STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019AP1989-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

OMAR S. CORIA-GRANADOS,

Defendant-Respondent.

APPEAL FROM AN ORDER DENYING THE STATE'S MOTION TO ADMIT EVIDENCE ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE ELLEN K. BERZ, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

1. Whether the circuit court erroneously exercised its discretion by denying the State's motion to admit evidence that Omar Coria-Granados engaged in other bad acts with the victims.

This Court should say yes.

2. Whether the circuit court erroneously exercised its discretion by denying the State's motion to admit the recorded interview of the child victim under Wis. Stat. § 908.08(3)(a)2.

This Court should say yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

INTRODUCTION

This case concerns an all-too-familiar fact pattern. Two sisters accused a long-time family friend of grooming behavior and sexual assault. Before trial, the State sought to introduce Coria-Granados's other acts—including his other sexual assaults of the victims—to show that the behavior underlying the charges was not a mistake, accident, or misunderstanding. The State also moved to introduce an audiovisual recording of the then-13-year-old child victim under the statute that created a hearsay exception for the admission of children's statements.

The circuit court denied both of the State's requests, crippling its effort to try its case. Ignoring the applicable standards to admit evidence in cases of child sexual assault, the circuit court said that the other acts were too prejudicial to Coria-Granados because they were not sufficiently corroborated. But this is an error of law: a conclusion that the

evidence was not sufficiently corroborated is a conclusion that the evidence was not relevant—not a conclusion that Coria-Granados proved undue prejudice.

Moreover, the court failed to properly apply Wis. Stat. § 908.08 to the State's motion to admit the child's recorded statement. In so doing, the court ignored the legislative directive that children's statements must be admitted into evidence with more ease.

Although the admission of evidence is a matter of the trial court's discretion, that discretion is not unfettered. Because the trial court here erroneously exercised its discretion, this Court should reverse.

STATEMENT OF THE CASE

In 2018, sisters Evelyn and Michaela met with Safe Harbor forensic interviewer Jennifer Ginsburg to report how their long-time family friend Coria-Granados had touched them multiple times and made them feel uncomfortable from about 2015 through 2017.[1] (R. 1, A-App. 102–08.) The interviews were recorded.[2] (R. 35.)

Evelyn, who was born in July 2006, told Ginsburg about three separate occasions when Coria-Granados touched her inappropriately. (R. 1:1–4, A-App. 102–05.) Evelyn said that in the summer of 2017, Coria-Granados and his wife took her to Milwaukee, stopping in Johnson Creek at the Old Navy store along the way. (R. 1:2, A-App. 103.) Evelyn said that Coria-Granados and his wife bought Evelyn two pairs of shorts and two shirts, and Evelyn changed into her new clothes before they continued their drive. (R. 1:2, A-App. 103.) Once in Milwaukee, Coria-Granados dropped his wife off at a

[1] To comply with Wis. Stat. § 809.86(4), the State uses pseudonyms in place of the victims' names.

[2] Only the recording of Evelyn, the younger child, is in the record. (R. 35.)

hair salon and drove Evelyn to a parking spot where they could not be seen. (R. 1:2, A-App. 103.)

Coria-Granados talked to Evelyn, asking her about school. (R. 1:2, A-App. 103.) Evelyn told Coria-Granados that she was being bullied and she was sad. (R. 1:2; 35:13:34–13:54; A-App. 103.) Coria-Granados then suddenly put his hand under her shirt and squeezed her breast. (R. 1:2, A-App.) Coria-Granados also pulled his penis out of his pants and insisted that Evelyn look at it. (R. 1:2, A-App. 103.) Coria-Granados told Evelyn that if she told her parents or his wife what he had done, he would tell her parents that she used Snapchat, which her parents had forbidden. (R. 1:2, A-App. 103.)

Evelyn described two more instances of inappropriate touching, both occurring at Coria-Granados's home. (R. 1:3–4, A-App. 104–05.) She said that in the first, she was sitting on a couch when Coria-Granados sat down next to her and kissed her on the lips. (R. 1:3, A-App. 104.) In the second, she and Coria-Granados were alone in his living room while her father was in the bathroom. (R. 1:3, A-App. 104.) While Coria-Granados was talking to Evelyn about school, he reached his hand into her shorts to try to touch her private area. (R. 1:3–4, A-App. 104–05.) Evelyn said she grabbed his hand and told him to stop, which seemed to anger Coria-Granados. (R. 1:4, A-App. 105.)

Evelyn said that she was scared to tell anyone about Coria-Granados's actions. (R. 1:4, A-App. 105.) She described how it affected her physically—she had stomachaches, bad dreams, and had wet the bed. (R. 1:4, A-App. 105.) She explained that she had revealed the assaults to her mom when the two of them were watching a cartoon about protecting children. (R. 1:4, A-App. 105.)

Michaela, who was born in December 2000, told Ginsburg that in 2015, Coria-Granados began sending her

sexually explicit text messages. (R. 1:1, 4, A-App. 102, 105.) He told her that he watched pornography, masturbated, and asked her whether she had had sex. (R. 1:6, A-App. 107.)

Michaela also described four times that Coria-Granados's in-person behavior made her uncomfortable. (R. 1:4–6, A-App. 105–07.) In the first, she and Evelyn were in a car with Coria-Granados, who was driving them to his home after a soccer game. (R. 1:4–5, A-App. 105–06.) While driving, Coria-Granados started to talk to Michaela about sex. (R. 1:4–5, A-App. 105–06.) He asked her if she wanted to touch his penis. (R. 1:4, A-App. 105.) He also put his hand on her thigh and moved it up her leg, asking her if it felt weird when he did so. (R. 1:5, A-App. 106.)

Michaela described to Ginsberg a second incident that made her feel uncomfortable. (R. 1:5, A-App. 106.) She was in her bedroom when Coria-Granados came in, picked up her bra, and held it. (R. 1:5, A-App. 106.)

In a third incident, Coria-Granados and Michaela were watching a soccer game at an indoor facility when he told her that he liked to look at girls' butts. (R. 1:5, A-App. 106.) He then slapped and grabbed her butt. (R. 1:5, A-App. 106.) Later, he texted Michaela not to tell her parents what he had done. (R. 1:5, A-App. 106.) Michaela described another time when Coria-Granados slapped and grabbed her butt when she was walking behind him after leaving his house. (R. 1:5, A-App. 106.) She said that when she asked Coria-Granados in a text message why he had done so, he responded that he just wanted to touch it. (R. 1:5, A-App. 106.)

Both girls told Ginsburg that Coria-Granados would give them money and buy them clothes and food. (R. 1:3, 5; A-App. 104, 106) Michaela said that Coria-Granados often offered her alcohol, inviting her over to his house to drink. (R. 1:5, A-App. 106)

Evelyn's allegation that Coria-Granados tried to touch her vagina in his home led the State to charge Coria-Granados with attempted first-degree sexual assault of a child between June 1, 2017, and August 31, 2017. (R. 1:1, 3; 30:10; A-App. 102, 104.) And based on Michaela's allegation that Coria-Granados touched her butt outside of his home, the State charged Coria-Granados with fourth-degree sexual assault during the same time period. (R. 1:2, 5; 30:10–11; A-App. 102, 106.)

The State moved to admit other-acts evidence against Coria-Granados. (R. 21.) Specifically, the State sought to admit Evelyn's allegations of Coria-Granados's behavior in Milwaukee, as well as Michaela's allegations that Coria-Granados sent her sexually explicit text messages, talked to her about sex, touched her thigh, picked up her bra, and touched her butt at a soccer game. (R. 21:2–3.) In addition, pursuant to Wis. Stat. § 908.08, the State filed a notice of intent to use Evelyn's audio visually recorded statement from Safe Harbor. (R. 10.)

The court held a hearing on the other-acts motion at which it asked for details regarding Evelyn's Milwaukee allegation. (R. 32:4.) The State explained that Evelyn told investigators that during the trip to Milwaukee, she and Coria-Granados were "in a parking lot by an apartment building that was close to the El Rey" grocery store, and from photographs Evelyn was able to identify that the store was on Cesar Chavez Drive. (R. 32:6.) Evelyn also said that Coria-Granados had taken his wife to a hair salon with "a very Hispanic name" that was "across the street from a church that had a gold baby Jesus on the top of it." (R. 32:6.) Further, Evelyn said that after the assault, she got some "hot Cheetos" from El Rey "and she remembered there being a corn stand outside of the grocery store." (R. 32:8.)

The court also asked for more information concerning Michaela's allegation that Coria-Granados touched her butt at a soccer game, asking the State where the game was played. (R. 32:9–10.) The State replied, "[A]t the United Football Association" in Madison. (R. 32:9.) The court asked where that was, remarking that it was "unfamiliar with any soccer field with that name." (R. 32:9.) The State then identified a specific address for the field. (R. 32:10.)

In assessing whether the State had satisfied the test for the admission of other acts, the court recited *Sullivan*'s three-prong test. (R. 32:31, A-App. 111.) It also acknowledged Wisconsin's greater latitude rule on the admission of evidence of other acts in child sexual assault cases. (R. 32:31–32, A-App. 111–12.) The court said that "[r]elevance is not the issue" and "purpose[] is not an issue." (R. 32:37, A-App. 117.) Instead, it said that it concluded that the "prejudice, unfair prejudice, far outweighs the probative value" of the evidence. (R. 32:37, A-App. 117.)

The court characterized the State's submissions as "just more he said/she said" evidence. (R. 32:36, A-App. 116.) It emphasized the lack of "corroboration" in the form of witnesses, text messages, dates, or convictions. (R. 32:32–36, A-App. 112–16.) The court said that the State could not "ask for admission of the evidence when a full and complete investigation has not been done." (R. 32:37, A-App. 117.) The court denied the State's motion in full. (R. 32:38, A-App. 118.)

Days later, the court orally announced its decision on the admissibility of Evelyn's recorded statement. (R. 33, A-App. 119–27.) The court explained that because Evelyn was then 13 years old, "the presumption is that the audiovisual recording does not come in." (R. 33:4, A-App. 122.) It then turned to the factors listed in Wis. Stat. § 908.08(4), which guide a circuit court on when the interests of justice warrant admission of a child's recorded statement. (R. 33:4, A-App. 122.)

The court said that the recording showed that Evelyn appeared to be "in fine physical and mental health," and "she was able to clearly and articulately answer questions." (R. 33:4–5, A-App. 122–23.) The court said that it did not find that the recording showed that Evelyn blamed herself for Coria-Granados's conduct. (R. 33:5–6, A-App. 123.) The court said that admitting the recording would not reduce the strain of testifying because "she would have to go over the whole story all over again through cross even if it was put in as her direct." (R. 33:6, A-App. 124.) And because "[c]oming into a courtroom is difficult for everyone," Evelyn's nervousness did not rise to the level required to conclude that the interests of justice warranted admission of the statement. (R. 33:6–7, A-App. 124–25.) The court therefore denied the admission of the statement. (R. 33:7, A-App. 125.)

After the court entered its written order denying the other-acts motion and the request for admission of the recorded statement, the State appealed. (R. 26; 28.)

STANDARD OF REVIEW

A circuit court's decision to admit or exclude evidence is discretionary. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." *State v. Hunt*, 2003 WI 81, ¶ 34, 263 Wis. 2d 1, 666 N.W.2d 771.

But other-acts evidence is relevant only when a court concludes that a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act. *See State v. Gribble*, 2001 WI App 227, ¶ 40, 248 Wis. 2d 409, 636 N.W.2d 488. And this is question of law, which this Court reviews de novo. *Id.*

ARGUMENT

I. The circuit court erroneously exercised its discretion when it denied the State's motion to admit Coria-Granados's other acts.

A. Relevant law.

To determine whether to admit evidence of other acts, "counsel and courts should engage in the three-step analytical framework" outlined in *State v. Sullivan*, 216 Wis. 2d 768, 771–72, 783, 576 N.W.2d 30 (1998). The first step asks whether the party offers the evidence for a permissible purpose under Wis. Stat. § 904.04(2). *Sullivan*, 216 Wis. 2d at 772. Permissible purposes include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2)(a). The next step asks whether the evidence is relevant. *Sullivan*, 216 Wis. 2d at 772. This question has two facets: whether the evidence relates to a fact of consequence and whether the evidence tends to make that fact more probable or less probable than the fact would be without the evidence. *Id.*

To determine whether the evidence relates to a fact of consequence, "the court must focus its attention on the pleadings and contested issues in the case." *State v. Payano*, 2009 WI 86, ¶ 69, 320 Wis. 2d 348, 768 N.W.2d 832. The question of probative value is a common-sense determination. *Id.* ¶ 70. While similarity of incidents can make evidence more probative, it is not dispositive of the question. *Id.* Dissimilar events may also be probative of facts of consequence. *Id.*

"[I]mplicit in a decision that evidence of the other act is relevant is a determination that a jury could reasonably find by a preponderance of the evidence that the defendant committed the other act." *Gribble*, 248 Wis. 2d 409, ¶ 40. This is question of law, which this Court reviews de novo. *Id.*

The party seeking the admission of the other-acts evidence has the burden to establish these two prongs by a preponderance of the evidence. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399. But once these prongs are satisfied, the burden then shifts to the opposing party for the third prong of the test. *Id.* This prong asks whether the probative value of the evidence is outweighed by prejudice or confusion to the jury under Wis. Stat. § 904.03. *Id.*

In addition to "this general framework, there also exists in Wisconsin law the longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" *State v. Davidson*, 2000 WI 91, ¶ 36, 236 Wis. 2d 537, 613 N.W.2d 606 (quoted source omitted). This evidentiary rule is now codified in Wis. Stat. § 904.04(2)(b)1. *State v. Dorsey*, 2018 WI 10, ¶¶ 31–33, 379 Wis. 2d 386, 906 N.W.2d 158. The rule applies to each prong of the *Sullivan* analysis. *Marinez*, 331 Wis. 2d 568, ¶ 20.

B. The court erroneously exercised its discretion in denying the State's motion to admit Coria-Granados's other acts.

The circuit court characterized the State's other-acts motion as a request for the admission of "approximately five other acts." (R. 32:32, A-App. 112.) For simplicity's sake, the State agrees with this characterization and refers to these acts in the following shorthand terms:

1. "The Milwaukee incident," which is Evelyn's allegation that Coria-Granados squeezed her breast in a car in Milwaukee.
2. "The soccer game incident," which is Michaela's allegation that Coria-Granados grabbed her butt at a soccer game after telling her that he liked to look at girls' butts.

3. "The bra incident," which is Michaela's allegation that Coria-Granados entered her bedroom, picked up her bra, and held it.
4. "The thigh incident," which is Michaela's allegation that—while driving his car—Coria-Granados spoke to her about sex and touched her thigh, asking her if it felt weird.
5. "Texting," which is Michaela's allegation that Coria-Granados sent her sexually explicit texts and told her not to tell her parents about his behavior.

The elements of the crimes. It is important to consider the other acts in light of the charges Coria-Granados faces: (1) attempted first-degree sexual assault of a child under the age of 13; and (2) fourth-degree sexual assault. (R. 1:1, A-App. 102.) To prove the former charge, the State must prove that Coria-Granados tried to have sexual contact with Evelyn, who was a person who had not yet turned 13 years old at the time of the crime. (R. 1:1, A-App. 102.) *See* Wis. Stat. § 948.02(1)(e). To prove the latter charge, the State must prove that Coria-Granados had sexual contact with Michaela without her consent. *See* Wis. Stat. § 940.225(3m). "Sexual contact" means that the contact must be for the purpose of sexually degrading or humiliating the victim or sexually arousing or gratifying the defendant. Wis. Stat. § 948.01(5)(a).

1. The State offered the evidence for a permissible purpose.

The first prong of the *Sullivan* analysis is not difficult to meet. *Marinez*, 331 Wis. 2d 568, ¶ 25. "As long as the State and circuit court have articulated at least *one* permissible purpose for which the other-acts evidence was offered," the test is met. *Id.* In addition, the greater latitude rule operates to increase the ease with which the State satisfies the first prong of the *Sullivan* test. *See Dorsey* 379 Wis. 2d 386, ¶¶ 32–33.

The State sought to admit the other-acts to show Coria-Granados's motive and intent, to prove his identity, to prove a lack of mistake, to establish his plan, to prove the element of sexual gratification, and to corroborate the victims' credibility. (R. 21:3–4, 6–9.) These are all permissible purposes that support the admission of the evidence. *See* Wis. Stat. § 904.04(2). With regard to each specific piece of evidence, the State presented a permissible purpose for its admission. Those reasons are as follows:

The Milwaukee incident. Evelyn alleged that in the summer of 2017, Coria-Granados touched her breast and showed her his penis. (R. 1:2, A-App. 103.) The State offered this evidence to establish that when Coria-Granados's attempted to touch her vagina later that summer, he did not do so accidentally. And that he did so for his own sexual gratification, which shows his motive. *See State v. Hurley*, 2015 WI 35, ¶ 74, 361 Wis. 2d 529, 861 N.W.2d 174.

The soccer game incident. Michaela alleged that she had been watching a soccer game with Coria-Granados at a facility on Blazing Star Drive in Madison when Coria-Granados told her that he liked to look at girls' butts. (R. 1:5, A-App. 106.) Coria-Granados then touched her butt. (R. 1:5, A-App. 106.) The State offered this evidence to show that when he touched Michaela's butt in the summer of 2017—which is the basis for the fourth-degree sexual assault charge—he did so for the purpose of his sexual gratification, which again shows his motivation. *See id.* And the State also offered the evidence to show Coria-Granados's absence of mistake or accident in the 2017 incident.

The bra incident. Michaela alleged that after she had surgery, Coria-Granados came over to her home to visit her. (R. 1:5, A-App. 106.) She said that he came into her bedroom. (R. 1:5, A-App. 106.) She explained that she had left her bra out in the open and that Coria-Granados picked it up and held it. (R. 1:5, A-App. 106.) The State offered this incident to prove

that Coria-Granados's behavior was sexually motivated. *See id.* It also establishes his absence of mistake in touching or attempting to touch the girls.

The thigh incident. Michaela alleged that when she was 15 years old, there was an incident in which she was a passenger in Coria-Granados's car when he started to talk to her about sex. (R. 1:4, A-App. 105.) Coria-Granados told her that "he liked to get head" and that when he was younger, he had given a young girl money for oral sex. (R. 1:4, A-App. 105.) Michaela said that Coria-Granados asked her if he wanted to touch his penis and, when she said no, asked her if she was sure. (R. 1:4, A-App. 105.) Coria-Granados then put his hand on her thigh, slid it toward her body, and asked her if it made her feel weird. (R. 1:5, A-App. 106.) The State offered this incident to—again—prove that when Coria-Granados's grabbed Michaela's butt in 2017, it was not a mistake, and it was for the purpose of sexual gratification.

Texting. Michaela alleged that over a period of about two years, Coria-Granados sent her sexually explicit texts that he told her to delete so that her mom would not find them. (R. 1:4–6, A-App. 105–07.) The State sought to admit this evidence to show that Coria-Granados's motivation for his crimes was sexual, and it was not a mistake or accident.

Given the low threshold necessary to establish a permissible purpose for the admission of other-acts evidence—coupled with the greater latitude courts must give the admission of this evidence—the State amply satisfied the first prong of *Sullivan*. And the circuit court agreed. (R. 32:37, A-App. 117.)

2. The other-acts evidence is relevant.

The circuit court said that "[r]elevance is not the issue," seemingly finding that the evidence *was* relevant to the identified purposes. (R. 32:37, A-App. 117.) But this is not the case because the circuit court concluded that the evidence was

inadmissible because it was not corroborated. (R. 32:33–37, A-App. 112–17.) A court's conclusion that evidence is not sufficiently corroborated "implicates the second step of the *Sullivan* analysis." *See Gribble*, 248 Wis. 2d 409, ¶ 40. Whether the State has shown that a particular other act occurred is a question of *relevance*. *Id.* For the other act to be relevant, the court must conclude that there is sufficient evidence from which a jury could find by a preponderance of the evidence that the defendant committed the other act. *Id.* This is a question of law, which this Court reviews de novo. *Id*.

Further, because the circuit court failed to apply the proper law to the question of relevance, it erroneously exercised its discretion. *State v. Muckerheide*, 2007 WI 5, ¶ 17, 298 Wis. 2d 553, 725 N.W.2d 930.

a. The evidence relates to facts of consequence.

The first question to answer in assessing relevance is whether the evidence relates to a fact of consequence. *Sullivan*, 216 Wis. 2d at 772. To determine whether the evidence relates to a fact of consequence, "the court must focus its attention on the pleadings and contested issues in the case." *State v. Payano*, 2009 WI 86, ¶ 69, 320 Wis. 2d 348, 768 N.W.2d 832.

To secure a conviction, the State must prove that Coria-Granados attempted to touch Evelyn's vagina for the purpose of his own sexual gratification. *See* Wis. Stat. § 948.02(1)(e). It must also prove that Coria-Granados touched Michaela's butt for his own sexual gratification. *See* Wis. Stat. § 940.225(4). Thus, with regard to the first charge, the facts of consequence are whether (1) Coria-Granados attempted to touch Evelyn's vagina, and (2) he did so for sexual purposes. With regard to the second charge, the facts of consequence are

whether (1) Coria-Granados grabbed Michaela's butt, and (2) he did so for sexual purposes.

In addition, the credibility of victims is always a consequential fact. *See Dorsey*, 379 Wis. 2d 386, ¶ 50. And here, the central issue at trial will be the victims' credibility. *See Hurley*, 361 Wis. 2d 529, ¶ 81. (noting that many child sexual assault cases turn on credibility). "[T]he greater latitude rule allows for the more liberal admission of other-acts evidence that has a tendency to assist the jury in assessing a child's allegations of sexual assault." *Id.* ¶ 82. "[B]ecause an average juror likely presumes that a defendant is incapable of" child sexual assault, the greater latitude rule is needed to corroborate the victim's testimony against a challenge to her credibility. *Id.* ¶ 59.

Given this, the five other acts relate to Evelyn and Michaela are credible because they establish that Coria-Grandos attempted to touch or touched them for sexual gratification. *See Hurley*, 361 Wis. 2d 529, ¶ 82. The acts relate to Coria-Granados's method of assaulting the girls, his motive of sexual gratification, his absence of mistake, and the reasons for their delayed disclosure. *See id.* ¶ 83. And the acts bolster the girls' credibility. *See id.* ¶ 81. The acts are therefore all related to facts of consequence.

b. The evidence is probative of the facts of consequence.

Next, to determine relevance, courts ask whether the evidence tends to make a fact of consequence more probable or less probable than the fact would be without the evidence. *Sullivan*, 216 Wis. 2d at 772. Whether evidence is of probative value is a common-sense determination. *See Payano*, 320 Wis. 2d 348, ¶ 70.

Given what the State must prove to secure a conviction, the five other acts are probative of the facts of consequence because the acts are demonstrate Coria-Granados's sexual motivation, lack of boundaries, efforts to make the girls feel uncomfortable, and attempts to prevent the girls from disclosing his behavior. *See id*.

The Milwaukee incident. Evelyn alleged that in the summer of 2017, Coria-Granados touched her breast and exposed himself to her while the two were alone in his car. She also alleged that he told her not to tell anyone or he would tell her parents that she was using social media. The act and the charged offense are similar in that they include the same victim, are close in time, and involve similar behavior. *See id*. It is therefore probative evidence.

The soccer game incident. Michaela alleged that while at a soccer game, Coria-Granados told her that he likes to look at girls' butts. He then then touched her butt. This act is strikingly similar to the charged offense, making it probative. *See id*.

The bra incident. Michaela's allegation that Coria-Granados picked up and held her bra may be less similar to the act charged but given the greater latitude rule and the lack of requirement of similarity, it is probative evidence. Common sense dictates that 15-year-old Michaela rightfully felt uncomfortable when a grown man entered her bedroom, picked up her bra, and held it. *See Payano*, 320 Wis. 2d 348, ¶ 70. In isolation the incident may not amount to much but placing this fact in "in the chain of inferences that are of consequence to the case," shows its value. *Sullivan*, 216 Wis. 2d at 786.

The thigh incident. Michaela's allegation that Coria-Granados told her about his affinity for oral sex, asked her if she wanted to see his penis, and touched her thigh, wondering if it made her feel "weird" is similar to the charged offenses.

The evidence involves the same victim, the same inappropriate sexual discussions, and uncomfortable touching. It bolsters Michaela's credibility, making it more likely that he touched her butt and that he did so for purposes of sexual gratification. It is probative evidence.

Texting. Michaela's allegation that Coria-Granados repeatedly texted her about sexual matters and told her not to tell her parents sheds light on Coria-Granados's motive for his behavior, and it dispenses with any attempt he may make to argue that the girls misunderstood his conduct. It is therefore also probative of facts of consequence.

The State satisfied its burden to establish that the other-acts evidence relates both to facts of consequence and is probative of those facts. All of these allegations are related to "the ultimate facts and links in the chain of inferences that are of consequence to the case." *Sullivan*, 216 Wis. 2d at 786. The jury must assess Evelyn and Michaela's credibility to determine whether the attempted touching and touching occurred, and whether those actions were for sexual purposes. Thus, whether Coria-Granados behaved in inappropriate sexual ways on other occasions with Evelyn and Michaela is related to consequential facts and is probative of those facts. *See Dorsey*, 379 Wis. 2d 386, ¶ 48. The other acts are therefore relevant. *See id.*

c. The State proved by a preponderance of the evidence that the other acts occurred.

Finally, other-acts evidence is relevant only when a court concludes that a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act. *See Gribble*, 248 Wis. 2d 409, ¶ 40. This is question of law, which this Court reviews de novo. *Id.*

The circuit court failed to apply this legal standard to the State's motion. (R. 32:33–37, A-App. 113–17.) Instead, the circuit court concluded that the other acts would unduly prejudice Coria-Granados because the State did not sufficiently corroborate them. (R. 32:33–37, A-App. 113–17.) But whether the acts occurred is a question of relevance—not prejudice. The court therefore erred as a matter of law, which necessarily means that it erroneously exercised its discretion. *See Muckerheide*, 298 Wis. 2d 553, ¶ 17.

The Milwaukee incident. Evelyn gave a detailed recitation of the Milwaukee incident. (R. 35:11:57–18:35.) Although she may not have remembered the specific day that Coria-Granados and his wife took her to Milwaukee, she knew that it took place in the summer of 2017. (R. 35:11:57.) And she remembered a plethora of details. She said that she, Coria-Granados, and his wife stopped at the Old Navy store in Johnson Creek along the way, and they bought her two pairs of shorts and two shirts. (R. 35:11:57–14:25.) She described how Coria-Granados dropped his wife at a hair salon, before they went to an El Rey grocery store with a corn stand out front, and she ate a new-to-her flavor of Cheetos. (R. 35:11:57–14:25, 18:35, 43:47.) She said that while she was telling Coria-Granados about being bullied in school and feeling sad, he reached out and touched her breast underneath her shirt. (R. 35:11:57–18:35.) There is more than enough within this accusation for a jury to find by a preponderance of the evidence that Evelyn's accusation occurred. *See Gribble*, 248 Wis. 2d 409, ¶ 41.

The circuit court emphasized the State's failure to find the church that it said that Evelyn described or an appointment at the salon for Coria-Granados's wife. (R. 32:33, A-App. 113.) But those shortcomings—to the extent that they can be characterized as such—are matters for cross-examination or argument. They are not germane to whether a jury could find—with the evidence that the State

presented—by a preponderance of the evidence that Coria-Granados touched Evelyn's breast in the summer of 2017. As a matter of law, the State met its burden of proof to establish a jury could find that the Milwaukee incident occurred. It is therefore relevant. *See Gribble*, 248 Wis. 2d 409, ¶ 41.

The soccer game incident. Michaela alleged that sometime between 2015 and 2017, Coria-Granados touched her butt at a soccer game at the United Football Association stadium in Madison after telling her he liked girls' butts. (R. 1:5; 32:10; A-App. 106.) Although this allegation contains fewer details than the Milwaukee incident, the State satisfies its burden by a preponderance of the evidence. And by a preponderance of the evidence, a jury could find that the soccer game incident happened. *See Gribble*, 248 Wis. 2d 409, ¶ 41.

The circuit court deemed the evidence inadmissible because there were no witnesses to "to this grabbing," no direct evidence, no circumstantial evidence, and Michaela did not report it to the police. (R. 32:34, A-App. 114.) But this is too strict a standard. The question is only whether the State presented sufficient evidence from which a jury could find that the event occurred. *See id.* And it did.

The bra incident. Michaela alleged that sometime between 2015 and 2017, Coria-Granados came to visit her after her surgery. (R. 32:20.) She said he entered her bedroom, picked up her bra and held it. (R. 32:20.) By a preponderance of the evidence, a jury could find that the event happened. *See Gribble*, 248 Wis. 2d 409, ¶ 41.

The circuit court lamented that the allegations lacked a more specific time frame and that the State had not provided other witnesses to Coria-Granados's visit. (R. 32:34–35, A-App. 114–15.) But those are credibility matters for the jury to sort through. Michaela's allegation enough for a jury to find—by a preponderance of the evidence—that Coria-Granados

held her bra in her bedroom sometime between 2015 and 2017.

The thigh incident. Michaela alleged that in the summer of 2016, she and Evelyn were in a car with Coria-Granados when he began to speak to her about sex and inappropriately touched her thigh.[3] (R. 1:4–5, A-App. 105–06.) She said the incident occurred on a Friday, after she had been at a soccer game in which her dad was playing. (R. 1:4, A-App. 105.) She described Coria-Granados's sexual comments in detail, including his assertion that he had once paid a young girl $20 for oral sex. (R. 1:4, A-App. 105.) She said that he spoke to her quietly in Spanish; she did not think Evelyn heard the conversation. (R. 1:4–5, A-App. 105–06.) This allegation is sufficient for a jury to find by a preponderance of the evidence that it occurred.

The circuit court dismissed the evidence, in part, because the State had not interviewed Evelyn about the allegation. (R. 32:35, A-App. 115.) The court also complained that "nothing was corroborated," there was "no direct evidence, no circumstantial evidence," and it was "not reported to police." (R. 32:35, A-App. 115.) But the court again failed to apply the relevant legal standard to Michaela's allegation of an other act, which is whether Michaela's testimony is enough for a jury to determine by a preponderance of the evidence that Coria-Granados acted as she described. *See State v. Gray*, 225 Wis. 2d 39, 59, 590 N.W.2d 918 (1999). And certainly, it is.

[3] The circuit court said that Michaela alleged that the incident occurred in the summer of 2017. (R. 32:35, A-App. 115.) But the complaint states that Michaela alleged that it happened in the summer when she was 15 years old. (R. 1:4, A-App. 105.) Because Michaela was born in December 2000, the incident occurred in 2016. (R. 1:1, A-App. 102.)

Texting. Michaela alleged that Coria-Granados sent her graphic sexual text messages for a period of two years and stopped only when her mom intervened. (R. 1:6, A-App. 107.) She said he would compliment her and tell her he would date her if he were her age. (R. 1:6, A-App. 107.) From this evidence, a jury could find that Coria-Granados sent Michaela the text messages she described.

Regarding whether the State provided enough evidence to show that the texting occurred, the circuit court complained of the lack of a forensic analysis on the phone or other witnesses other to the texts. (R. 32:36, A-App. 116.) But the court did not assess whether a reasonable jury could find by a preponderance of the evidence that Coria-Granados sent the text messages that Michaela described. *See id.* Under the proper standard, the State met its burden. *See id.*

In sum, the girls' testimony that the other acts occurred is sufficient evidence to satisfy standard from which a jury could find by a preponderance of the evidence that the acts occurred. *See Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005)("[I]t is black letter law that testimony of a single eyewitness suffices for conviction even if 20 bishops testify that the eyewitness is a liar.")

3. The circuit court failed to determine whether Coria-Granados met his burden to show that risk of undue prejudice was too great.

A court may exclude otherwise admissible evidence "only if the evidence's probative is *substantially outweighed* by the danger of unfair prejudice." *Marinez*, 331 Wis. 2d 568, ¶ 41. This means that the scale tilts "squarely on the side of admissibility. Close cases should be resolved in favor of admission." *Id.* (citation omitted). And the greater latitude rule applies to the third prong of the *Sullivan* test, as well. *See Dorsey*, 379 Wis. 2d 386, ¶ 36. Thus, a scale that already

tilts toward admission leans even further that direction in a case of child sexual assault.

In this case, the circuit court did not examine the third prong of the *Sullivan* analysis. As stated in section I.B.3., the court's decision demonstrates that it instead found that the evidence was not relevant because it did not find it sufficiently corroborated. When a circuit court fails to apply a *Sullivan* prong, this Court may independently review the record to determine if there was any reasonable basis for the trial court's discretionary decision. *Payano*, 320 Wis. 2d 348, ¶ 92. Here, the record establishes that there is no reasonable basis to conclude that the probative value of the evidence would be outweighed by unfair prejudice. *See Hurley*, 361 Wis. 2d 529, ¶ 87. Thus, this Court should find no basis for the circuit court's decision to prohibit the admission of the evidence. *See Payano*, 320 Wis. 2d 348, ¶ 92.

In assessing undue prejudice, the Court must consider the State's need to present the other-acts "evidence given the context of the entire trial." *Hurley*, 361 Wis. 2d 529, ¶ 87. To prove Coria-Granados's guilt, the State must show that in the summer of 2017, Coria-Granados attempted to touch Evelyn's vagina and grabbed Michaela's butt for his sexual gratification. The other-acts evidence gives context to Coria-Granados's attempt to touch Evelyn's vagina because it shows that his attempt was not a mistake and it was for sexual purposes. It also bolsters Evelyn's credibility. The other-acts evidence provides similar context to Michaela's allegation: it shows that the grabbing was not a mistake and that it was for sexual purposes. It also bolsters Michaela's credibility.

And again, this Court examines this prong in light of the greater latitude rule. *See Dorsey*, 379 Wis. 2d 386, ¶ 36. The rule serves to remind courts that "child sexual abuse is a serious social problem, that prosecutions are plagued with myriad proof problems, and that other act evidence is both keenly needed and usually expected by the jury." 7 Daniel D.

Blinka, Wisconsin Practice Series: Wisconsin Evidence § 404.720 at 256 (4th ed. 2017). "The dangers presented by the propensity inference are thus evenly balanced by the need to corroborate young victims whose horrific allegations might otherwise be doubted." *Id.* And "[c]hild sexual assault cases often proceed under three major disabilities: they rely on a single witness who is very young and whole allegations are frequently unsupported by physical evidence." *Id.* at 255. "Like many child sexual assault cases, this case boil[s] down to a credibility determination." *See Hurley*, 361 Wis. 2d 529, ¶ 81.

Here, there are two witnesses instead of one—but neither is a witness to the other's assault. And while the victims may not be "very young," they are indeed children who allege that a man assaulted them when no one was watching. The similarity of Coria-Granados's other acts to the charged offenses make it less likely that the girls' invented or misunderstood his behavior. The probative value of the evidence is therefore high. *See State v. Davidson*, 2000 WI 91, ¶ 75, 236 Wis. 2d 537, 613 N.W.2d 606 (stating that similarities between other acts and the crime charged "may render the other crimes evidence highly probative, outweighing the danger of prejudice").

Conversely, there is no support in the record for a conclusion that the admission of the other acts would influence the outcome of the case *by improper means*. *See Marinez*, 331 Wis. 2d 568, ¶ 41 (citation omitted) ("Prejudice is not based on simple harm to the opposing party's case, but rather 'whether the evidence tends to influence the outcome of the case by improper means.'"). The evidence essentially mirrors the allegations in the charged offenses; the other acts do not arouse a sense of horror any more than the charged offenses do. *See Davidson*, 236 Wis. 2d 537, ¶¶ 73–78. There is no basis to believe that learning of the other acts would

improperly sway a jury to convict Coria-Granados of the charged crimes.

Moreover, the circuit court may provide the jury with a limiting and cautionary instruction on how to consider the other-acts evidence. *See Marinez*, 361 Wis. 2d 568, ¶ 31. This will serve to guard against any risk to Coria-Granados. *See State v. Hammer*, 2000 WI 92, ¶ 36, 236 Wis. 2d 686, 613 N.W.2d 629. But because the court must admit the evidence unless Coria-Granados has shown that its probative value is *substantially outweighed* by the danger of undue prejudice, and he has not met this burden, the Court should reverse the circuit court and instruct it to admit the evidence.

II. The circuit court erroneously exercised its discretion by denying the State's motion to admit Evelyn's audiovisual recorded statement.

A. Relevant law.

Hearsay is an out-of-court statement offered into evidence for its truth. *See* Wis. Stat. § 908.01(3). Hearsay is not admissible absent a recognized exception. *See* Wis. Stat. § 908.02.

Wisconsin Stat. § 908.08 offers exceptions for the admission of audiovisual recordings of child hearsay statements. The statute sets forth two different standards: one for children under age 12 at the time of trial, and one for children between the ages of 12 and 16 at the time of trial. *See* Wis. Stat. § 908.08(3).

With regard to the latter category, which encompasses Evelyn's statement, a court must admit the recording when "the interests of justice warrant its admission."[4] Wis. Stat.

[4] The State has not sought admission of the recorded statement under the residual hearsay exception. *See* Wis. Stat.

(continued on next page)

§ 908.08(3)(a)2. To determine whether this standard is met, the statute sets forth the following non-exhaustive list of nine factors that the court may consider:

> (a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.
>
> (b) The child's general physical and mental health.
>
> (c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.
>
> (d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.
>
> (e) The child's familial or emotional relationship to those involved in the underlying proceeding.
>
> (f) The child's behavior at or reaction to previous interviews concerning the events involved.
>
> (g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.
>
> (h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their

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§ 908.08(7); *State v. Snider*, 2003 WI App 172, ¶ 16, 266 Wis. 2d 830, 668 N.W.2d 784.

> repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.
>
> (i) Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

Wis. Stat. § 908.08(4).

Whether the recorded statement is warranted in the interests of justice is a discretionary decision. *State v. Tarantino*, 157 Wis. 2d 199, 211, 458 N.W.2d 582 (Ct. App. 1990). But a trial court erroneously exercises its discretion when it fails to apply the accepted legal standards to the facts of record. *State v. Huntington*, 216 Wis. 2d 671, 680–81, 575 N.W.2d 268 (1998).

B. The circuit court erroneously exercised its discretion by failing to properly apply Wis. Stat. § 908.08(4) to the facts of record.

Safe Harbor recorded Evelyn's statement when she was 11 years old. (R. 1:1; 35, A-App. 102.) At the time the State sought admission of the statement, Evelyn was 13 years old. (R. 10; 33, A-App. 119–27.) Thus, the State moved to admit Evelyn's audiovisual statement under Wis. Stat. § 908.08(3)(a)2, which controls the admission of audiovisual recordings of children over 12 but under 16 years of age. (R. 10.) As allowed by statute, the State argued that the interests of justice warranted admission of the statement under Wis. Stat. § 908.08(4). (R. 10:2–5.)

In an oral ruling, the court reviewed the statutory factors in Wis. Stat. § 908.08(4)(a)–(i) related to the interests of justice. (R. 33:4, A-App 122.) The court made the following findings as to the nine factors:

a. Evelyn will be older than 12 years old at the time of trial, so "the presumption is that the audiovisual recording does not come in." (R. 33:4, A-App. 122.)
b. Evelyn "looks to be in fine physical and mental health." (R. 33:4, A-App. 122.)
c. "[T]he events about which the child is talking do constitute criminal conduct against the child." (R. 33:4, A-App. 122.)
d. Evelyn lives "with her parents, not with the defendant." (R. 33:4, A-App. 122.)
e. Coria-Granados, "according to the child, was a close friend of the family and she had known him, wow, for a very long time." (R. 33:5, A-App. 123.)
f. The Safe Harbor recording showed that Evelyn "is affected, but she was able to clearly and articulately answer questions. She seems like a very bright child, quite frankly." (R. 33:5, A-App. 123.)
g. Coria-Granados told Evelyn not to disclose the conduct, but the court "did not see the child blaming herself for [his] behavior." (R. 33:5–6, A-App. 123–24.)
h. The State alleged "that the child has been having nightmares, mood changes, problem concentrating." (R. 33:6, A-App. 124.)
i. Playing the recording "would not reduce the number of times [Evelyn would testify] because she would be brought in for cross-examination and she would have to go over the whole story all over again." (R. 33:6, A-App. 124.) Therefore, the court did not "see that it would reduce any strain." (R. 33:6, A-App. 124.)

Finally, the court said that it is "difficult for everyone" to testify—"be they adults or children. It is a nerve-racking sort of situation." (R. 33:6–7, A-App. 124–25.) It concluded that Evelyn's "nervousness" did not rise "to the level of the

interests of justice" warranting the admission of her recorded statement. (R. 33:7, A-App. 125.)

The circuit court's ruling demonstrates an erroneous exercise of its discretion. A court properly exercises its discretion when it examines the relevant legal standard and applies it to the facts. *See Snider*, 266 Wis. 2d 830, ¶ 16. But here, the court misunderstood or disregarded the law, it failed to properly apply the correct law to the correct facts, and it erred in its factual findings.

1. The court erred as a matter of law.

At the start, the court appeared to ignore the purpose of Wis. Stat. § 908.08. (R. 33:4, A-App. 122.) "The Legislature's purpose in enacting Wis. Stat. § 908.08 was to make it easier, not harder, to employ videotaped statements of children in criminal trials and related hearings." *Snider*, 266 Wis. 2d 830, ¶ 13.

It is true that there are two standards applicable to determine the admissibility of a child's recorded hearsay statement: one applies to children under 12, and one applies to children between 12 and 16.[5] *See* Wis. Stat. § 908.08(3)(a)1.–2. But there is no support for the circuit court's declaration that the law creates a *presumption* that statements from children who fall into the latter category should be excluded from a trial. *See State v. Lopez*, 2014 WI 11, ¶ 89, 353 Wis. 2d 1, 843 N.W.2d 390 (acknowledging the

[5] Here, there does not seem to be any dispute that the audiovisual recording satisfies subsections (b)—(e) of the statute. Although the circuit court did not address these subsections, Coria-Granados did not object to the admission of the record statement on any of the grounds addressed by these subsections. The only dispute is whether the interests of justice warrant admission of the statement under Wis. Stat. § 908.08(3)(a)2. And the circuit court erred in concluding that they did not.

significance of the statute and its application in cases in which the child is older than 12). The difference between the statutes is only that the admissibility of a statement from a child over 12 but under 16 depends on whether the interests of justice also warrants its admission. *See* Wis. Stat. § 908.08(3)(a)2.

The court's misunderstanding of the statute's proper application is further highlighted by its declaration that "[c]oming into a courtroom is difficult for everyone, be they adults or children." (R. 33:6–7, A-App. 125–26.) This statement directly contradicts the Legislature's directive that circuit courts must allow statements from *children* into evidence with more ease. The purpose of the statute is "to allow children to testify in criminal, juvenile and probation and parole revocation proceedings in a way which minimizes the mental and emotional strain of their participation in those proceedings." *Tarantino*, 157 Wis. 2d at 214 (quoting 1985 Wis. Act 262, § 1). While the admissibility of evidence is a matter of a circuit court's discretion, the "social policy of protecting children from unnecessary trauma brings Wis. Stat. § 908.09 within the realm of public welfare legislature," which is within the power of the Legislature. *See State v. James*, 2005 WI App 188, ¶ 25, 285 Wis. 2d 783, 703 N.W.2d 727. The trial court exceeds its discretion when it fails to heed the statute. *See id.*

Because the court's statements demonstrate a misunderstanding of the application of Wis. Stat. § 908.08, its decision was necessarily an erroneous exercise of its discretion. *See Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998).

2. The court erred in its factual findings.

Even if this Court were to conclude that the circuit court's recitation of the law was somehow correct, even a cursory review of the record demonstrates that the court erred

in its factual findings. There is no support for the court's findings that Evelyn did not blame herself for Coria-Granados's behavior or that admitting the recording would not reduce her emotional strain.

Despite the court's factual errors, there is no need for this Court to remand the case to the circuit court to cure its errors and properly exercise its discretion. This Court may review the recorded statement to make that determination on appeal. *See State v. Jimmie R.R.*, 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 606 N.W.2d 196. When the only evidence the State seeks to admit at trial is the recording, this Court is "in as good a position as" the circuit court to decide the interests of justice question. *See id.* And this Court should follow that course here.

The Safe Harbor forensic interviewer, Jennifer Ginsburg, interviewed then-11-year-old Evelyn in April 2018, about her allegations against Coria-Granados. (R. 1; 35; A-App. 102) The interview was recorded and lasted about 50 minutes. (R. 35.) Ginsburg asked Evelyn to explain the difference between the truth and a lie, and the consequences of telling a lie. (R. 35:3:00–3:40.)[6] Evelyn responded appropriately. (R. 35:3:55–4:28.) Evelyn swore to tell the truth. (R. 35:4:40–4:53.) As Ginsburg asked Evelyn questions, Evelyn fidgeted with what appears to be a snap bracelet. (R. 35:1:27–5:33.)

Ginsburg asked Evelyn to describe to her the last time she made slime, a favorite hobby of Evelyn's. (R. 35:5:28–8:43.) Evelyn's tone of voice and body language shows her facing Ginsberg, sitting forward in her chair, engaged in the conversation, eager to explain how to make slime, and

[6] The State uses the time marking found in the lower-left of the recording for citation purposes. All times are approximate.

seemingly happy. (R. 35:5:28–8:43.) Her tone of voice was clear, amplified, and easy to understand. (R. 35:5:28–8:43.)

But then Ginsberg asked Evelyn if she knew why she was at Safe Harbor. (R. 35:8:53.) Evelyn's behavior and tone of voice shifted. (R. 35:8:53–9:04.) Instead of sitting forward in her chair, she sat back, crossed her arms, and looked down. (R. 35:9:04.) She began to pet the pillow next to her. (R. 35:9:04–9:26.) She became quiet, spoke softly, and was difficult to hear. (R. 35:8:53–9:54.) Evelyn said that she was there to talk about someone who had done something that he was not supposed to do. (R. 35:9:53.) She named Coria-Granados as that someone. (R. 35:9:55–9:56.)

Evelyn explained that Coria-Granados had a close relationship with her family, considering her and Michaela like his own daughters. (R. 35:10:24–10:28.) She said that she had known Coria-Granados since she was two or three years old and that he and his wife had even lived with her family for a time. (R. 35:10:28–11:11.) She said that her mom felt that he was a brother to her. (R. 35:33:38–33:41.) Evelyn called him "just another family member." (R. 35:12:08.) The recording shows that she appeared confused by why he would have acted so inappropriately toward her when he had been like a family member. (R. 35:14:25–15:06.)

When Evelyn explained the first instance of Coria-Granados's inappropriate behavior to Ginsburg, she set forth numerous details of the day in a straight-forward, coherent manner. (R. 35:11:57–14:11.) She said that when the two were in the parking lot, he asked her about school, and she told him she was having trouble with bullying. (R. 35:13:34–13:54.) Evelyn then said that "all of a sudden right here started to hurt," pointing to her chest. (R. 35:13:47–13:52.) She said, "I didn't even ask him. He just, like, went and then touched my—," trailing off. (R. 35:13:56–14:06.) Ginsberg asked her what Coria-Granados touched. (R. 35:14:06.) Evelyn became visibly uncomfortable before disclosing that he touched her

chest. (R. 35:14:06.) She said it was not a regular touch. (R. 35:14:20.) When Ginsburg asked what kind of touch it was, Evelyn used her hand to show a grabbing motion. (R. 35:14:43.)

Evelyn told Ginsberg how Coria-Granados's behavior had affected her physically. (R. 35:32:44.) She said that she had had stomachaches, nightmares, and had even wet the bed. (R. 35:32:44–32:54.) She was particularly embarrassed to reveal this last piece. (R. 35:32:48.) She explained that when she disclosed the assaults to her mom, it was as if a huge weight had lifted off of her. (R. 35:33:07–36:03.)

But she also said that she was recently having flashbacks to the Milwaukee incident when she would see a car that was similar to Coria-Granados's car. (R. 35:46:53–47:20.) She explained that she was having trouble concentrating at school and was under stress. (R. 35:46:26.) She said that she did not know if she should explain the events to her teachers because she worried that they would think she was overreacting. (R. 35:48:02.)

There is no requirement that a majority—or even more than one—of the nine factors in Wis. Stat. § 908.08(4) be present to find that the interests of justice warrant the admission of the recording. But here, in conjunction with the legislative directive in favor of admission, the presence of so many factors compel the admission of the recording in the interests of justice.

The State examines each factor in light of the facts, as well as the circuit court's reasoning:

(a) *Age, level of development, capacity to understand.* Evelyn was 11 years old at the time Ginsburg interviewed her and 13 years old at the time of the circuit court's decision.[7]

[7] Evelyn is also 13 years old at the time of briefing. (R. 1:1, A-App. 102.)

The recording showed Evelyn at an age-appropriate level of development. And she showed the "capacity to comprehend the significance of the events and to verbalize about them." Wis. Stat. § 908.08(4)(a).

(b) *Physical and mental health.* Evelyn's general physical and mental health are hard to gauge. Although the circuit court said that "she looks to be in fine physical and mental health" (R. 33:4, A-App. 122.), Evelyn described the physical and mental toll Coria-Granados's behavior had taken on her, pointing to stomachaches, nightmares, and peeing the bed. And while it is possible that those issues subsided after she disclosed the assaults, she said that she had recently had flashbacks to what Coria-Granados had done. She expressed an increase in stress and a worry that her teachers would not understand her if she explained to them the cause.

(c) *Whether the conduct was criminal, whether it was sexual assault, and the extent of any physical or emotional injury*. The circuit court glossed over this factor, saying only, "Yes, the events about which the child is talking do constitute criminal conduct against the child." (R. 33:4, A-App. 122.) The court ignored that not only was the conduct criminal, it was sexual assault, which the statute highlights as particularly important. When sexual assault is alleged, courts must consider "its duration and the extent of physical or emotional injury thereby caused." Wis. Stat. § 908.08(4)(c). Here, the court failed to conduct this inquiry.

In this case, Coria-Granados's inappropriate behavior toward Evelyn lasted several months and caused her significant emotional pain. As the recording shows, she was unsure why a person in a position of trust would have behaved this way. She expressed continued emotional stress from the behavior in the form of flashbacks and an unwillingness to disclose to others what had happened for fear that they may minimize it. The emotional toll on Evelyn appears substantial.

(d) *Living situation*. Evelyn lived with her parents and sister but at one time, she lived with Coria-Granados and his wife, as well. (R. 10:3–4.) The circuit court dismissed any analysis of this factor, saying only that Evelyn lived "with her parents, not with the defendant." (R. 33:4, A-App. 122.) But this ignored that Coria-Granados had been like a family member to Evelyn. And the court did not consider how Evelyn's allegations had been received by other members of the household. The record suggests that when Evelyn first disclosed Coria-Granados's behavior, her family members did not immediately go to the police. (R. 1:6, A-App. 107.)

(e) *Emotional or familial relationship between the defendant and the child.* Evelyn and Coria-Granados had an extremely close relationship; she said that he thought of her as his daughter. She said that her family thought of him as another family member. Although the court acknowledged that Coria-Granados "was a close friend of the family and [Evelyn] had known him, wow, for a very long time," it failed account for how the significance of their closeness and how the relationship would affect Evelyn's testimony. (R. 33:5, A-App. 123.)

(f) *Behavior during previous interviews*. This factor asks how the child behaved in interviews *other* than the one the State sought to admit. *See* Wis. Stat. § 908.08(4)(f). Here, the State is not aware of any other interview with Evelyn. Thus, this factor is not relevant.

(g) *Blaming, consequences of disclosure*. When Evelyn initially disclosed the behavior, her family did not tell authorities immediately. *See* Wis. Stat. § 908.08(4)(g).

In addition, throughout the recording, Evelyn's body language, tone, and words show her confusion about Coria-Granados's actions and her role in them. The following are some examples in which Evelyn exhibits symptoms of self-blame:

- Although Ginsburg did not ask Evelyn why her parents let her go to Milwaukee with Coria-Granados and his wife, Evelyn seemed to want to explain. (R. 35:11:57–12:30.) She pleaded, "And my parents didn't know, and I didn't, either! 'Cause, I mean, like, he's just another family member for us." (R. 35:12:02–12:09.)
- Evelyn highlighted that she did not ask Coria-Granados to touch her. (R. 35:13:56.)
- She was visibly and audibly upset that Coria-Granados had not said anything to her during the first assault and would not explain why he had done it. (R. 35:14:30–15:00, 17:35.)
- Evelyn wanted Ginsburg to know that she walked significantly behind Coria-Granados on the way back to the hair salon, presumably worrying that Ginsburg may have thought that Evelyn was condoning Coria-Granados's actions. (R. 35:17:53–18:03.)
- Evelyn emphasized how much bigger Coria-Granados was than she. (R. 35:23:13.)
- When discussing Coria-Granados exposing himself to her, Evelyn blurted out, "I'm only 11!" (R. 35:30:07.) This prompted Ginsburg to tell Evelyn that this was not her fault and that she was not in trouble. (R. 35:30:10.)

Despite the above, the circuit court found that Evelyn demonstrated an "ability to understand that it was not her fault." (R. 33:6; A-App. 124) But the circuit court failed to explain from what it derived that finding and the recording does not support the conclusion. The finding is therefore against the great weight and clear preponderance of the evidence. *See State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748.

(h) *Posttraumatic stress disorder or other mental health symptoms*. Of particular relevance to this factor is Evelyn's statement that she experienced flashbacks to the Milwaukee incident. She said that when she saw a car that was the same

model and color as Coria-Granados's car, she remembered what had happened and got scared. (R. 35:47:20.)

The circuit court acknowledged that the State alleged that Evelyn had "been having nightmares, mood changes, and problem[s] concentrating." (R. 33:6, A-App. 124.) But the court seemed to discount these allegations—and failed to account for Evelyn's own statements concerning her suffering—because it did not discuss this factor further. And the court did not acknowledge Evelyn's flashbacks.

(i) *Whether playing the recording will reduce strain on the child testifying*. It is a given that allowing the State to place a child's recorded statement into evidence in lieu of direct testimony will reduce his or her mental or emotional strain. It is the very purpose of the statute. *See Tarantino*, 157 Wis. 2d at 214.

Looking at the factors in the aggregate, the interests of justice warrant the admission of the recorded statement. Evelyn and her family's relationship with Coria-Granados and his wife will make it hard for her to testify against him. Her confusion about her role in the assault may put her under additional emotional strain. She has already experienced flashbacks when she has seen a car that is similar to Coria-Granados's; she expressed that she did not want to see him again. She suffered from physical pain in the form of stomachaches. She had nightmares and peed her bed. She worried that her teachers would minimize her stress and trauma were she to disclose to them what had happened. All of this is more than enough to warrant the admission of the audiovisual recording.

The circuit court's conclusions to the contrary are wrong. It all but dismissed her close relationship with Coria-Granados and his wife; the court seemed to devalue the significance of the closeness between the families. The court minimized the mental strain Evelyn had been under at the

time of the recording. The court ignored the signs of self-blame that Evelyn exhibited on the recording—instead, finding that Evelyn *understood* that Coria-Granados's behavior was not her fault. There is no support in the record for this factual finding. All of this demonstrates that the circuit court's factual findings relating to Evelyn's demeanor, stress, and emotional pain were clearly erroneous. *See Arias*, 311 Wis. 2d 358, ¶ 12.

But of particular concern to the State is the circuit court's rationale that because "[c]oming into a courtroom is difficult for everyone." (33:6, A-App. 122.) Evelyn simply had not shown enough nervousness in a one-on-one recording with a Safe Harbor forensic interviewer to avail herself of the protections provided by the Legislature in Wis. Stat. § 908.08. This is not the law and should not be any measurement by which a court determines whether the interests of justice warrant the admission of an audiovisual recording of a child.

The State agrees that testifying in court "can be an intimidating and unsettling experience for any witness, adult or child." *Tarantino*, 157 Wis. 2d at 214. But the Legislature carved out a particular hearsay exception for children. And it did not turn on how nervous, fragile, or timid the child appeared to a circuit court from an audiovisual recording. Those are not factors set forth in the statute nor are they found in the case law. And for good reason. How "strong" or "confident" a child appears on a recording while speaking to a trained child interviewer within the relative safety of a child advocacy center has little to no translation to the trauma she will experience in a courtroom in front of the defendant, his family, her family, and strangers. The Legislature recognized the inherent trauma in requiring children to testify in court, particularly in cases in which the child alleges a sexual assault committed by a trusted adult or family member.

Again, the legislative purpose behind Wis. Stat. § 908.08 was to make it easier to admit children's recorded statements. *See Snider*, 266 Wis. 2d 830, ¶ 13. But the circuit court's decision flouts that purpose here. The record establishes that this Court should reverse the decisions of the circuit court.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the order of the circuit court and remand the case for the admission of the other acts evidence and the audiovisual recording.

Dated this 11th day of March 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,965 words.

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KATHERINE D. LLOYD
Assistant Attorney General

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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).

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

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Dated this 11th day of March 2020.

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KATHERINE D. LLOYD
Assistant Attorney General

APPENDIX OF PLAINTIFF-APPELLANT

INDEX

State of Wisconsin v. Omar S. Coria-Granados
Case No. 2019AP1989-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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KATHERINE D. LLOYD
Assistant Attorney General

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