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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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STANDARD OF REVIEW

Evidence sufficiency review 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 is a legal question); *State v. Rowan*, 2012 WI 60, ¶ 5, 341 Wis. 2d 281, 814 N.W.2d 854 (high deference to the trier of fact). Coughlin "does not quibble" with this standard. (Coughlin's Br. 13.)[1] So the parties agree evidence sufficiency is a question of law subject to de novo review as to the lower courts, *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410, with great deference to the trier-of-fact, *State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530. Under this highly deferential standard to the fact-finder, a court cannot reverse unless 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. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

Despite general agreement, a division exists between the parties. As the State explained, the deference is owed to the fact-finder, not the lower courts. (State's Br. 15.) But Coughlin states "this Court should adopt the decision of the court of appeals," as he "urges this Court to adopt its findings." (Coughlin's Br. 12, 20.) Coughlin's argument is contrary to the standard of review. This Court doesn't adopt an appellate court's findings in de novo review; it is an independent review. *State v. Maddix*, 2013 WI App 64, ¶ 12, 348 Wis. 2d 179, 831 N.W.2d 778.

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[1] The State cites to the page in the upper right corner of Coughlin's electronically submitted brief in alignment with sequential numbering starting with the cover page under rule 809.19(8)(bm).

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.

The State and Coughlin agree on the general framework by which a court reviews an evidence sufficiency claim. (Coughlin's Br. 12.) Coughlin doesn't dispute that he bears the heavy burden on such a claim. (Coughlin's Br. 13.) Coughlin doesn't dispute the great deference owed to the jury and its verdict. (Coughlin's Br. 13.) The only substantive dispute between the parties is the application of the law to the facts of this case.

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

Under the *Williams-Hansbrough*[2] framework, this Court should conclude that the theory of guilt is the broader definition of sexual contact in the jury instructions, not the narrower sexual contact identified in the verdict forms. Coughlin accepts that the theory of guilt in the jury instructions controls, choosing to "not contest this assertion by the State for purposes of this appeal." (Coughlin's Br. 15.) By not disputing the State's argument, Coughlin concedes this is the proper framework for a court to identify the theory of guilt against which the evidence is measured. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp*., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (respondent not disputing appellant's argument is a concession). This Court should

[2] *State v. Williams*, 2015 WI 75, 364 Wis. 2d 126, 867 N.W.2d 736; *State v. Hansbrough*, 2011 WI App 79, 334 Wis. 2d 237, 799 N.W.2d 887.

adopt the uncontested framework presented in the State's brief. (State's Br. 16–21.)

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's evidence sufficiency review must be highly deferential to a jury's verdict, adopting the reasonable inferences the jury drew from the evidence to reach its guilty verdict. (State's Br. 21–25.) Coughlin is in "general agreement on [the] case law" presented by the State, agreeing "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." (Coughlin's Br. 12.) Coughlin doesn't identify any specific disagreement with any legal concept presented by the State. (Coughlin's Br. 12.) So this Court may rely upon the uncontested legal principles presented in the State's brief. (State's Br. 21–25.)

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 explained the 15 counts under review charged periods that were each multiple months in duration, providing this Court with a table to present the counts. (State's Br. 26–27.) Coughlin doesn't take any issue with the State's charged periods; he correctly acknowledges that, "[i]n *Fawcett*, the court upheld the concept of the State alleging an

offense occurred during a several month time period, similar to this case." (Coughlin's Br. 19 (citing *State v. Fawcett*, 145 Wis. 2d 244, 254, 426 N.W.2d 91 (Ct. App. 1988)). So there is no dispute before this Court regarding the charging periods.

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

The parties agree the stepson and nephew testified that Coughlin had sexual contact with them on numerous occasions. The State explained the sexual contact involved acts of touching another's penis. (State's Br. 27–29.) Coughlin acknowledges there was evidence he had sexual contact with the victims, stating "each of the victims testified about *numerous instances of sexual contact* between [the] defendant and each of them, almost all contacts consisting of hand-to-penis contact, either by [the] defendant touching a victim, or a victim touching [the] defendant." (Coughlin's Br. 7 (emphasis added).) So neither party disputes the presence of ample evidence to Coughlin having had sexual contact with the victims.

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

The State presented evidence that established Coughlin had pervasive sexual abuse and frequent sexual activity with his stepson and nephew during the years that spanned the charged periods. (State's Br. 29–32.) Coughlin never directly responds to the State's presentation. Such evidence established Coughlin's sexual activity and abuse against his stepson was a weekly occurrence in the family home. (R. 301:45, 79–84.) The evidence also established that Coughlin took his stepson to shine deer about twice a week in late

summer that continued throughout the autumn. (R. 301:40, 58, 62.) Coughlin used deer shining as an opportunity to engage in sexual conduct with his stepson. (R. 301:41–42.) The evidence similarly showed Coughlin engaged in sexual conduct with his nephew during deer shining. (R. 303:23–24.) Coughlin's nephew typically was present multiple times each month during this period in the late summer and autumn. (R. 303:25, 53.)

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

The State explained how the evidence permitted the jury to reasonably infer that Coughlin engaged in acts of sexual contact with the victims during each of the 15 periods charged. (State's Br. 32–36.) Despite Coughlin's other areas of agreement with the State, he "obviously disagrees with the State's conclusion there was sufficient evidence presented." (Coughlin's Br. 12.). This is the one material disagreement between the parties.

The State and Coughlin examine the evidence very differently. The State considers the evidence collectively based on the entirety of the record, in alignment with this Court's instruction in *Smith*, 342 Wis. 2d 710, ¶¶ 35–36 & n.12. Coughlin relies on a few pages of trial transcripts in a vacuum, contrary to *Smith*. *See id.* ¶ 36 ("an appellate court must consider the totality of the evidence when conducting a sufficiency of the evidence inquiry").

To argue that the evidence was insufficient, Coughlin directs this Court to six pages of trial transcripts. (Coughlin's Br. 16–17 (citing R. 301:60–62; 303:22, 28–29)[3].) Coughlin

[3] The State corrects a scrivener's error in Coughlin's brief where he cited to 302, but had intended to cite to 303.

relies on three pages from the trial transcript to argue that his stepson "was vague in describing which . . . sexual activities took place during each time period." (Coughlin's Br. 17 (citing R. 301:60–62).) Coughlin relies on three additional transcript pages to make the same claim regarding his nephew, arguing "he was very general in describing the sexual behavior that occurred during each time period." (Coughlin's Br. 16 (citing R. 303:22, 28–29).)

Coughlin's approach is legally and factually flawed. In *Smith*, this Court explained that, just as the jury must not "focus on each piece [of evidence] in a vacuum and ask whether that piece standing alone supports a finding of guilt," a reviewing court "must consider the totality of the evidence when conducting a sufficiency of the evidence inquiry." *Smith*, 342 Wis. 2d 710, ¶ 36. Certainly, the six pages of transcripts upon which Coughlin relied are relevant and *part* of the evidence to review. But it cannot be the *entire* review. Coughlin's factual assessment is flawed because it's incomplete. By relying solely on six pages of transcripts to argue the evidence was insufficient, Coughlin ignores the larger picture.

The State's approach presented the larger picture, describing Coughlin's pervasive sexual abuse and how the jury reasonably inferred the abuse included acts of sexual contact in each charged period. (State's Br. 27–36.) Rather than repeat it all again here, the State provides one illustrative example to refute Coughlin's claim the evidence was "vague." (Coughlin's Br. 17.) The jury heard that Coughlin drove with his stepson to shine deer multiple times a week in the late summer and throughout the autumn; the nephew came along multiple times a month during this period. (R. 301:40, 58, 62; 303:25, 53.) The nephew explained that Coughlin rotated which child was in the front seat of the vehicle. (R. 303:23–24.) He would park the vehicle in a secluded wooded area, (R. 301:38), and then "masturbate" on

(i.e. touch the penis of) the child in the front seat (R. 303:23–24). Both the stepson and nephew confirmed Coughlin had "masturbated" on them (i.e. Coughlin had touched their penises) during deer shining. (R. 301:40–41; 303:24.) Such a description is not "very general," as Coughlin alleges. (Coughlin's Br. 16.)

As this example illustrates, the evidence was sufficient to sustain the guilty verdicts based upon the reasonable inferences the jury drew. As the State explained, evidence existed to show that during this period of their childhood: (1) Coughlin repeatedly and pervasively sexually abused the victims, (State's Br. 29–32); and (2) Coughlin engaged in sexual contact with both victims (State's Br. 27–29). 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." *State v. Sholar*, 2018 WI 53, ¶ 45, 381 Wis. 2d 560, 912 N.W.2d 89.

This Court should conclude that sufficient evidence supports the jury's 15 guilty verdicts. Both victims testified to pervasive sexual abuse by Coughlin during their childhood that included the years spanning the charged periods. They also testified that such abuse involved Coughlin touching their penises during frequent and regular outings, such as when Coughlin was alone with the children during deer shining. Accordingly, there was sufficient evidence from which a reasonable jury could conclude that Coughlin had sexual contact with the victims during each charged period.

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

The State and Coughlin diverge on assessing the court of appeals' decision. Given the undisputed standard of review, the State observes no deference is due to the court of appeals. *Smith*, 342 Wis. 2d 710, ¶ 24. In contrast, Coughlin repeatedly asks this Court to "adopt" the decision and its findings. (Coughlin's Br. 12, 20.)

In pursuit of Coughlin's adoption theory, he replicates the court of appeals' error. Both the court of appeals and Coughlin fail to appreciate this Court has recognized that 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. The court of appeals and Coughlin divert attention from this principle by suggesting the prosecutor's questions were to blame. *But see State v. Collier*, 220 Wis. 2d 825, 838, 584 N.W.2d 689 (Ct. App. 1998) (attorney's question is not evidence). The court of appeals attributes fault to the prosecutor for ambiguity or a lack of certitude from the stepson and nephew. *State v. Coughlin*, No. 2019AP1876-CR, 2021 WL 822223, ¶¶ 24, 29 (Wis. Ct. App., Mar. 4, 2021) (unpublished).[4] Coughlin similarly blames the prosecutor for "the inartful wording of his questions." (Coughlin's Br. 19.) Such a claim is wrong in fact and law.

The court of appeals and Coughlin ignore the fact that the stepson and nephew explained to the jury why they had difficulty testifying with specificity about particular sexual assaults. The stepson and nephew had difficulty testifying

[4] The State provided the court of appeals' decision in its appendix, filed with its brief-in-chief, so it doesn't include a duplicate copy with this reply brief.

with specificity because of Coughlin's pervasive and repeated sexual abuse that took multiple forms and occurred frequently over many years throughout their childhood. As the stepson explained: "Because there was a lot of sexual abuse going on" it was "[k]ind of hard to keep track of all of it." (R. 301:85.) 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.) Neither the court of appeals nor Coughlin explain why the prosecutor should have repeatedly asked the victims to identify a specific instance of sexual contact for each charged period when they had explained why such pinpoint specificity wasn't possible.

The court of appeals and Coughlin's position is legally flawed because it contradicts precedent. *See Thomas v. State*, 92 Wis. 2d 372, 386, 284 N.W.2d 917 (1979) (inability to identify precise dates relates to credibility not sufficiency of evidence). It cannot credibly be disputed that evidence sufficiency doctrine permits circumstantial evidence and the factfinder to draw reasonable inferences. *Poellinger*, 153 Wis. 2d at 501, 504, 506. Yet the court of appeals and Coughlin imply the evidence must be direct, suggesting the evidence is insufficient because the stepson and nephew hadn't directly testified that Coughlin had sexual contact during each charged period. If that is the law, then *Poellinger*'s discussion about circumstantial evidence and jurors drawing reasonable inferences is superfluous. There is

no need for the jury to draw any inferences or rely on circumstantial evidence if everything must come from direct evidence.

The court of appeals' and Coughlin's view ignores law holding that the "inability to connect the alleged crime with a particular date goes to the issue of credibility, and thus is a matter for consideration by the jury." *Thomas*, 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).

The State remains faithful to evidence sufficiency precedent and the deeply rooted principle of judicial deference to a jury's verdict. The court of appeals and Coughlin deviate from precedent and this principle. They attempt to shift the focus from Coughlin's conduct and the evidence that supports his guilt by focusing on a few pages of transcripts and the questions asked by the prosecutor in that limited portion of the trial. They never recognize other key passages in the transcripts relevant to evidence sufficiency review. Here, when the record is properly viewed in its entirety—taking into account all reasonable inferences the jury may draw—sufficient evidence supports the jury's guilty verdicts. Coughlin cannot overcome his heavy burden given the deference due to the jury's verdict.

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

This Court should conclude the error in the verdict forms was harmless. The error was sufficiently insignificant that it wasn't presented as an issue in the circuit court or during postconviction proceedings. (State's Br. 39.) And before this Court, Coughlin doesn't argue the error was

harmful. As explained above, *supra* Section A., Coughlin chooses not to contest any adverse impact from the errant verdict forms and, thus, concedes the error was harmless. *See Charolais Breeding Ranches, Ltd.*, 90 Wis. 2d at 109 (undisputed argument a concession). This Court should conclude the error was harmless for the reason set forth in the State's brief. (State's Br. 38–42.)

CONCLUSION

This Court should reverse the court of appeals opinion as to its reversal of the 15 convictions for Coughlin's sexual assaults against his stepson and nephew.

Dated this 15 day of November 2021.

Respectfully submitted,

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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 3,000 words.

Dated this 15th day of November 2021.

WINN S. COLLINS
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

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. §(Rule) 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 15th day of November 2021.

WINN S. COLLINS
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