STATE OF WISCONSIN
SUPREME COURT
****
CASE NO. 2019AP001876-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT-PETITIONER,

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

DONALD P. COUGHLIN,
DEFENDANT-APPELLANT.

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

DEFENDANT-APPELLANT'S RESPONSE BRIEF

BY:

Philip J. Brehm
Atty For Defendant-Appellant
23 West Milwaukee St., #200
Janesville, WI 53548
608/756-4994
Bar No. 1001823

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CASES CITED

STATEMENT OF ISSUE

I. WHETHER A SUFFICIENT FACTUAL BASIS FOR PRESENTED AT TRIAL TO SUPPORT A CONVICTION FOR COUNTS 7-9 AND 11-22.

This issue was not raised at trial. On 9/10/19, the trial court concluded there was a sufficient factual basis for each conviction (309:9-20). On 9/13/19, an order denying postconviction relief was entered (312). On 3/4/21, the court of appeals concluded there was an insufficient factual basis to support convictions for Counts 7-9 and 11-22 (*State v. Coughlin,* No. 2019AP1876-CR, 2021 WL 822223 (Wis. Ct.App. March 4, 2021) (unpublished).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The issue raised relates to the sufficiency of evidence to support convictions and is one resolved by applying well-established precedent to facts presented at trial.

STATEMENT OF THE CASE

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

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

On 3/1/11, an information was filed which alleged 23 counts, including: (1) 2nd degree sexual assault of a child (John Doe 1, 9/1/89-12/31/89 offense date); (2) 2nd degree sexual assault of a child (John Doe 1, 2/1/90-5/14/90 offense

date); (3) 2nd degree sexual assault of a child (John Doe 1, 9/1/90-12/31/90 offense date); (4) 2nd degree sexual assault of a child (John Doe 1, 2/1/91-5/14/91 offense date); (5) 2nd degree sexual assault of a child (John Doe 1, 9/1/91-12/31/91 offense date); (6) 2nd degree sexual assault of a child (John Doe 1, 2/1/92-5/14/92 offense date); (7) 1st degree sexual assault of a child (John Doe 2, 9/1/89-11/19/89 offense date); (8) 2nd degree sexual assault of a child (John Doe 2, 9/1/90-12/31/90 offense date); (9) 2nd degree sexual assault of a child (John Doe 2, 9/1/91-12/31/91 offense date); (11) 2nd degree sexual assault of a child (John Doe 2, 9/1/92-11/19/92 offense date); (12) 1st degree sexual assault of a child (John Doe 3, 9/1/89-12/31/89 offense date); (13) 1st degree sexual assault of a child (John Doe 3, 2/1/90-5/14/90 offense date); (14) 1st degree sexual assault of a child (John Doe 3, 9/1/90-12/31/90 offense date); (15) 1st degree sexual assault of a child (John Doe 3, 2/1/91-5/14/91 offense date); (16) 1st degree sexual assault of a child (John Doe 3, 9/1/91-12/31/91 offense date); (17) 2nd degree sexual assault of a child (John Doe 3, 2/1/92-5/14/92 offense date); (18) 2nd degree sexual assault of a child (John Doe 3, 9/1/92-12/31/92 offense date); (19) 2nd degree sexual assault of a child (John Doe 3, 2/1/93-5/14/93 offense date); (20) 2nd degree sexual assault of a child (John Doe 3, 9/1/93-12/31/93 offense date); (21) 2nd degree sexual assault of a child (John Doe 3, 2/1/94-5/31/89 offense date); (22) repeated sexual assault of a child (John Doe 3, 9/1/94-11/9/94 offense date); and (23) child enticement (John Doe 4, 2/1/08-2/21/98 offense date) (11). The first 21 counts consistently alleged defendant had touched each victim on the penis during a specific time frame (11). On 3/1/11, defendant stood mute and not guilty pleas were entered on his behalf (264:3).

On 6/1/15, a jury trial commenced (272). On 6/11/15, the jury found defendant guilty of all counts except Count 10 of the information (272:4-21).[1] Bond was revoked and defendant was remanded for sentencing (272:29-30).

[1]In its recitation of the statement of the case, the State accurately points out an earlier jury trial in this matter is not relevant to this appeal (State's brief at 11). Nevertheless, the State goes on to note defendant was found guilty of charges. For the sake of completeness, defendant Coughlin was granted a new trial based on evidence a juror had failed to disclose her relationship to the State's lead officer, Detective Shaun Goyette during voir dire (289). Despite being present during the juror's inaccurate responses during voir dire, Detective Goyette, demonstrating shockingly

On 11/23/15, defendant's trial counsel, Attorney Daniel Berkos, filed a motion for a new trial, asserting that a juror had lied about material matters during the voir dire process (104). On 6/28/16, the court orally granted defendant's motion a new trial (289:30-31).

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

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

On 4/1/19, defendant filed a motion to dismiss all counts based on insufficient evidence (242). In the alternative, defendant moved for a new trial based on ineffective assistance of counsel and in the interest of justice (242). On 9/10/19, the trial court orally denied defendant's motion for relief (309:8-20). On 9/13/19, a written order denying postconviction relief was entered (312). On 9/30/19, a notice of appeal was filed (257).

On 3/4/21, the court of appeals reversed defendant's convictions for Counts 7-9 and 11-22, agreeing there was an insufficient factual basis for the convictions. *State v. Coughlin,* No. 2019AP1876-CR, 2021 WL 822223 (Wis. Ct.App. March 4, 2021) (unpublished).

STATEMENT OF FACTS

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

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bad judgment for an experienced law enforcement officer, made no effort to apprise the trial court of the juror's obvious misstatement related to this relationship (289:23).

involved A.F. (John Doe 3) (199:11-21). For Counts 12-22, defendant was found guilty of touching A.F.'s penis during specified time periods (199:11-20).

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

On 5/1/17, G.F. (aka "John Doe 1") testified related to Counts 1-6 (299:122-294). Defendant Coughlin was convicted of those counts. Those convictions were affirmed by the court of appeals. The sufficiency of evidence related to those convictions is not challenged and is not discussed further.

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

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

[A.F.], or [G.F.] or [A.F.], but never just me and [defendant].

Q: So either of the two boys, or both, and you?

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

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

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

A: [Defendant].

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

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

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

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

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

A: No.

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

A: Yeah.

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

A: Yes.

Q: And [G.F.]?

A: Yes.

Q: And [A.F.]?

A: Yes.

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

A: Yes.

Q: Would you guys ejaculate?

A: Not when it first started, no.

Q: Eventually, you would?

A: Eventually. …

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

A: While he was masturbating?

Q: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

A: He was watching us and masturbating himself.

Q: And then what happened?

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

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

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

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

A: No.

Q: Did it happen fairly often?

A: Yes.

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

A: Yes, we did.

Q: How often would you go shining deer?

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

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

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

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

A: Yes (301:38-40).

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

ARGUMENT

Summary

Because the real issue in the case is one of sufficiency of the evidence, the defense is placed in an unusual position in briefing this matter. The State has submitted a lengthy brief that cites many cases in support of its argument. The defense response will be much more succinct. This is because the defense agrees with most of the concepts cited by the State in its case law and with the general framework to be used in resolving the sufficiency of the evidence issue advocated for by the State.

Notwithstanding that general agreement on case law, the defense obviously disagrees with the State's conclusion there was sufficient evidence presented to support defendant's convictions related to Counts 7-9 and 11-22. The defense agrees with the decision of the court of appeals and urges this Court to adopt its findings there was insufficient evidence presented to support defendant's convictions related to Counts 7-9 and 11-22.

I. THE CONVICTIONS RELATED TO COUNTS 7-9 AND 11-22 SHOULD BE VACATED AND DISMISSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT THEM.

A. Standard of review.

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

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

In the State's brief, it cites many cases that highlight or further define this standard of review (State's brief at 15). The defense does not quibble with any of the law cited by the State related to this standard. The State argues defendant Coughlin "bears a heavy burden to show the evidence could not reasonably have supported a finding of guilt" (State's brief at 16). That said, none of the cases cited by the State suggest that if the State fails to prove guilt on any one count, that a reviewing court should nevertheless uphold the conviction because of the likelihood of guilt for uncharged offenses.

B. The jury instructions.

Defendant was charged with first and second-degree sexual assault offenses. On 5/2/17, during trial, the prosecutor orally moved to the court to amend the information to conform to the evidence at trial (300:248-49). An amended information was filed on 5/4/17 (136). For Counts 1-9 and 11-21 of the amended information, the sexual conduct alleged remained "by the defendant touching the victim's penis" (199). Notwithstanding the specific sexual conduct alleged in the majority of the counts of the amended information, the definition of sexual contact was expanded in the jury instructions (198).

For second-degree sexual assault, the jury was advised as to the definition of sexual contact:

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

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

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

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

> apply because it does talk about the intentional touching of the intimate parts of another person, but it does not specifically say it has to be by the defendant. It only says the intentional touching of another person. You know, so I think that that would apply if that was at the request or at the insistence of the defendant. You know, the same language, specifically if the defendant intentionally caused the victim to touch his own penis, I think that comes under sexual contact as it existed at all appropriate times. So for that reason, I'd ask the Court to supplement 2101-A, both in the first degree and second degree sexual assault counts, to include the intentional touching of the—by the victims at the –that was caused by the defendant (305:4-5).

The trial court declined the State's request (305:6-7).

C. <u>For purposes of this appeal, the broader charging language in the jury instructions should supersede the narrower language of the verdicts</u>.

In its brief, the State argues that the broader definition of sexual contact in the jury instruction language supersedes the narrower definition in the verdict form (State's brief at 16-21). The State asserts the verdicts were "errant" because they were inconsistent with the jury instructions (State's brief at 16, 38-39). For reasons related to issues of double jeopardy, the defense chooses not contest this assertion by the State for purposes of this appeal.

Practically as it relates to defendant's case, the defense agrees with the court of appeals observation that regardless of whether the narrower definition of sexual conduct set forth in the information and verdicts is used or whether it is the broader one defined within the jury instructions is used, the ultimate conclusion regarding the sufficiency of the evidence on the relevant counts does not change. *See Coughlin* at ¶37 n. 2. Regardless of which standard is used, the relevant counts should be vacated and dismissed.

D. The evidence introduced at trial was insufficient to support convictions for Counts 7-9 and 11-22.

J.C., Counts 7-9, 11

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

While J.C. confirmed sexual behavior occurred during each time period, he was very general in describing the sexual behavior that occurred during each time period. The question framed by the prosecutor for each time period was whether defendant had engaged in at least some type of sexual activity with J.C. *at least once* during each time period (302:22, 28-29). The jury had no way of knowing for sure which specific sexual activity occurred during each time period and whether it was the charged conduct or, if it was a single episode of sexual activity, whether it was defendant urging J.C. to touch his own penis in defendant's presence. The jury had no way to determine the frequency of the charged sexual behaviors described by J.C. If the only sexual activity that occurred during any of the time periods included that described in (2) above, there was an insufficient basis for the jury to conclude defendant was guilty of Counts 7-9 and 11 of the amended information.

A.F., Counts 12-22

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

While A.F. confirmed sexual activity occurred during each time period, he too was vague in describing which of the three sexual activities took place during each time period. The jury had no way of knowing for sure which specific sexual activity occurred during each time period. The jury had no way to determine the frequency of each of the sexual activities described by A.F. The question posited to A.F. by the prosecutor for each time period was whether defendant had engaged in some type of sexual activity with A.F. *at least once* during each time period (301:60-62). If the only sexual activity that occurred during any of the time periods included that described in (3) above, defendant urging A.F. to touch his own penis, there was an insufficient basis for the jury to conclude first or second-degree sexual assault had been committed.

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

E. The weakness in the record is of the State's own making.

The State writes:

> 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 of any of it. 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*[2], 145 Wis.2d at 254. But that isn't the law; the "inability to connect the alleged crime with a particular dates goes to the issue of credibility, and thus is a matter for consideration by the jury." *Thomas*[3], 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 N.W.2d 124, 650 N.W.2d 124, 650 N.W.2d 850 (jury not required to nail down a specific time period) (State's brief at 37-38).

In this excerpt, the State suggests the court of appeals is somehow at fault for finding there was insufficient evidence to support many of the counts when evidence was presented that at least some sexual abuse of these victims occurred at unspecified times. The State suggests the court of appeals did not understand how to analyze a sufficiency of the evidence issue.

The State does not acknowledge the obvious in its brief. The State had access to all of the relevant information about these cases and charges before a charging decision was made. Presumably, the State had unfettered access to each of the alleged victims, not only before a charging decision was made, but all the way through the trial process. The State had the ability to decide what charges to file and what charges it thought it could prove beyond a reasonable doubt. Arguably, the State had an ethical duty to only pursue charges that it felt it could prove at trial.

We know that J.C. and A.F. testified that defendant Coughlin touched their penis at times. He may have had them touch his penis at times. What times? The State had the duty of presenting evidence in support of all of their charges. The only way that could be done was through witnesses. If the witnesses could testify that they had been touched or had touched defendant Coughlin during each relevant time period, all the prosecutor had to do was ask them, "Did defendant Coughlin touch your penis during this time period?" and, "Did defendant touch your penis during that time period?" The ultimate question was never directly asked of witnesses related to the counts.

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[2] *State v. Fawcett,* 145 Wis.2d 244, 426 N.W.2d 91 (Ct.App. 1988).
[3] *Thomas v. State,* 92 Wis.2d 372, 284 N.W.2d 917 (1979).

This oversight is not the error of anyone but the prosecutor at trial. This is not the fault of AAG Collins, or the trial court or defendant's trial counsel. Pointing out this error is not an attempt to impugn the prosecutor's general ability. In reviewing the transcript, it is apparent the prosecutor did a lot of things correctly and was able to convince the jury to find guilt notwithstanding the inartful wording of his questions to the alleged victims.

These mistakes sometimes happen during trial. Prosecutors forget to put in evidence of venue or an age or some other critical fact that is vital to its proof. The failure can lead to charges being dismissed, even with prejudice. When this happens, it is not the job of a reviewing court to find a way to protect the conviction, but to apply the relevant law to the facts.

This is not a situation where the jury was called upon to grapple with the issue of whether vague testimony by alleged victims that they were touched in the "potty spot" or their "privates" was sufficient to establish sexual contact as was the issue in *State v. Brunette,* 220 Wis.2d 431, 450-52, 583 N.W.2d 174 (Ct.App. 1998). This is lack of evidence, not an ambiguity of evidence for the jury to resolve.

The State argues a child cannot be expected to state with precision the date of the offense (State's brief at 37). The defense cannot argue with that proposition. In *Fawcett,* the court upheld the concept of the State alleging an offense occurred during a several month time period, similar to this case. But the State recognizes in its brief that the jury was correctly advised there still had to be at least one charged sexual assault during the relevant time period (State's brief at 32, 305:91).

Who knows whether J.C. and A.F. were sexually assaulted as charged during any of the charged time periods? J.C. and A.F. know. So how would one have found out whether the assaults occurred as charged in the relevant counts? By asking J.C. and A.F., of course. If they had been asked this specific question during trial, there would be one of three possible answers for each time period: (1) yes, he touched my penis or I touched his penis during that time period; (2) I do not remember whether he did so; and (3) he did not do so. Answer (1) for any charge would be evidence

of guilt for the charge. Answers (2) and (3) would not be evidence of guilt and would be the antithesis of guilt. If J.C. or A.F. testified they either did not remember an assault or that it did not occur during a relevant time period, how would the jury find be able to nevertheless find guilt for that charge? After all, J.C. and A.F. are the ones that would know. How can the jury conclude beyond a reasonable doubt an assault occurred during any time period if J.C. or A.F. themselves do not know or they have not so testified? Wouldn't the jury be left to speculate with this incomplete information? This gap in the evidence and the necessity of speculation to find guilt was why the court of appeals found the evidence was insufficient to sustain convictions as to the relevant counts. *Coughlin* at ¶¶23-33 the court of appeals. J.C.'s and A.F.'s answers that sexual conduct occurred during each time period does not answer whether the charged sexual assault occurred. It is the equivalent of, "I do not confirm or deny whether the charged conduct occurred." This is why the evidence for these convictions is insufficient.

CONCLUSION

For the reasons set forth above, this Court should adopt the decision of the court of appeals. Defendant's convictions for Counts 7-9 and 11-22 should be vacated and dismissed as argued above.

Dated: November 1, 2021

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Philip J. Brehm
Attorney for Defendant

23 West Milwaukee, #200
Janesville, WI 53548
608/756-4994
Bar No. 1001823

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify this brief meets the form and length requirements of Rule 809.19(8)(b), (bm) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. This brief is 4935 words.

Dated: November 1, 2021

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Philip J. Brehm

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify I have submitted an electronic copy of this brief, excluding the appendix, if any which complies with the requirements of Rule 809.19(12). I certify: This electronic brief is identical in content and format to the printed form of the brief filed on or after this date and that a copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: November 1, 2021

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Philip J. Brehm