. 242:12–13.) Coughlin acknowledged that touching the victims' penises is sexual contact. (R. 242:12–13.) He similarly recognized that having the victims touch his penis is sexual contact. (R. 242:12–13.) But he argued that another type of sexual activity—urging the victims to touch their own penises—fell outside the definition of sexual contact. (R. 242:12–13.) Coughlin argued that the evidence was insufficient because "[t]he jury had no way of knowing for sure what sexual activity occurred during each [charged] time period." (R. 242:12.)

The circuit court denied Coughlin's motion. (R. 309:19–20.) The court recognized that it must accept the jury's credibility determinations, observing "it must be assumed that the jury used th[e] testimony to support its verdict that

[5] The State does not address Coughlin's other claims not relevant to this petition. Coughlin had also alleged ineffectiveness of counsel and that the real controversy had not been tried. (R. 242:14–16.)

the defendant was guilty." (R. 309:19.) The court concluded "the jury acted reasonably and could be convinced beyond reasonable doubt by the evidence that was presented to the jury in this case." (R. 309:20.) The court observed the evidence showed more sexual assaults than just the charged counts such that the State "was nice in some ways of not charging more sexual assaults." (R. 309:20.) The court found "[t]here could have been more charges out of this then what was charged, even ten fold . . . in some cases." (R. 309:20.) The court entered an order denying Coughlin's postconviction motions on September 13, 2019. (R. 312.)

Appeal and petition for review.

Coughlin filed a notice of appeal and commenced with an appeal. (R. 257.) He again claimed the evidence was insufficient to convict. (Coughlin's Br. 10–22.)

Coughlin presented multiple insufficiency claims on appeal, including a new claim he hadn't advanced in the circuit court. Coughlin continued his claim that the victims were either "vague" or "very general" in their testimony such that there was "no way to determine the frequency" that he had sexual contact with the victims. (Coughlin's Br. 13, 17, 19.) But he added a new claim that "the definition of sexual contact was expanded in the jury instructions." (Coughlin's Br. 11.) Coughlin argued the court should review only whether the evidence was sufficient to Coughlin having touched the victims' penises—not under the alternate theory of whether the victims had touched his penis. (Coughlin's Br. 11–12.)

The State argued the evidence was sufficient. The State explained the testimony sufficiently supported the jury's verdicts for Coughlin having had sexual contact. (State's Br. 14–20.) As for Coughlin's new jury instruction claim, the State argued the "claim fails on the merits and because he forfeited and underdeveloped his argument." (State's Br. 20.)

The State preserved argument as to the jury instructions should the case proceed to this Court. (State's Br. 24–25, n.12–13.) For purposes of the appellate court's review, the State argued the evidence was sufficient under even the narrower definition of sexual contact limited to Coughlin having touched the victims' penises. (State's Br. 23–24.)

The court of appeals disagreed, concluding the evidence was insufficient to convict Coughlin for sexually assaulting John Doe 2 and John Doe 3.[6] *Coughlin*, 2021 WL 822223, ¶¶ 1–2.

The State now petitions for this Court for review and provides additional information in the argument section about the appeal and appellate court decision.

CONCISE STATEMENT OF THE CRITERIA FOR GRANTING REVIEW

Two independent grounds satisfy the criteria for this Court to grant review. First, a decision by this Court will help develop and clarify sufficiency of the evidence law by answering a novel question the resolution of which will have statewide impact, thereby satisfying the criterion in Wis. Stat. § (Rule) 809.62(1r)(c)2. Second, the court of appeals' decision conflicts with controlling opinions of this Court and other court of appeals decisions, thereby satisfying the criterion in Wis. Stat. § (Rule) 809.62(1r)(d). Both grounds present a real and significant question of constitutional law because sufficiency of the evidence review is "grounded in the due process guarantees of the Fourteenth Amendment" where "the Double Jeopardy Clause of the Fifth Amendment precludes retrial when the evidence is insufficient." *State v. Miller*, 2009 WI App 111, ¶ 28, 320 Wis. 2d 724, 772 N.W.2d

[6] The court of appeals' decision affirmed six counts for Coughlin sexually assaulting John Doe 1 that are beyond the scope of this petition. *Coughlin*, 2021 WL 822223, ¶¶ 1–2.

188. So both grounds satisfy the criterion in Wis. Stat. § (Rule) 809.62(1r)(a). The argument that follows further amplifies these criteria and reasons relied on to support this petition.

ARGUMENT

I. This Court should grant this petition because a decision will resolve a novel question by clarifying how to review the theory of guilt within an evidence sufficiency claim.

This case presents a novel question because no precedent resolves how a reviewing court deduces the theory of guilt when an inconsistency exists between a jury instruction and verdict form. Here, in 14 of the counts at issue, the jury received a broader definition of sexual contact in the jury instruction than it did in the verdict forms.[7]

A. A novel question exists because no precedent resolves how a court deduces a theory of guilt when an inconsistency exists between an instruction and verdict.

In a sufficiency of the evidence claim, a court reviews only "whether the *theory of guilt* accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." *State v. Poellinger*, 153 Wis. 2d 493, 508, 451 N.W.2d 752 (1990) (emphasis added). An appellate court may deduce the theory of guilt from the instruction received and verdict rendered by the jury. *See State v. Witkowski*, 163 Wis. 2d 985, 991, 473 N.W.2d 512 (Ct. App. 1991) (court considers instructions in evidence sufficiency review).

But, as the appellate court observed here, no precedent resolves how a reviewing court considers the theory of guilt

[7] The State does not discuss the fifteenth relevant count, Count 22, here because it doesn't pertain to the novel question.

when an inconsistency exists between an instruction and verdict. *Coughlin*, 2021 WL 822223, ¶ 18 n.11. This Court resolved in *State v. Beamon* how to address the theory of guilt when an instruction contains a legal misstatement that erroneously contains an additional requirement:

> We conclude that jury instructions that add requirements to what the statute sets out as necessary to prove the commission of a crime are erroneous; and therefore, we examine the sufficiency of the evidence in this case by comparison to what the statute requires and not by comparison to an additional requirement in the jury instructions.

State v. Beamon, 2013 WI 47, ¶ 3, 347 Wis. 2d 559, 830 N.W.2d 681. But here, there is no claim of legal error in the jury instructions. (R. 309:8 (Coughlin conceding legal definition correct).) So *Beamon* is inapposite.

The novel question to resolve in this case is how a reviewing court considers the theory of guilt when an instruction and verdict are both legally correct, but inconsistent with one another.

B. This Court should grant this petition because the court of appeals' opinion squarely recognized this novel question, but left it unanswered.

This petition presents the opportunity for this Court to develop sufficiency of the evidence doctrine by clarifying how a reviewing court considers the theory of guilt.

The court of appeals' opinion clouds, rather than clarifies, sufficiency of the evidence law. The court of appeals elevated the novel question to the foreground of its opinion despite Coughlin having not raised it in the postconviction proceedings. (*See* R. 309:8 (arguing court's sexual contact definition was correct).) The court of appeals made this novel question a focal point in its opinion, dedicating several

paragraphs to discussing it.[8] *Coughlin*, 2021 WL 822223, ¶¶ 16–19. But the court of appeals' decision ultimately ended by "assum[ing] without deciding" how it should consider the case theory. *Id.* ¶ 19.

The underlying case is an appropriate vehicle for this Court's review for multiple reasons. First, the question is squarely presented within a sufficiency of the evidence claim without extraneous legal claims because Coughlin abandoned an ineffectiveness of trial counsel claim. *Coughlin*, 2021 WL 822223, ¶ 12 n.7. So review by this Court doesn't require layering constitutional doctrine. Second, the facts of the case are particularly well-suited for this Court to consider how to review the theory of guilt in relation to each victim. John Doe 2 testified that he never touched Coughlin's penis. (R. 303:23–24.) In contrast, John Doe 3 identified that he had touched the defendant's penis. (R. 301:42.) This Court may clarify how to review the theory of guilt in each situation, thereby developing sufficiency of the evidence doctrine in multiple scenarios.

This Court should grant this petition to answer a novel question, i.e., how to resolve an insufficiency of evidence claim when the jury instruction and the verdict form present alternate theories of guilt. The court of appeals opinion squarely recognized, but left unanswered, this question. A decision by this Court will have statewide impact by clarifying

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[8] The court of appeals' decision misconstrued the State's argument and case presentation. The opinion alleged the State ignored the broader definition of sexual contact in the instruction. *Coughlin*, 2021 WL 822223, ¶ 17 n.10. But that is not accurate. The State addressed Coughlin's sufficiency claim, as he presented it. (State's Br. 22–24.) Given the limited error-correction role of the appellate court (State's Br. 25 n.13), the State argued evidence that Coughlin had touched the victims' penises was sufficient in each of the relevant counts, while preserving further argument relating to the jury instructions should this case proceed to this Court. (State's Br. 23–25 n.12–13.)

how a court reviews the theory of guilt when such an inconsistency exists.

II. This Court should grant this petition because a decision will resolve a conflict between the court of appeals' decision and controlling opinions of this Court and other appellate court decisions.

This case also warrants review because the court of appeals' decision is inconsistent with precedent. Precedent holds that a jury—not an appellate court—resolves any vagueness in testimony. Evidence sufficiency doctrine requires a reviewing court to accept the reasonable inferences a jury drew from the evidence. The reviewing court cannot substitute its deductions for that of the jury. Here, the court of appeals' decision failed to abide by precedent, concluding that vagueness in testimony rendered the evidence insufficient.

A. Doctrine holds that vagueness in testimony goes to credibility and weight that a jury resolves through reasonable inferences it may draw from the evidence.

Under evidence sufficiency doctrine, the jury weighs the evidence and draws reasonable inferences from the evidence. *State v. Hauk*, 2002 WI App 226, ¶ 12, 257 Wis. 2d 579, 652 N.W.2d 393. It is the jury's task to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Poellinger*, 153 Wis. 2d at 506. The jury decides "which evidence is credible and which is not" and may "reject evidence and testimony suggestive of innocence." *Id*. at 503.

When a jury may draw multiple reasonable inferences from the evidence, an appellate court must adopt the inference that supports the verdict. *Id.* at 504. This requirement "is the same in either a direct or circumstantial

evidence case." *Id.* at 501. It is not necessary that the appellate court "be convinced of the defendant's guilt but only that the court is satisfied the jury acting reasonably could be so convinced." *State v. Koller*, 87 Wis. 2d 253, 266, 274 N.W.2d 651 (1979). The appellate court's review must be "highly deferential to a jury's verdict." *Beamon*, 347 Wis. 2d 559, ¶ 21.

Evidence sufficiency doctrine aligns with another branch of precedential doctrine relating to the constitutional due process right of notice of charges and the right against double jeopardy. *Compare Miller*, 320 Wis. 2d 724, ¶ 28 (evidence sufficiency), *with State v. Fawcett*, 145 Wis. 2d 244, 250–51, 426 N.W.2d 91 (Ct. App. 1988) (notice). Courts recognize that, "[i]n a case involving a child victim, . . . a more flexible application of notice requirements is required and permitted." *Fawcett*, 145 Wis. 2d at 254.

In *Fawcett*, the court explained that "[t]he vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance." *Id.* "'Time is not of the essence in [child] sexual assault cases' when the date of the commission of the crime is not a material element of the offense, it need not be precisely alleged." *State v. Hurley*, 2015 WI 35, ¶ 34, 361 Wis. 2d 529, 861 N.W.2d 174 (quoting *Fawcett*, 145 Wis. 2d at 250). Courts "are mindful that child victims of sexual assault are often unable to pinpoint dates," such that courts "do not hold the state to an impossible burden, especially when the state has no control over the ability to narrow." *State v. Stark*, 162 Wis. 2d 537, 545, 470 N.W.2d 317 (Ct. App. 1991). So any vagueness "go[es] to [a victim's] credibility and the weight of [the victim's] testimony." *State v. Kempainen*, 2014 WI App 53, ¶ 24, 354 Wis. 2d 177, 848 N.W.2d 320, *aff'd*, 2015 WI 32, 361 Wis. 2d 450, ¶¶ 24–25, 862 N.W.2d 587.

When reviewing sufficiency of the evidence in a child sexual assault prosecution, courts have not required precision as to the date and description of the conduct. In *Thomas v. State*, the court explained that the "inability to connect the alleged crime with a particular date goes to the issue of credibility, and thus is a matter for consideration by the jury." *Thomas v. State*, 92 Wis. 2d 372, 386, 284 N.W.2d 917 (1979) (quoting *State v. Sirisun*, 90 Wis. 2d 58, 64, 279 N.W.2d 484 (Ct. App. 1979); *see State v. Miller*, 2002 WI App 197, ¶ 17, 257 Wis. 2d 124, 650 N.W.2d 850 (jury not required to nail down a specific time period). In *State v. Brunette*, the court concluded that a victim describing contact with her "private" and "potty place" was sufficient evidence for unlawful sexual contact with her "groin, vagina or pubic mound." *State v. Brunette,* 220 Wis. 2d 431, 450–52, 583 N.W.2d 174 (Ct. App. 1998).

B. This Court should grant this petition because the court of appeals' decision broke from precedent.

The jury—not the appellate court—resolves vagueness in testimony as issues of credibility and weight. To conclude otherwise breaks from evidence sufficiency and notice doctrine. Here, the court of appeals' decision broke from this doctrine.

The court of appeals' decision conceded that both John Doe 2 and John Doe 3 testified to Coughlin sexually abusing them. *Coughlin*, 2021 WL 822223, ¶¶ 7–8. The decision acknowledged the victims testified that Coughlin would "'masturbate' whichever victim was sitting in the front seat [of a vehicle]" as well as at a "village firehouse where Coughlin had an office, and in various rooms of the Coughlin family home." *Id.* ¶ 9. The decision further recognized testimony stating that at other times Coughlin had asked a victim "to 'masturbate' him." *Id.* ¶ 9. Despite such acknowledgments,

the court of appeals' decision concluded that vagueness in the testimony without specific sexual conduct in specific charging periods rendered the evidence insufficient regarding John Doe 2 and John Doe 3. *Id.* ¶¶ 23–33.

The flaw in the court of appeals' reasoning is that vagueness in testimony goes to credibility and weight that a jury—not an appellate court—resolves. *See Kempainen*, 354 Wis. 2d 177, ¶ 24 (vagueness goes to credibility and weight). When a jury may draw multiple reasonable inferences from the evidence, an appellate court must adopt the inference that supports the verdict. *Poellinger*, 153 Wis. 2d at 504. It "must affirm the jury's finding if there is *any* reasonable hypothesis that supports the conviction." *Hauk*, 257 Wis. 2d 579, ¶ 12. Even minimal evidence may have probative value sufficient for the jury to draw reasonable inferences of guilt. *State v. Zimmerman*, 2003 WI App 196, ¶ 30, 266 Wis. 2d 1003, 669 N.W.2d 762. The court of appeals' decision did the opposite; it drew inferences to reverse Coughlin's 15 convictions for sexually assaulting John Doe 2 and John Doe 3.

This Court should grant this petition because the court of appeals' decision conflicts with controlling opinions of this Court and other court of appeals' decisions. The court of appeals did so in an opinion citable for its persuasive value. *See* Wis. Stat. § (Rule) 809.23(3)(b) (citation of unpublished opinions). A decision by this Court will resolve this conflict.

III. The evidence, viewed most favorably to the State and the convictions, was sufficient to sustain the jury's 15 guilty verdicts reversed in the court of appeals' decision.

Upon resolution of the novel question and reexamination of the trial evidence under the long-standing sufficiency of the evidence principles reviewed above, this Court should find that the 15 guilty verdicts at issue here should be affirmed.

Under the standard to review sufficiency of the evidence, a court may not reverse a "conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 501. Coughlin, as the "defendant challenging the sufficiency of the evidence bears a heavy burden to show the evidence could not reasonably have supported a finding of guilt." *Beamon*, 347 Wis. 2d 559, ¶ 21. To succeed, he "must show a record devoid of evidence on which a reasonable jury could convict," *State v. Sholar*, 2018 WI 53, ¶ 45, 381 Wis. 2d 560, 912 N.W.2d 89, to overcome the great deference this Court gives to the jury and its verdict, *see State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530.

A. The evidence was sufficient to sustain the four convictions for Coughlin sexually assaulting John Doe 2.

Here, the State charged Coughlin with four counts of sexually assaulting John Doe 2 between September 1989 and November 1992. (R. 136:3–4.) The jury found Coughlin guilty of each of these four counts. (R. 199:7–10.) The theory of guilt concerned Coughlin having sexual contact with John Doe 2 between September and either November or December in the years 1989 to 1992. Here, the theory of guilt could not involve acts of John Doe 2 touching Coughlin's penis because this victim testified that he hadn't touched the defendant's penis. (R. 303:23–24.) So the theory of guilt necessarily involved acts of Coughlin touching John Doe 2's penis.

John Doe 2 described how Coughlin had masturbated on the victim's penis. (R. 303:24.) John Doe 2 explained that Coughlin took the victim and his cousins, John Doe 1 and John Doe 3, in a vehicle to shine deer, using these shining

episodes as an opportunity to masturbate with and on the children in a parked vehicle. (R. 303:23–24.) John Doe 2 explained that Coughlin "would either masturbate whoever was in the front seat, or he would try to, and himself." (R. 303:23.) The prosecutor asked: "Did he ever masturbate you while you were in the front seat?" (R. 303:24.) John Doe 2 answered: "Yes." (R. 303:24.)

John Doe 2 explained how the sexual conduct typically occurred during the late summer and autumn. John Doe 2 explained the defendant took his cousins and him shining for deer a "lot of times over the years . . . more than once a month during the late summer and fall," (R. 303:25), explaining the shining episodes ranged from about once to four times a month during this period. (R. 303:53.) John Doe 2 testified that masturbation during the deer shining episodes was a frequent occurrence where shining "[d]efinitely usually" ended with masturbation. (R. 303:25.) John Doe 2 described that "it happened enough times where . . . [w]e would play with ourselves, he might play with somebody, might not play with somebody. But he would always masturbate and ejaculate." (R. 303:27.)

John Doe 2 confirmed that the time frame of the sexual conduct occurred each autumn between 1989 and 1992:

> Q. [John Doe 2], would this have happened at least one time in the fall of 1989 before your 13th birthday?
>
> A. Yeah. If you're 13 when you're in sixth grade, yeah.
>
> Q. Would it have happened at least one time in the fall of 1990 when you would have been 13 years old?
>
> A. Yes.
>
> Q. And would it have happened at least one time in the fall of 1991 when you would have been 14 years old?

A. Yes.

Q. And would it have happened at least on[c]e in the fall of 1992 before you were 16 years old?

A. Yes.

(R. 303:28–29.) John Doe 2 explained that it hadn't occurred prior to the first charged period (*Compare* R. 303:11 (date of birth), *with* 303:19 (age at incident)), except for an earlier incident when Coughlin had measured the children's penises at the village firehouse shortly before the first deer shining episode. (R. 303:17–20, 53.) John Doe 2 further explained that Coughlin's last assault occurred around the time of the victim's high school graduation in 1995. (R. 303:43.)

The jury may draw reasonable inferences from the basic facts to reach the ultimate fact as to guilt. *Poellinger*, 153 Wis. 2d at 506. From this evidence, the jury could reasonably infer the deer shining episodes: (1) typically occurred multiple times per month in the autumn of 1989 to 1992, (2) usually involved Coughlin masturbating with or on the child victims, (3) included Coughlin touching John Doe 2's penis when he masturbated on the child. From these basic facts, the jury could reasonably infer that Coughlin's frequent deer shining episodes usually included various acts of masturbation that included at least one act of Coughlin touching John Doe 2's penis in each of the charged periods, sufficient to reach the ultimate fact that Coughlin was guilty for each of the four counts.

The evidence here is sufficient to sustain Coughlin's four convictions for sexually assaulting John Doe 2. The jury—not the appellate court—resolves any vagueness in testimony. When multiple reasonable inferences from the evidence are possible, the reviewing court must adopt the inference that supports the verdict. *Poellinger*, 153 Wis. 2d at 504. The court of appeals' decision did the reverse, adopting an inference that supports acquittal. Under proper

application of evidence sufficiency doctrine, the convictions should not have been reversed.

B. The evidence was sufficient to sustain the eleven convictions for Coughlin sexually assaulting John Doe 3.

Here, the State charged Coughlin with eleven counts for sexually assaulting John Doe 3 between September 1989 and November 1994. (*Compare* R. 136:4–7 (amended information), *with supra* n.3 (drafting error).) The first ten counts charged Coughlin for having sexual contact with the child. (R. 136:4–7.) The eleventh count charged Coughlin with repeatedly sexually assaulting John Doe 3 on three or more occasions. (R. 136:7.)

The jury found Coughlin guilty on each of these eleven counts. (R. 199:11–21.) The theory of guilt relating to the first ten counts concerned Coughlin having sexual contact with John Doe 3 between September and either November or December in the years 1989 to 1993 and between February and mid-May in the years 1990 to 1994. Depending on how this Court resolves the novel question, the theory of guilt relating to these ten counts concerned sexual contact either limited to Coughlin touching John Doe 3's penis or additional conduct within the definition of sexual contact, such as John Doe 3 touching Coughlin's penis. The theory of guilt for the eleventh count concerns Coughlin committing three or more sexual assaults of John Doe 3 by either touching the victim's penis or the victim touching Coughlin's penis beginning on September 1, 1994 and ending on November 9, 1994. (R. 56:21; 305:83–86; 307:17–18.) The novel question does not pertain to this count because there was no inconsistency in the court's definition of sexual contact regarding this final count.

John Doe 3 described a pattern of sexual abuse by Coughlin that began when John Doe 3 was seven years old and continued until around October or November of 1994, shortly before his sixteenth birthday. (R. 301:37–38, 108.) John Doe 3 explained how the sexual activity and abuse occurred at multiple locations in the county, including in a vehicle during deer shining and at the family residence as well as additional locations. (R. 301:49–50, 72–73.)

John Doe 3 explained that the deer shining episodes were frequent, occurring "[o]ne to two times a week, minimum" in the autumn. (R. 301:58.) Coughlin used deer shining as an opportunity to masturbate on John Doe 3:

> Q. Was it always everybody -- each person masturbating themselves, or did something else happen on occasion?
>
> A. No, there were times when Donny would want to masturbate us.
>
> Q. And would he do that?
>
> A. Yes.
>
> Q. Were there times when he masturbated you?
>
> A. Yes.

(R. 301:41.) John Doe 3 also stated that he had masturbated on Coughlin during the deer shining episodes:

> Q. Was there anything else that would happen?
>
> A. He would want us to masturbate him.
>
> Q. Did that happen as well?
>
> A. Yes.
>
> Q. Were there times when you masturbated him?
>
> A. Yes.

(R. 301:42.) John Doe 3 said masturbation took place "[e]very time" they went deer shining. (R. 301:62.)

John Doe 3 described how Coughlin initiated sexual activity in the family residence (R. 301:45), such as using pornography and alcohol to instigate masturbation with his stepsons (R. 301:46). John Doe 3 confirmed that frequent sexual activity occurred at the residence including Coughlin masturbating on a stepson as well as having a stepson masturbate on Coughlin:

> Q. And again, when the defendant would ask you to do this, was it always him asking you to masturbate, you would masturbate yourself, or did something else happen on occasion?
>
> A. He would always ask. He would always be there and want us to masturbate, he would want to masturbate us, and at times he did.
>
> Q. At times did he ask one of you to masturbate him?
>
> A. Yes.
>
> Q. Did that happen as well at the house?
>
> A. Yes.
>
> Q. How often would this happen in the home?
>
> A. Weekly.

(R. 301:44–45.) John Doe 3 explained some type of sexual activity with Coughlin occurred "[a]t least once a week . . . [t]hroughout the year" except during several summers when he lived with his aunt and uncle out on a family farm. (R. 301:59.)

John Doe 3 described how Coughlin incorporated a penis pump into the sexual assaults with him and his brother, John Doe 1:

> Q. And what was a penis pump?

> A. It was a device that was supposed to make your penis larger.
>
> Q. And did he use it on you and [John Doe 1]?
>
> A. Yes.
>
> Q. And what would happen? How would he do that?
>
> A. It slipped over your penis and had some sort of pump contraption on it, and applied suction.
>
> Q. Now, you said -- and then he would have you guys use it on him?
>
> A. Yes.

(R. 301:48.) John Doe 3 stated Coughlin incorporated the penis pump on "several occasions." (R. 301:48.)

John Doe 3 said Coughlin masturbated with the child victims at other locations in the county. (R. 301:72–73.) John Doe 3 explained when John Doe 1 and he were out cutting wood that Coughlin "would want us to masturbate." (R. 301:50.) John Doe 3 described the same conduct at a family business where Coughlin "would always want to masturbate" (R. 301:51), confirming they had masturbated at the business (R. 301:52). John Doe 3 also stated it occurred at the village firehouse, explaining that Coughlin was the fire chief at the time. (R. 301:55–56.) John Doe 3 said Coughlin incited masturbation with them at the family business and village firehouse by providing pornography magazines and pornographic videos. (R. 301:52, 57.)

John Doe 3 explained, "[b]ecause there was a lot of sexual abuse going on . . . . [it was] [k]ind of hard to keep track of all of it." (R. 301:85.) But John Doe 3 did confirm that Coughlin engaged in sexual activity regularly between the autumn of 1989 and the autumn of 1994. John Doe 3 said there "[d]efinitely" were multiple instances in the autumn of 1989. (R. 301:58.) During 1990, the sexual activity occurred

"[a]t least once a week. . . . [t]hroughout the year." (R. 301:58–59.) John Doe 3 confirmed there was at least one instance during each of the charged periods in 1991 through 1993. (R. 301:59–61.) John Doe 3 also confirmed there was at least one instance in the spring of 1994. (R. 301:61.) He similarly confirmed that three or more instances occurred between September 1994 and his sixteenth birthday in November 1994. (R. 301:61–62, 94–95, 97.) Prior to discussing the charged periods, John Doe 3 already had explained that sexual activity with Coughlin had been a weekly occurrence. (R. 301:45, 58, 83–84.)

The jury may draw reasonable inferences from the basic facts to reach the ultimate fact as to guilt. *Poellinger*, 153 Wis. 2d at 506. From this evidence, the jury could reasonably infer Coughlin's sexual abuse was continuous throughout John Doe 3's childhood, except during summers when he was at his uncle and aunt's family farm. But otherwise, sexual abuse occurred on roughly a weekly basis that included every autumn during deer shining and at about the same frequency at the family residence throughout the year. So the jury could reasonably infer that Coughlin masturbated with or on John Doe 3 about once a week during the relevant charged periods. The jury could also reasonably infer that Coughlin had touched John Doe 3's penis when he masturbated on the child and John Doe 3 had touched Coughlin's penis when the child had masturbated on the defendant. From these basic facts, the jury could reasonably infer that Coughlin's conduct during the frequent deer shining episodes, conduct in the family residence, and additional conduct at other locations in the county, included at least one act of Coughlin having sexual contact with John Doe 3 in each of the ten charged periods and at least three such acts in the eleventh charged period, sufficient to reach the ultimate fact that Coughlin was guilty of each of the eleven counts.

The evidence here is sufficient to sustain Coughlin's eleven convictions for sexually assaulting John Doe 3. The evidence is sufficient whether limited only to instances of Coughlin touching John Doe 3's penis or under a broader definition of sexual contact. The court of appeals' decision recognized that the answer to the novel question may not be dispositive here. *Coughlin*, 2021 WL 822223, ¶ 37 n.13. But the court of appeals' decision committed a fatal error in its analysis regarding vagueness in the testimony. Vagueness in testimony in a child sexual assault goes to witness credibility and testimonial weight. *Fawcett*, 145 Wis. 2d at 254. The jury decides credibility and weight. *Poellinger*, 153 Wis. 2d at 503, 506. The jury may draw reasonable inferences. *Hauk*, 257 Wis. 2d 579, ¶ 12. When multiple reasonable inferences from the evidence exist, the reviewing court must adopt the inference that supports the verdict. *Poellinger*, 153 Wis. 2d at 504. So it is the jury—not the appellate court—resolving the vagueness in the testimony. The court of appeals' decision did the reverse. Under proper application of evidence sufficiency doctrine, the convictions cannot be reversed.

CONCLUSION

This Court should grant this petition and review the court of appeals' decision that reversed 15 convictions for Coughlin sexually assaulting John Doe 2 and John Doe 3.

Dated this 2nd day of April 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 7,942 words.

Dated this 2nd day of April 2021.

WINN S. COLLINS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

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

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

Dated this 2nd day of April 2021.

WINN S. COLLINS
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Donald P. Coughlin
Case No. 2019AP1876-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of April 2021.

WINN C. COLLINS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

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

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

Dated this 2nd day of April 2021.

Winn S. Collins

WINN S. COLLINS
Assistant Attorney General