STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DONALD P. COUGHLIN,

Defendant-Appellant.

AN APPEAL FROM AN ORDER DENYING
A POSTCONVICTION MOTION ENTERED IN
JUNEAU COUNTY CIRCUIT COURT, THE
HONORABLE STACY A. SMITH, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

WINN S. COLLINS
Assistant Attorney General
State Bar #1037828

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6203
(608) 294-2907 (Fax)
collinsws@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Few legal principles are more deeply rooted and indisputable than judicial deference to a jury's verdict. It is a long-held principle the jury follows a court's instructions. A reviewing court must not underestimate the jury's ability to apply the instructions to the evidence. A court reviewing evidence sufficiency must be highly deferential to the jury.

Here, the jury heard testimony from Donald Coughlin's stepson and nephew that he repeatedly sexually abused them over many years of their childhood.[1] The jury received proper instruction as to the legal definition of sexual contact. The circuit court explained it includes multiple types of conduct. But an error occurred when the jury received verdict forms identifying only one type of sexual contact. Each victim testified that Coughlin engaged in conduct that satisfied both the broader definition of sexual contact in the instructions and the narrower contact identified in the verdict forms, though they candidly acknowledged difficulty distinguishing one specific assault from another given the pervasiveness of the abuse. The jury assessed credibility, weighed the evidence, and resolved the ambiguity in the testimony. The jury drew reasonable inferences and found Coughlin guilty.

This Court should conclude there was sufficient evidence. Coughlin claimed postconviction that the evidence was insufficient. The circuit court denied the motion. But the court of appeals reversed, believing the evidence was insufficient. Under the deference due to the trier-of-fact, this Court should reverse the court of appeals; it should sustain Coughlin's convictions for sexually assaulting his stepson and nephew, concluding the evidence was sufficient.

---

[1] The State uses "stepson" and "nephew" as the designations to deidentify these individuals in compliance with Wis. Stat. § (Rule) 809.86(4).

STATEMENT OF THE ISSUE[2]

Has Coughlin satisfied his heavy burden to demonstrate that the evidence, viewed most favorably to the State and convictions, was insufficient in regard to the jury's 15 guilty verdicts relating to his sexual assaults of his stepson and nephew?

This Court should conclude Coughlin has not met his heavy burden to overcome the great deference given to the jury and its verdicts because the evidence was sufficient. The circuit court had concluded the evidence was sufficient; the court of appeals concluded it was not. This court should sustain the convictions and reverse the court of appeals' decision regarding these 15 convictions.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests both oral argument and publication, pursuant to Wis. Stat. §§ (Rule) 809.22 and 809.23.

STATEMENT OF THE CASE

Nature of the case. The State petitioned this Court to review the reversal of 15 convictions for Coughlin's repeated sexual assaults against his stepson and nephew. The court of appeals said the evidence was insufficient and reversed these convictions, despite acknowledging the two victims had testified to sexual abuse. *State v. Coughlin*, No. 2019AP1876-CR, 2021 WL 822223, ¶¶ 7–8, 37 (Wis. Ct. App., Mar. 4, 2021) (unpublished). This Court granted the petition.

---

[2] A single evidence sufficiency claim is under review. The State had identified three issues related to this claim in its petition for review. Here, it's presented more efficiently as a single issue, whereby the first and second issues in the petition are subsumed by the third issue.

Charges. The State charged Coughlin with 15 counts relevant to this Court's review. (R. 136.) Eleven counts charged Coughlin with sexually assaulting his stepson and four counts charged him with sexually assaulting his nephew. (R. 136:3–7.)[3] Each count identified a date range of several months in duration; each was within a period between 1989 to 1994. (R. 136:3–7.) The State provides additional information about these 15 counts in its argument, *infra* Section B.2.a.

The State also charged eight additional counts that aren't under review. The State charged Coughlin with six counts for sexually assaulting a third victim.[4] (R. 136:1–3.) And the State charged Coughlin with child enticement against a fourth victim. (R. 136:8.) The court also dismissed another count based upon a stipulation of the parties. (R. 284:24.)

Investigation and jury trial. In 2009, the stepson and nephew reported to law enforcement that Coughlin repeatedly sexually abused them when they were children. (R. 161; 169; 179; 180.) The stepson told law enforcement

---

[3] The amended information had drafting errors in Counts 12 and 16, though the record demonstrates the counts proceeded without the errors. (*Compare* R. 136:4–5 (amended information), *with* 199:11, 15 (verdict forms); 305:77, 79 (jury instructions); 307:11, 13–14 (verdict instructions).) Hereinafter, the State assumes Counts 12 and 16 proceeded without the drafting errors, *see infra* n.9 (table).

[4] The parties have not asked this Court to review the court of appeals decision affirming six convictions related to Coughlin sexually assaulting a third victim—the older brother and cousin of the other two victims. The court of appeals' decision concluded there was sufficient evidence regarding these six convictions. *State v. Coughlin*, No. 2019AP1876–CR, 2021 WL 822223, ¶ 37 (Wis. Ct. App. Mar. 4, 2021). Coughlin didn't petition for review; he didn't petition for cross-review. So neither party has asked this Court to disturb these six convictions.

Coughlin had first touched his penis when he was seven or eight years old, recalling: "I know he touched me." (R. 169:2.) The stepson estimated that hundreds of acts of sexual abuse occurred over an approximate eight-year period. (R. 161:1–2.) The stepson described the sexual abuse as a weekly occurrence. (R. 169:14–15.) The nephew told law enforcement the first time Coughlin had "touched me" occurred when the nephew wasn't even old enough to ejaculate. (R. 180:47.) The nephew described the sexual abuse taking place over several years, typically around the autumn when Coughlin took him out to shine deer. (R 180:36, 44, 55–56, 60, 68.)

The case proceeded to trial in 2017.[5] The stepson's and nephew's statements to law enforcement were exhibits at trial. (R. 301:70–71, 222, 272; 303:35, 40, 78–79.)

The jury heard how Coughlin groomed the victims by normalizing the touching of their genitals in an act referred to as "grubbing." (R. 305:93–94.) The stepson explained that "grubbing would be when he grabs on, gives your testicles a squeeze." (R. 301:87.) The stepson explained when Coughlin "grabbed on to your penis and testicles . . . he got a good feel of what he was grabbing on to." (R. 301:88.) The stepson added that Coughlin "would grab it in a way that I think he was trying to arouse me." (R. 301:107.) The stepson stated, "at the time I thought it was a prank, but it's easy to look back down and see that it wasn't just a prank." (R. 301:88.)

The victims testified Coughlin had a recurring interest in the size of children's penises. The stepson said there were several occasions when Coughlin used a penis pump with his brother and him to cause or enlarge an erection. (R. 301:47.)

---

[5] An earlier trial in 2015 is not relevant to this appeal. At the earlier trial, a jury had found Coughlin guilty. (R. 56 (verdict forms), 285:4–21 (trial transcript).) But the court granted Coughlin's motion for a new trial. (R. 289:2–3.) The case proceeded to a second trial in 2017. (R. 298 (trial transcript).)

Coughlin also measured the stepson and nephew's penises multiple times during their childhood. (R. 301:48–49; 303:17–19, 23.)

The jury heard how Coughlin used alcohol and pornography to entice a victim. The stepson recalled a time when he was 14 years old and with his brother "on New Year's Eve when [Coughlin] brought wine up to the room and wanted us to drink it," having entered with the wine and "a porno magazine." (R. 301:46.) The stepson explained how they "drank the bottle of wine" and "we all masturbated." (R. 301:46–47.) The stepson recalled other incidents when Coughlin used pornographic magazines and videos, including an incident at a family business and times at a village firehouse. (R. 301:52, 57.) Coughlin was a fire chief at the time, thereby giving him the opportunity to be alone with children in the firehouse basement. (R. 301:55–56, 90–92, 105.)

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

Coughlin's stepson and nephew later reported the sexual abuse when they were adults. (R. 301:68–69; 303:31–32.) The stepson described how he had "pretty much buried" some of it with "the rest of my awful memories" from his childhood. (R. 301:90). The stepson explained not every person was subject to the sexual abuse "on account of Donny [Coughlin] only liked little boys." (R. 301:101.) But the stepson had sufficient concern as an adult to contact law enforcement "to make sure it didn't happen to another little

kid." (R. 301:69.) The nephew described the mental trauma he endured, especially when his own son was the same age he had been during the sexual abuse. (R. 303:44, 59.) The nephew explained that "the reason this came out was because I didn't want him alone with my kid." (R. 303:46.)

Coughlin testified and denied ever sexually assaulting any of the victims. (R. 304:152.) Coughlin acknowledged being familiar with "grubbing," but alleged that he never engaged in the conduct. (R. 304:175–77.) He claimed that, although people talked in a sexual manner in the home, he did not participate. (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.)

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.) The State provides additional information regarding the jury instructions and verdicts in its argument, *infra* Section A.2. Here, it is sufficient to know the court defined sexual contact as an act that included: (1) Coughlin touching a victim's penis; and (2) A victim touching Coughlin's penis when he caused or allowed the touching. (R. 305:70–71, 80.) But the verdict forms read and provided by the court only identified the first type of contact—acts of Coughlin touching a victim's penis—as sexual contact. (R. 199:7–20l; 307:11–17.)

The jury deliberated and later returned guilty verdicts against Coughlin, except on one count. (R. 199:1–22.) The jury found Coughlin guilty of 11 counts for sexually assaulting his stepson. (R. 199:11–21.) And the jury found Coughlin guilty of four counts for sexually assaulting his nephew. (R. 199:7–10.) The jury also found Coughlin guilty of six counts for sexually assaulting a third victim. (R. 199:1–6.) But the jury found Coughlin not guilty in the last count, a charge related to child enticement against a fourth victim. (R. 199:22.) The State

provides additional information about the evidence supporting the 15 guilty verdicts related to the stepson and nephew in its argument, *infra* Section B.2.

Sentence and postconviction. After the circuit court imposed prison and entered a judgment of conviction (R. 220; 308:120–22), Coughlin filed a postconviction motion alleging the evidence was insufficient to convict. (R. 242:10–13.) He alleged that the evidence was insufficient to prove that sexual contact occurred within any of the charged periods.[6] (R. 242:12–13.) The circuit court denied the motion after briefing and argument by the parties (R. 309:19–20); it entered a written order denying the motion (R. 312).

Appeal and petition for review. On appeal, Coughlin again claimed the evidence was insufficient. (Coughlin's Br. 10–22.) He alleged that the "jury had no way of knowing for sure which specific sexual activity occurred during each time period." (Coughlin's Br. 21, 23.) He argued that, while the stepson "confirmed sexual activity occurred during each time period, he . . . was vague" in describing the sexual conduct that "took place during each time period." (Coughlin's Br. 23.) Coughlin similarly argued the nephew was "very general in describing the sexual behavior that occurred during each time period." (Coughlin's Br. 21.)

The court of appeals reversed in part and affirmed in part. *Coughlin*, No. 2019AP1876–CR, ¶ 37. It recognized that victims of child sexual assault are unlikely to be able "to identify the dates of events with any precision" and its often "difficult for witnesses to testify about such events with

---

[6] Coughlin didn't challenge the sufficiency of the evidence on any other grounds, such as a victim's age, his identity or intent (i.e. sexual arousal or gratification), and venue (R. 242:10–13), so he has forfeited an evidence sufficiency claim on any alternate ground. *See State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (forfeiture).

clarity, . . . [b]ut those are among the challenges that the State necessarily assumes in prosecuting such a case." *Id.* ¶ 27. The court thought there was insufficient evidence to support any conviction in the 11 counts involving Coughlin's stepson and four counts involving his nephew, though it did conclude there was sufficient evidence for Coughlin's six convictions regarding the third victim. *Id.* ¶ 37.

This Court granted the State's petition, that sought review of the 15 reversed counts. Coughlin did not petition for review or cross-review; instead, he simply responded to the State's petition by arguing this Court should not grant review. This Court's order granting the petition limited the issues under review to those set forth in the petition.

STANDARD OF REVIEW

This Court's review as to evidence sufficiency is highly deferential to the fact-finder and de novo to the lower courts. *See Musacchio v. United States*, 577 U.S. 237, 243 (2016) (evidence sufficiency a legal question); *State v. Rowan*, 2012 WI 60, ¶ 5, 341 Wis. 2d 281, 814 N.W.2d 854 (high deference to trier of fact) So, although "[t]he question of whether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law, subject to . . . de novo review," a court "conducting such a review, . . . consider[s] the evidence in the light most favorable to the State and reverse[s] the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W. 2d 752 (1990)).

ARGUMENT

This Court should conclude the evidence was sufficient and Coughlin has not met his heavy burden to overcome the great deference given to the jury and its verdict.

"[A] defendant challenging the sufficiency of the evidence bears a heavy burden to show the evidence could not reasonably have supported a finding of guilt." *State v. Beamon*, 2013 WI 47, ¶ 21, 347 Wis. 2d 559, 830 N.W.2d 681. 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.

A. The theory of guilt presented in the jury instructions that correctly defined sexual contact controls over the errant verdict forms.

The first—and critical—step in assessing sufficiency of the evidence is to identify the proper theory of guilt against which the evidence is measured. Evidence sufficiency review is "grounded in the due process guarantees of the Fourteenth Amendment" where "the Double Jeopardy Clause of the Fifth Amendment preclude[s] retrial when the evidence is insufficient." *State v. Miller*, 2009 WI App 111, ¶ 28, 320 Wis. 2d 724, 772 N.W.2d 188. Jeopardy is necessarily implicated for conduct within the theory of guilt, *id.*, just as a subsequent prosecution is not prohibited for conduct beyond the theory of guilt, *see State v. Schultz*, 2020 WI 24, ¶¶ 2, 5, 390 Wis. 2d 570, 939 N.W.2d 519 ("not twice in jeopardy for the same criminal offense" when the "parameters of the offense[s]" aren't identical in fact). At this stage, the court only is determining the standard for analysis, *Beamon*, 347 Wis. 2d 559, ¶ 40, by identifying de novo the theory of guilt, *Poellinger*, 153 Wis. 2d at 508.

1. An evidence sufficiency claim is reviewed under the theory of guilt in the jury instructions, except when an error exists.

When the jury received proper instruction, this Court considers the theory of guilt presented in the circuit court's instructions to the jury. *See Beamon*, 347 Wis. 2d 559, ¶ 22 (citing *State v. Witkowski*, 163 Wis. 2d 985, 991, 473 N.W.2d 512 (Ct. App. 1991)). But such an approach does not work when the jury received an inaccurate or inconsistent instruction. *Id.* An inaccurate instruction is a legal misstatement of law. Inconsistent instructions are correct statements of law that contains a factual discrepancy. *See, e.g., State v. Williams*, 2015 WI 75, 364 Wis. 2d 126, 867 N.W.2d 736 (instruction naming the wrong victim).

The Supreme Court resolved how to determine the theory of guilt when a jury instruction contains a legally inaccurate statement of law: "when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." *Musacchio*, 577 U.S. at 243 This Court similarly concluded a jury instruction that adds a requirement "to what the statute sets out as necessary to prove the commission of a crime [is] erroneous; and therefore, [a court] examine[s] the sufficiency of the evidence . . . by comparison to what the statute requires and not by comparison to an additional requirement in the jury instructions actually given." *Beamon*, 347 Wis. 2d 559, ¶ 50.

This Court also resolved how a court determines the theory of guilt when a jury instruction contains a factual inconsistency. In *Williams*, this Court held "a jury instruction may be considered erroneous when it describes a theory of criminal culpability that was not presented to the jury or it

omits a valid theory of criminal culpability that was presented to the jury." *Williams*, 364 Wis. 2d 126, ¶ 6. In such a circumstance, a court upholds the conviction when "the court is convinced, beyond a reasonable doubt, that the jury would have convicted the defendant if a proper instruction—an instruction that is consistent with both the relevant statute and the factual theory presented—had been provided to the jury." *Id*. ¶ 63.

2. The verdict forms contained an error by identifying sexual contact more narrowly than defined in the instructions.

Here, the jury received proper instruction as to the legal definition of sexual contact, but there was a difference between the instructions and verdict forms. The court had read the charges in the information (R. 305:66–69, 77–79, 83), and had properly instructed the jury that the information was not evidence (R. 198:28; 305:91). The jury then received a legally correct definition of sexual contact, but the factual nature of the contact at issue varied in the instructions and verdict forms. The court instructed the jury that sexual contact meant either Coughlin having touched a victim's penis or Coughlin having intentionally caused or allowed a victim to touch his penis. (R. 305:70–71, 80.) But the court presented the jury with verdict forms that identified only the act of Coughlin having touched the victims' penises. (R. 307:8–17.)

The discrepancy arose because of a change between the narrower sexual contact alleged in the information versus the broader sexual contact worked out at the jury instruction conference. The information had identified the sexual contact only as Coughlin having touched the victims' penises. (R. 136:3–7.) During the final jury instruction conference, the circuit court added an alternative definition of sexual contact, (R. 305:7), that included Coughlin having intentionally

caused or allowed the victims to touch his penis (R. 198:9, 17). So the jury received instructions that defined sexual contact as either Coughlin having touched the victims' penises or the victims having touched his penis. (R. 305:70–71, 80.) But the verdict forms hadn't been updated such that the forms submitted to the jury only identified the sexual contact as Coughlin having touched the victims' penises. (R. 199:7–20.)

The discrepancy was sufficiently insignificant that the parties and court appear to have not noticed it. After reading the instructions, the court asked whether either party had any objections in the instructions or verdicts. (R. 305:99; 307:21.) In both instances, neither party identified the discrepancy. (R. 305:99–100; 307:21–22.)

3. Under the *Williams-Hansbrough* analysis, the definition of sexual contact in the jury instructions is the proper theory of guilt.[7]

The State is unaware of the specific discrepancy here having previously come before an appellate court, but this Court's analysis in *Williams* and the appellate court's analysis in *Hansbrough*[8] is instructive—both demonstrate that the jury instructions should control over the errant verdict forms.

---

[7] The State proceeded under the narrower definition of sexual contact in the court of appeals, while preserving argument related to broader definitions of sexual contact for any subsequent review by this Court. (State's Br. 24 n.12, 25 n.13.) Identifying the proper theory of guilt came to the forefront upon release of the court of appeals' decision, *Coughlin*, No. 2019AP1876–CR, ¶¶ 16–18, such that now this Court must decide de novo the theory of guilt upon which to review the sufficiency of the evidence.

[8] *State v. Hansbrough*, 2011 WI App 79, 334 Wis. 2d 237, 799 N.W.2d 887.

In *Williams*, this Court concluded a theory of guilt should comport with the evidence as presented. *See Williams*, 364 Wis. 2d 126, ¶¶ 64–72 (application of rule). It recognized that "a criminal defendant whose conviction is overturned due to insufficient evidence cannot be retried for that crime." *Id.* ¶ 52. This Court concluded that an "all-or-nothing proposition would yield extraordinary results if appellate courts could not review and resolve errors." *Id.* This Court invoked a sounder and more reasonable approach. *Id.* This Court examined the totality of the circumstances to understand what transpired in the circuit court to establish the theory of guilt. *Id.* ¶ 48.

Similarly, in *Hansbrough*, the court didn't find an error in the verdict form dispositive; allowing an error in the verdict form to govern "underestimates the jury's ability to understand and apply the instructions provided by the trial court." *Hansbrough*, 334 Wis. 2d 237, ¶ 22. The court recognized the long-held principle that "the jury follows the court's instruction." *Id.*

Under the *Williams-Hansbrough* analysis, the definition of sexual contact provided by the court to the jury in its instructions is the theory of guilt—not the sexual contact identified in the errant verdict forms. Here, the jury instruction conference confirms that the theory of guilt included alternative forms of sexual contact. (R. 305:4–7.) In conformity with the court's instructions, the State explained during closing argument that sexual contact "can be either the touching, in other words, the defendant touching, masturbating [the victims], which they testified he did. Or it could be [the victims] touching the defendant. . . . So it could be either one of those things." (R. 305:105.) Coughlin acknowledged in his postconviction pleadings that the legal definition of "sexual contact" relevant to his trial included both forms of conduct. (R. 242:12.) The totality of the circumstances demonstrates that the theory of guilt was the broader definition of sexual contact in the jury instructions.

* * * * *

To review evidence sufficiency, this Court must determine the proper legal theory of guilt. Though it's unfortunate the verdict forms hadn't been updated after the final jury instruction conference, such a discrepancy isn't the decisive factor in establishing the theory of guilt. *See Williams*, 364 Wis. 2d 126, ¶ 52 (sufficiency of the evidence review doesn't come down to errors). This Court must identify whether review is under the narrower sexual contact identified in the verdict forms or broader definition of sexual contact provided by the circuit court during its instructions to the jury. Under the *Williams-Hansbrough* framework, the broader sexual contact defined in the jury instructions is the appropriate theory of guilt.

B. The jury reasonably inferred that Coughlin had sexual contact with his stepson and nephew during each of the 15 charged time periods.

1. A court must be highly deferential to a jury's guilty verdict and adopt the reasonable inferences the jury drew to reach its verdict.

A court reviews the findings the jury necessarily made to find guilt under a highly deferential review to the trier-of-fact. *See State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530 ("great deference to the trier-of-fact"). A court "will not upset the trier of fact's determination of the weight and credibility to be given a witness' testimony" unless the testimony is inherently or "patently incredible as a matter of law" such that it is "in conflict with nature or fully established or conceded facts." *Thomas v. State*, 92 Wis. 2d 372, 382, 284 N.W.2d 917 (1979) (quoting *State v. Clark*, 87 Wis. 2d 804, 816, 275 N.W.2d 715 (1979)). A court must accept the reasonable inferences a jury made, *Poellinger*,153 Wis. 2d

at 504, presuming the jury made credibility and weight determinations in favor of guilt and defer to that resolution. *Jackson v. Virginia*, 443 U.S. 307, 326 (1979).

Reviewing the sufficiency of the evidence must not contradict the "deeply rooted tradition of judicial deference for jury verdicts" because "there are few legal principles more indisputable than the idea that a jury is in a far better position to evaluate the evidence than is a reviewing court." *Smith*, 342 Wis. 2d 710, ¶ 33. In *Smith*, the court used the "opportunity to reaffirm the soundness of the reasoning of *Poellinger*. . . . on the principle that it is inappropriate for an appellate court to 'replace [ ] the trier of fact's overall evaluation of the evidence with its own.'" *Id.* (quoting *Poellinger*, 153 Wis. 2d at 506). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

It is a primary function of a jury "to resolve conflicts in the testimony and to determine which evidence is credible or worthy of belief." *State v. Zdiarstek*, 53 Wis. 2d 776, 784, 193 N.W.2d 833 (1972). The jury decides "which evidence is credible and which is not" and may "reject evidence and testimony suggestive of innocence." *Poellinger*, 153 Wis. 2d at 503. "It is certainly allowable for the jury to believe some of the testimony of one witness and some of the testimony of another witness even though their testimony, read as a whole, may be inconsistent." *State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). An inconsistency or contradiction does not render evidence inherently or patently incredible; it simply creates "a question of credibility for the jury, and not this court, to resolve." *Haskins v. State*, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980).

It is a core function of the jury—not a reviewing court—to weigh the evidence. *Poellinger*, 153 Wis. 2d at 506. It is an

indisputable legal principle that a jury is in a far better position than a reviewing court to evaluate the evidence and review questions as to its weight. *Smith*, 342 Wis. 2d 710, ¶ 33. The jury determines the weight to ascribe to the evidence. *State v. Roberson*, 2019 WI 102, ¶ 25, 389 Wis. 2d 190, 935 N.W.2d 813. "In weighing the evidence presented at trial, the jury could take into account matters of common knowledge and experience in the affairs of life." *Poellinger*, 153 Wis. 2d at 508.

A lack of certitude in evidence goes to credibility and weight, which a jury resolves. *Howland v. State*, 51 Wis. 2d 162, 171, 186 N.W.2d 319 (1971). Vagueness in "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." *State v. Fawcett*, 145 Wis. 2d 244, 254, 426 N.W.2d 91 (Ct. App. 1988) Courts are mindful victims and witness often cannot provide pinpoint specificity, 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). Ambiguity in the evidence goes to credibility and weight that a jury—not an appellate court—resolves. *Cf. 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 (ambiguity and vagueness goes to credibility and weight).

When a factfinder may draw multiple reasonable inferences from the evidence, the factfinder may accept the inference that establishes guilt. *Poellinger*, 153 Wis. 2d at 504. In *Poellinger*, this Court "stated both unanimously and unequivocally that when 'viewing evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, *reject that inference which is consistent with the innocence of the accused*.'" *Smith*, 342 Wis. 2d 710,

¶ 30 (quoting *Poellinger*, 153 Wis. 2d at 506). The jury, not the reviewing court, draws reasonable inferences from the evidence. *State v. Hauk*, 2002 WI App 226, ¶ 12, 257 Wis. 2d 579, 652 N.W.2d 393.

A reviewing court "must affirm the jury's finding if there is *any* reasonable hypothesis that supports the conviction." *Id.* A reviewing court "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326. 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.

During a court's review, it must consider the evidence collectively based on the entirety of the record. *Smith*, 342 Wis. 2d 710, ¶ 36 n.12. It is a "well-settled practice" to review evidence as a whole; "It would hardly make sense to view the evidence any other way." *Id.* ¶ 35. It is an error for the reviewing court to "focus on each piece of evidence separately" and weigh each individually. *Id.* ¶ 36 n.12. The jury must not ignore the larger picture; it must not "focus on each piece [of evidence] in a vacuum and ask whether that piece standing alone supports a finding of guilt" because "[t]hat is not how people seek to determine the truth, whether in a jury room or anywhere else." *Id.* ¶ 36. Accordingly, a reviewing court must do the same; it "must consider the totality of the evidence when conducting a sufficiency of the evidence inquiry." *Id.*

But in reviewing the totality of the evidence, the reviewing court must accept that a single piece of evidence may be dispositive for the jury. *State v. Zimmerman*, 2003 WI App 196, ¶ 30, 266 Wis. 2d 1003, 669 N.W.2d 762. For

example, a jury is free to find a defendant guilty from a single piece of DNA evidence, despite the presence of multiple alibi witnesses. *See State v. Kazee*, 192 Wis. 2d 213, 224, 531 N.W.2d 332 (Ct. App. 1995) ("alibi witnesses might not be believed in face of the DNA evidence"). Even minimal evidence may have probative value sufficient for the jury to draw reasonable inferences of guilt. *Zimmerman*, 266 Wis. 2d 1003, ¶ 30.

A court's review "is the same in either a direct or circumstantial evidence case." *Poellinger*, 153 Wis. 2d at 501. Direct evidence is rarely available to prove some elements of a crime, such as the element of intent. *See Jackson*, 443 U.S. at 324–25 (circumstantial evidence established intent). "A conviction may be supported solely by circumstantial evidence, and in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence." *State v. Mertes*, 2008 WI App 179, ¶ 11, 315 Wis. 2d 756, 762 N.W.2d 813.

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). "[T]his inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt,'" rather, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318–19 (quoting *Woodby v. Immigr. & Naturalization Serv.*, 385 U.S. 276, 282, (1966)).

2. The evidence was sufficient to find that Coughlin had sexual contact in each of the 15 counts.

a. Each count included a date range that was multiple months in duration.

The State charged each of the 15 counts under periods that were multiple months in duration in alignment with longstanding precedent:

Table[9]

	Count	Statute	Violation Date Range	Victim Age
Stepson	12	Wis. Stat. § 948.02(1)	September 1, 1989, and December 31, 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(1)	September 1, 1991, and November 9, 1991	Under 13
	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
	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

[9] *See supra* n.3 (charges presented to the jury).

Nephew	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

See Fawcett, 145 Wis. 2d at 250 ("where the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged").

Each count required a single act of sexual contact, except for the final count related to the stepson that required at least three such acts. So, at its core, the issue is whether the jury reasonably may infer at least one act of sexual contact—or three such acts in the final count applicable to the stepson—occurred during each of the multi-month time periods charged.

b. The stepson's and nephew's testimony established that Coughlin had sexual contact with them.

Both the stepson and nephew testified to acts of sexual contact that necessarily included the touching of another person's penis. The stepson testified both to acts involving Coughlin having touched his penis and the stepson having touched Coughlin's penis. The nephew testified exclusively to acts of Coughlin having touched his penis.

The stepson explained how Coughlin would touch a child's penis in the family home and during times he took the children deer shining. The stepson's older brother was typically present. (R. 301:44.) The stepson used the term "masturbate" when describing how Coughlin would touch the penis of the children at the family residence: "He would

always be there and want us to masturbate, he would want to masturbate us, and at times he did." (R. 301:45.) During the deer shining episodes, the stepson's older brother again was usually present and Coughlin's nephew was sometimes present. (R. 301:40–41; 84.) The stepson told the jury "there were times when Donny [Coughlin] would want to masturbate us." (R. 301:41.) The stepson was asked: "Were there times when he masturbated you?" (R. 301:41.) The stepson replied, "Yes." (R. 301:41.)

The stepson also described how Coughlin would cause or allow a child to touch his penis in the family home and during deer shining. He was asked: "At times did he ask one of you to masturbate him?" (R. 301:45.) The stepson replied: "Yes." (R. 301:45.) And he then confirmed it happened at the house. (R. 301:45.) The stepson also explained that, during deer shining, Coughlin "would want us to masturbate him." (R. 301:42.) The stepson was asked: "Were there times when you masturbated him?" (R. 301:42.) The stepson answered: "Yes." (R. 301:42.) The stepson told the jury that it was Coughlin's idea to "masturbate" at the residence and during deer shining. (R. 301:40, 45.)

The nephew testified about how Coughlin would touch a child's penis after deer shining. The nephew stated he never was alone with Coughlin during deer shining; his cousins—Coughlin's stepsons—were present. (R. 303:22–23.) The nephew explained that one child was in the front seat of a parked vehicle with Coughlin, while the other two children were in the back seat. (R. 303:23–24.) The child in the front seat rotated among the many assaults during deer shining. (R. 303:23–24.) The nephew used the term "masturbate" to describe how Coughlin would touch the penis of the child in the front seat. (R. 303:24.) He explained the children didn't ejaculate at first when they were younger, but eventually they did ejaculate when Coughlin would "masturbate" on them in the front seat of the vehicle. (R. 303:24.) The nephew was

asked: "Did he ever masturbate you while you were in the front seat?" (R. 303:24.) The nephew confirmed: "Yes." (R. 303:24.) He also confirmed that Coughlin had engaged in the same conduct with his cousins—Coughlin's stepsons—when they were in the front seat. (R. 303:24.) The nephew explained that he only was present when Coughlin had touched the children's penises by "masturbating" on them in the front seat; he never was present when one of the children would have touched Coughlin's penis to "masturbate" on him. (R. 303:23–24.)

The jury reasonably inferred that the masturbation described included acts of a person touching another's penis. Courts "do not, and should not, ask jurors to leave their common sense behind at the courthouse door." *Smith*, 342 Wis. 2d 710, ¶ 36. The circuit court had instructed the jury that it "may take into account matters of your common knowledge and your observations and experience in the affairs of life." (R. 305:95–96.) So the jury was permitted to deduce that one person "masturbating" on another person, necessarily included an act of a person touching another's penis. *See State v. Brunette*, 220 Wis. 2d 431, 450–52, 583 N.W.2d 174 (Ct. App. 1998) (victim describing contact with her "private" and "potty place" was sufficient evidence for contact with her "groin, vagina or pubic mound").

c. The evidence established frequent sexual activity and pervasive abuse during the timeframe that spanned the charged periods.

The stepson and nephew testified to frequent sexual activity during the timeframe of the charged periods. The victims described the sexual abuse as pervasive in their childhood that spanned a period longer than the discrete charged periods.

The stepson testified that Coughlin's sexual abuse began when he was seven years old and continued until he was 15 years old, shortly before his sixteenth birthday. (R. 301:37–38, 63–65, 94, 97.) The stepson was seven in the years 1985 and 1986. (*See* R. 301:25 (date of birth).) The stepson still was 15 years old through early November of 1994, prior to his sixteenth birthday later that month. (R. 301:63.) The stepson lived with Coughlin during this entire period (R. 301:26–27, 33–35, 97–99), except during several summers when he was away living at an uncle's farm (R. 301:59).

The stepson confirmed sexual activity happened during the charged time periods (R. 303:58–62.). The stepson confirmed the sexual abuse in the family home took place repeatedly for many years on an ongoing and frequent basis. (R. 301:79–84.) He explained Coughlin asking a child to "masturbate" on him was a weekly occurrence in the family home. (R. 301:45.) The stepson explained deer shining started in late summer and continued throughout the autumn. (R. 301:62.) He said that deer shining occurred "twice a week" during the autumn (R. 301:40); later adding it was "[o]ne to two times a week, minimum" in the autumn (R. 301:58).

The stepson told the jury how his older brother and he brought an end to the sexual assaults when they had gone squirrel hunting in the autumn of 1994. (R. 301:63–64.) He explained that, around late October or early November of that year, Coughlin "thought it was going to be like a normal day." (R. 301:64.) But the stepson and his brother had decided prior to the hunt to refuse to engage in sexual activity with Coughlin. (R. 301:63.) He explained how Coughlin got "real mad, madder, madder" when they refused, before calming down enough to return home. (R. 301:64.) The assaults ended after the squirrel hunting incident in the fall of 1994, shortly before the stepson's sixteenth birthday. (R. 301:94.)

Turning to the nephew, he described having a sexual relationship with Coughlin (R. 303:44.), beginning when the nephew was in sixth grade and continuing until around the time he graduated from high school. (R. 303:42–43, 48.) The nephew was 11 years old when he started sixth grade in 1988. (R. 303:56–57.) The nephew graduated high school at the age of 18 years. (R. 303:16, 43.) The nephew was a cousin to Coughlin's stepsons and he was quite close with his cousins; he knew Coughlin pretty well because he was with his cousins fairly often during this period. (R. 303:12–13.)

The nephew told the jury that molestation began with Coughlin measuring his penis while in the firehouse basement. (R. 303:17–18, 22, 52.) The nephew described how Coughlin took his stepsons and him out one evening to shine deer in the late summer or autumn. (R. 303:48–47, 50.) After dark, Coughlin took the three children to the firehouse basement. (R. 303:17–18, 21–22, 48–49, 50.) The nephew explained that the sexual activity continued thereafter, though Coughlin no longer used the firehouse as the location. (R. 303:22.)

The nephew explained that Coughlin continued to use deer shining as an opportunity to be with the children. The nephew stated he never was alone with Coughlin during deer shining; his cousins—Coughlin's stepsons—were present. (R. 303:22–23.) After driving around to shine deer, Coughlin would park the vehicle and engage in sexual activity with the children. (R. 303:22–24.)

The nephew explained the sexual abuse during deer shining began the same autumn as the first incident at the firehouse. (R. 303:52–53.) The nephew described shining deer "quite a bit," where it "[c]ould be four times a month, could be once a month, depending on the month." (R. 303:53.) The nephew confirmed that deer shining happened "more than once a month during the late summer and fall." (R. 303:25.)

The nephew confirmed the sexual activity happened during the charged time periods. (R. 303:28–29.)

Both victims acknowledged difficulty distinguishing or recalling specific instances given that the sexual abuse was pervasive over many years. The stepson explained: "Because there was a lot of sexual abuse going on. Kind of hard to keep track of all of it" (R. 301:85). The nephew similarly stated: "I mean, there was so many incidents of stuff that -- to say one time for one thing is pretty hard to remember." (R. 303:49.) The stepson explained, "[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). Not all the masturbation involved the touching of another's penis. As the nephew summarized: "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.)

d. The jury reasonably inferred the sexual abuse included acts of sexual contact in each charged period.

The jury reasonably inferred that Coughlin had engaged in acts of sexual contact with the victims during each of the 15 time periods charged. The circuit court had instructed the jury, if it found "the offense charged was committed by the defendant, it's not necessary for the State to prove the offense was committed on a specific date. If the evidence shows beyond a reasonable doubt that the offense was committed during the time period alleged in the information, that is sufficient." (R. 305:91.) Shortly thereafter, the court instructed that a "fact may be proved indirectly by circumstantial evidence," explaining that "[c]ircumstantial evidence is evidence by which a jury may

logically find other facts according to common knowledge and experience." (R. 305:93.)

To examine the 11 counts involving the stepson, here, the State divides the counts into three categories: (1) The five counts that charged a 19-week period from February 1 to May 14 in the years 1990 to 1994; (2) The five counts that charged periods at least ten weeks in duration from September 1 to either November or December in the years 1989 to 1993; and (3) The one count that charged a ten-week period from September 1 to November 9, 1994. All of the 11 counts centered around periods when the stepson lived in the family home. (*Compare* R. 136:4–7 (information), *with* 301:59 (summers at the farm).) Each count only required a single act of sexual contact, except for the count charging repeated sexual assaults in the late summer and autumn of 1994 that required three or more acts. (R. 136:3–7.)

The jury reasonably relied on direct and circumstantial evidence to find that Coughlin had sexual contact with his stepson at least once during each of the five counts that charged a period from February 1 to May 14. The jury heard sufficient testimony to conclude that Coughlin sexually abused his stepson on approximately a weekly basis at the family home during this period (R. 301:45, 83), such that Coughlin engaged in about 19 sexual acts with his stepson during each of these charged periods. The jury also heard sufficient testimony to conclude that some of the sexual abuse during the stepson's childhood included: (1) Coughlin touching his stepson's penis by "masturbating" on the child (R. 301:45); and (2) The stepson touching Coughlin's penis by "masturbating" on him (R. 301:45). In these five counts, the jury reasonably inferred at least one of the approximate 19 sexual acts that occurred during each charged period included at least one act of Coughlin having sexual contact with his stepson.

The jury also reasonably relied on the direct and circumstantial evidence to find Coughlin had sexual contact with his stepson at least once during each of the five counts that charged a period from September to either November or December in the years 1989 to 1993. The sexual abuse occurred in the family home during these periods such that the same facts identified in the previous paragraph apply here, though the periods are a little shorter so the reasonable inference is that Coughlin engaged in fewer acts with his stepson at the family residence given the shorter charged periods. But the jury also heard about the additional sexual abuse during deer shining that occurred about twice a week during these charged periods. (R. 301:40, 58.) The evidence permitted the jury to reasonably deduce that, between the family residence and deer shining, Coughlin engaged in about 30 sexual acts during the shortest charged period and over 50 acts during the longest charged period. For these five counts, the jury reasonably inferred at least one of the 30 to 50 sexual acts involved Coughlin having sexual contact with his stepson.

The jury reasonably found from the direct and circumstantial evidence that Coughlin had sexual contact with his stepson on at least three occasions during the ten-week period from September 1 to November 9, 1994. As explained in the preceding paragraph, the evidence established that about 10 acts of sexual abuse occurred in the family home during this period. And Coughlin engaged in about 20 sexual acts during deer shining in this same period. For this final count, the jury reasonably inferred at least three of the approximately 30 sexual acts involved Coughlin having sexual contact with his stepson.

The jury also reasonably found that Coughlin had sexual contact with his nephew during each charged period. The four counts centered around the late summer and autumn (R. 136:3–4), the period when Coughlin frequently

took his nephew deer shining (R. 303:25). Two counts charged an 80-day period and two counts charged a period in excess of 120 days. (R. 136:3–4.) Deer shining occurred frequently during the charged periods, more than once a month with the nephew (R. 303:25); sometimes as much as four times a month (R. 303:53). The nephew explained how Coughlin rotated which child was in the front seat of the vehicle. (R. 303:23–24.) Coughlin would "masturbate" on (i.e. touch the penis of) the child in the front seat. (R. 303:23–24.) The nephew confirmed he was part of the front seat rotation and Coughlin had "masturbated" on him (i.e. Coughlin had touched his penis). (R. 303:24.) The jury reasonably inferred the nephew was in the front seat in sufficient frequency for Coughlin to have touched his penis at least once during each of the four charged periods.

The inferences the jury drew were all the more reasonable given the additional evidence presented regarding Coughlin's recurring interest in the children's penises that included Coughlin's repeated acts of measuring his stepson's and nephew's penises, incorporating the use of a penis pump in assaults of his stepson, grooming a victim by "grubbing" a child (i.e. grabbing on to a child's penis and testicles), and using alcohol and pornography to entice a child. (R. 301:46–49, 52, 57, 87–88, 106–07; 303:17–19, 23.)

* * * * *

The evidence was sufficient to sustain the 15 guilty verdicts based upon the reasonable inferences the jury drew. Evidence existed to show that during this time period of their childhood: (1) Coughlin repeatedly and pervasively sexually abused the victims, *supra* Section B.2.c.; and (2) Coughlin engaged in sexual contact with both victims, *supra* Section B.2.b. The jury was permitted to infer from the direct and circumstantial evidence that, during the repeated and pervasive sexual abuse against the stepson and nephew, Coughlin had sexual contact at least once in each of the multi-

month periods charged in 14 counts and at least three times in the final count involving his stepson. This is not "a record devoid of evidence on which a reasonable jury could convict." *Sholar*, 381 Wis. 2d 560, ¶ 45. A reasonable hypothesis supports the jury's verdicts. *Hauk*, 257 Wis. 2d 579, ¶ 12.

3. The court of appeals erred by not giving the high degree of deference due to the reasonable inferences available to the jury.

This Court owes no deference to the circuit court and court of appeals in review of an evidence sufficiency claim, *Smith*, 342 Wis. 2d 710, ¶ 24. The high deference owed is only to the jury. *Rowan*, 341 Wis. 2d 281, ¶ 5. Even with no deference due, a moment may be spent examining the contrast between the circuit court's and court of appeals' evidence sufficiency review.

The circuit court correctly applied evidence sufficiency doctrine; the court of appeals did not. Comparing the circuit court's decision to the court of appeals opinion highlights the appellate court's error. The circuit court observed the evidence showed more sexual assaults than just the charged counts: 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.) In contrast, the court of appeals thought Coughlin couldn't be convicted of any counts for sexually assaulting his stepson and nephew. *Coughlin*, No. 2019AP1876–CR, ¶ 37.

Under such a highly deferential standard, one must ask how two courts reviewed the same evidence and reached such contradictory results. It occurred because the court of appeals misunderstood this stage in the evidence sufficiency framework. The court of appeals dedicated a single paragraph to present the evidence sufficiency doctrinal principles.

Coughlin, No. 2019AP1876–CR, ¶ 13. Although it recognized the well-established principle that the evidence must be "viewed most favorably to the state and the conviction," *id.* (*quoting Poellinger*, 153 Wis. 2d at 501), it failed to recognize the high deference it must extend to the jury's resolution of any ambiguity or vagueness in the evidence as credibility and weight determinations. The court of appeals strayed from its duty to be highly deferential to the reasonable inferences the jury drew from the evidence.

The court of appeals failed to appreciate this Court has recognized a person doesn't escape punishment because he sexually assaulted a child unable to testify clearly as to the date and details of the assault. *State v. Hurley*, 2015 WI 35, ¶ 33, 361 Wis. 2d 529, 861 N.W.2d 174. In *Hurley*, this Court explained: "Often the child is assaulted by a trusted relative and does not know whom to turn to for protection. The child may have been threatened, or, as is often the case, may harbor a natural reluctance to come forward." *Id.* (citations omitted). Such circumstances "deter a child from coming forth immediately. As a result, "exactness as to the events fades in memory." *Fawcett*, 145 Wis. 2d at 249. A victim of child sexual assault "cannot be held to an adult's ability to comprehend and recall dates and other specifics." *Id.* Courts have long recognized that "[c]hild molestation often encompasses a period of time and a pattern of conduct. As a result, a singular event or date is not likely to stand out in the child's mind." *Id.*, at 254. The jury—not the reviewing court—is tasked with the responsibility to draw reasonable inferences from the evidence when considering whether the conduct occurred within a charged period of time. *See Hauk*, 257 Wis. 2d 579, ¶ 12 (distinguishing role of jury and court).

The court of appeals reached an unusual result by recognizing that the stepson and nephew had testified to sexual abuse, *Coughlin*, No. 2019AP1876-CR, ¶¶ 7–8, but Coughlin couldn't be convicted for any of it, *id.* ¶ 37. The court

of appeals appears to have recognized this oddity because it "pause[d] to emphasize that, in reversing the convictions pertaining to [the stepson and nephew], we do not mean to suggest that the conduct they described is not criminal in nature." *Id.* ¶ 34. But it then allowed Coughlin to capitalize on his repeated sexual abuse against the victims. From the court of appeals' perspective, the sexual abuser who assaults a victim in multiple ways over an extended period may escape conviction because "a singular event or date is not likely to stand out in the child's mind." *Fawcett*, 145 Wis. 2d at 254. But that isn't the law; 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*, 92 Wis. 2d at 386 (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).

* * * * *

This Court should find that Coughlin failed to satisfy his heavy burden to reverse the verdicts of the jury. There are few legal principles more deeply rooted and indisputable than judicial deference to a jury's verdict. A court cannot overturn a verdict simply because it wasn't convinced by the evidence. *Koller*, 87 Wis. 2d at 266. The record must be devoid of evidence upon which to convict. *Sholar*, 381 Wis. 2d 560, ¶ 45. Here, sufficient evidence does exist to sustain the guilty verdicts.

C. The error in the verdict forms was harmless because sufficient evidence existed to convict and the errant forms didn't affect the outcome.

The State certainly recognizes the vital importance for proper instruction and submission of correct verdict forms to the jury. *Williams*, 364 Wis. 2d 126, ¶ 58. But this Court has

recognized the sound policy behind harmless error review as a reasonable approach in instances when there is an error. *Id.* ¶ 52. Harmless error review applies to an error in a verdict form, *Hansbrough*, 334 Wis. 2d 237, ¶ 10, just as it does for an error in the jury instructions, *Williams*, 364 Wis. 2d 126, ¶ 51. "The test for harmless error is 'whether there is a reasonable possibility that the error contributed' to the outcome." *State v. Johnson*, 2012 WI App 21, ¶ 14, 339 Wis. 2d 421, 811 N.W.2d 441 (quoting *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985)) This Court applies this test under de novo review, considering the totality of the circumstances during its evidence sufficiency review. *Beamon*, 347 Wis. 2d 559, ¶¶ 18–20, 27–28.

1. The error in the first ten verdict forms related to Coughlin's sexual contact with stepson was harmless.

The discrepancy between the definition of sexual contact provided during the jury instructions and contact identified on the verdict forms was harmless with respect to the first ten counts relating to Coughlin's sexual assaults of his stepson. The error was sufficiently insignificant that it wasn't presented as an issue in the circuit court. Coughlin didn't raise an objection to the scope of sexual contact after instruction to the jury and its receipt of the verdict forms.[10] (R. 305:99–100; 307:21–22.) In postconviction proceedings, Coughlin identified both forms of sexual contact—his touching of the victims' penises and the victims touching of

[10] For limited purpose of evidence sufficiency review, whether a party objected to a faulty instruction is irrelevant. *See Musacchio*, 577 U.S. at 244 ("failure to object to the heightened jury instruction thus does not affect the court's review for sufficiency of the evidence"); *see also State v. Beamon*, 2003 WI 47, ¶¶ 47–49, 347 Wis. 2d 559, 830 N.W.2d 681 (not applying forfeiture doctrine).

his penis—as properly within "the legal definition of 'sexual contact" for purposes of this trial." (R. 242:12.)

The errant verdict forms were insignificant because the scope of sexual contact wasn't significant to the defense. Coughlin had denied ever sexually assaulting his stepson (R. 304:152); he repeatedly denied any sort of sexual molestation (R. 304:82, 85–86, 88.) Reliance on the narrower contact identified in the verdict form or broader definition in the jury instructions wasn't the dispositive issue. Whether the jury convicted or acquitted Coughlin for sexually assaulting his stepson came down to who the jury believed. (R. 305:230, 241.) It didn't come down to one form of sexual contact versus another.

The error was harmless because the evidence at trial supported both the theory of guilt in the instructions and narrower sexual contact identified in the verdict forms. The discrepancy in the jury instructions and verdict forms wasn't an instance of a contradiction; rather, the jury instructions contained a broader definition of sexual contact than the verdict forms did. The verdict forms identified only conduct A; that is, Coughlin touching a victim's penis. The broader definition identified conduct A and B; that is, Coughlin either touching a victim's penis or a victim touching Coughlin's penis. The jury received evidence both as to A and B (i.e. Coughlin having touched his stepson's penis and the stepson having touched Coughlin's penis). (R. 301:41–42, 45.) So the error was harmless because the jury received sufficient evidence to convict under both a narrower and broader theory of guilt, *supra* Section B.2.

2. There was no error in the eleventh and final verdict form related to Coughlin's stepson.

Here, it is important to distinguish the final count from the first ten counts that involved the stepson. This final count

charged Coughlin with committing three or more sexual assaults against his stepson between September and November 1994. (R. 136:7.) On this count, the court instructed the jury that sexual contact meant either "the intentional touching of the penis of [the victim] by the defendant" 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. 305:84–85.) The verdict in this count never was limited to the narrow act of Coughlin having touched his stepson's penis (R. 199:21; 307:17); it proceeded under the broader definition, both during the instructions and presentation of the verdict forms. As there was no discrepancy between the eleventh verdict form and the instructions, there was no error.

3. The error in the four verdict forms related to Coughlin's sexual contact with his nephew was harmless.

For the four counts regarding Coughlin sexually assaulting his nephew, the discrepancy in the jury instructions and verdict forms was harmless because the trial evidence aligned with the narrower definition of sexual contact identified in the jury verdict forms. The nephew testified that he never touched Coughlin's penis. (R. 303:23–24.) This witness's testimony identified only acts of Coughlin having touched the nephew's penis. (R. 303:24.) So there is no material discrepancy; it's simply an instance of a court instructing on the broader legal definition of sexual contact where only one type of contact is relevant to the facts of the case—the contact identified in the verdict forms.

* * * * *

This Court should conclude the error in the verdict forms was harmless. The error was sufficiently insignificant because this case came down to credibility—not the definition

of sexual contact. (*See* R. 305:230, 241 (closing arguments).) The State prevails under either the broader definition of sexual contact in the jury instructions or narrower contact identified in the verdict forms. The evidence was sufficient to satisfy either definition. The jury made credibility determinations and reasonably inferred from the evidence that Coughlin had the required sexual contact upon which to find guilt in each of the 15 counts.

CONCLUSION

This Court should reverse the court of appeals opinion as it pertains to its reversal of the 15 convictions for Coughlin's sexual assaults against his stepson and nephew. As neither party sought this Court's review of the six convictions affirmed by the court of appeals regarding the third victim, those convictions remain of record and undisturbed. So the collective result is sustaining the jury's verdicts, thereby giving the jury the deference it's due.

Dated this 13th day of October 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

WINN S. COLLINS
Assistant Attorney General
State Bar #1037828

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6203
(608) 294-2907 (Fax)
collinsws@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,494 words.

Dated this 13th day of October 2021.

WINN S. COLLINS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–2020)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12) (2019–20).

I further certify that:

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

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

Dated this 13th day of October 2021.

WINN S. COLLINS
Assistant Attorney General