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STATE OF WISCONSIN

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

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

Dane County Case No. 18-CF-1223

v. Appeal No. 2019AP001989-CR

OMAR S. CORIA-GRANADOS,

Defendant-Respondent.

ON APPEAL OF AN ORDER DENYING THE STATE'S MOTIONS TO ADMIT OTHER ACTS EVIDENCE AND AN AUDIOVISUALLY RECORDED STATEMENT ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE ELLEN K. BERZ, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

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STATEMENT OF THE ISSUES

1. **Did the circuit court properly exercise its discretion in denying the State's motion to admit five items of other acts evidence at the trial of this matter?**

The circuit court answered yes, and this court should affirm.

2. **Did the circuit court properly exercise its discretion in denying the State's motion to admit an audiovisually recorded statement of [Evelyn] at in lieu of direct testimony at the trial of this matter?**

The circuit court answered yes, and this court should affirm.

STATEMENT ON ORAL ARGUMENT

Appellant anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, appellant is not requesting oral argument.

STATEMENT ON PUBLICATION

In all likelihood, this opinion will not merit publication because the issue presented is fact-specific and the case is governed by existing precedent.

STATEMENT OF THE CASE

The State charged Coria-Granados with one count of attempted first degree sexual assault of a child by having sexual contact with a child under the age of 13, a class B felony, as well as one count of fourth degree sexual assault, a class A misdemeanor, in the information in this matter. (R8: 1-2). The State later brought a motion to admit five instances of other acts at the trial of this matter, as well as a motion to admit the audiovisually recorded statement of Evelyn[1], the alleged victim of the first degree sexual assault of a child allegation. (R21: 1-13; R10: 1-5). In its other acts motion, the State summarized the charged acts as follows: "Defendant is alleged to have attempted to touch the vaginal area of [Evelyn] on or between June 1, 2017 and August 31, 2017. Defendant is alleged to have touched the buttocks of [Michaela] on or between June 1, 2017 – August 31, 2017." (R21: 1).

The five other acts the State sought to admit into evidence at the trial of this matter were described by the circuit court as follows: (1) an allegation that Coria-Granados touched Evelyn's breast in Milwaukee after his wife had gone into a salon; (2) an allegation that Coria-Granados had grabbed Michaela's buttocks at a soccer field in Madison, and that he had allegedly texted her afterwards asking that she not tell her parents that he had done so; (3) an allegation that Coria-Granados had went into Michaela's room and picked up one of

[1] The State, in its brief, uses the pseudonyms Evelyn and Michaela to refer to the two alleged victims in this matter; for ease of reference, the defense will do the same.

her bras after she got home from a surgery; (4) an allegation that Coria-Granados had touched Michaela's thigh during a car ride after a soccer game while he was in the back seat of the car with both Michaela and Evelyn, and that he had made inappropriate sexual comments to Michaela during this incident; and (5) an allegation that Coria-Granados had sent a series of inappropriate texts to Michaela at unspecified intervals throughout the period running from 2015 to 2017. (R32: 32-36). As the circuit court noted, none of these alleged incidents resulted in charges being brought against Coria-Granados, despite their having been reported to the police contemporaneously with the disclosures that resulted in the charges in this matter. (R32: 36).

The circuit court noted that although corroboration of the above alleged other acts could have been obtained by the State, it had failed to do so. (R32: 32-36). The court then announced its ruling as follows:

> Here we have information which could potentially have been corroborated. We know that it was around a salon at which the defendant's wife had an appointment. However, the salon could not be located so that the schedule could be checked.
>
> …
>
> There was no church found which had the characteristics, physical characteristics, described by the child. This was divulged only in relation to an inquiry on the charges in this case. There is no direct evidence that this touching occurred. There is no circumstantial evidence that this touching occurred. It was not reported to police prior to the divulging at Safe Harbor and, although referred to the Milwaukee DA's office, it was not charged.
>
> With respect to grabbing [Michaela]'s butt at a soccer field, I think we do now know the location of the soccer field. The date is anywhere in a two-year period of time between 2015 and 2017. No witnesses have been found to this grabbing while they were at the soccer field. There's no direct evidence. There's no circumstantial evidence. It was never reported to police. It was only divulged at the Safe Harbor involving these charges. There was apparently, or at least allegedly, a text message from the defendant basically admitting to the touching. [Michaela] indicates that was deleted. There was no forensic analysis

of [Michaela]'s phone to try and get that text message back and the incident was not charged by the Dane County DA's office.

With respect to picking up [Michaela]'s bra when she was at home after a surgery, this was alleged to have happened somewhere between 2015 and 2017, which is somewhat amazing to me because we're talking about a child here, and I don't know if she's had enumerable surgeries, but let's assume, as with most children, that a surgery is a rather rare event. We couldn't pin down a year, a month, surrounding a date of surgery? We don't know who else was in the home to corroborate that the defendant even cameover? There's no direct evidence. There's no circumstantial evidence. It was not reported to police. It was only divulged at the Safe Harbor with reference to these charges.

We have the inappropriate comments and touching [Michaela]'s thigh in a car. This was supposed to have happened in the summer of 2017, with [Evelyn] in the back seat. [Evelyn] was not even interviewed to find out if she could corroborate any of this, even that they were in a car from a soccer game with [Evelyn] in the back seat and [Michaela] in the front seat. Nothing, although one would think it would be relatively easy to corroborate, nothing was corroborated. There's no direct evidence, no circumstantial evidence, not reported to police, divulged only with relation to these charges.

Then we have texts between the defendant and [Michaela] again between years 2015 and 2017. These texts were allegedly transmitted via an app that was on the phone, but [Michaela] indicates that she deleted these apps. The phone was not checked to even see if the app was on the phone. There was no forensic analysis of the phone which could bring back the texts. No witnesses to the text. She indicates, [Michaela] indicates that she told her mother not only about the texts, but about the butt grab, and the mother was never interviewed to find out, to corroborate what [Michaela] has just said. No direct evidence, no circumstantial evidence, not reported to police, only divulged at the Safe Harbor.

There was no course of conduct charged here. These are individual instances that are charged. There is, frankly, simply not enough in any of this to say anything more than this possibly happened. None of this evidence corroborates the charges. None of it corroborates the charges. It's just more he said/she said, and it will, aside from the fact that it will completely confuse the jury as to

> what it is that they have to decide, which act is at issue in the trial, there is no way, given the lack of evidence, that the defense can even take any steps toward figuring out a defense.
>
> We're talking about a time period two to four years ago, without witnesses, which potentially could have been there in some of these acts but which were not found or, probably, looked for. They do not have access to a child's phone for a forensic analysis. All of this, all it does is put in more questions than there are answers. Just one piece of corroboration is all I would be -- have been looking for. Just corroborate for me that someone went to a salon in Milwaukee. Just corroborate for me that everyone was at a particular soccer field at a particular game. Just corroborate for me that an app even exists on a phone. None of this -- none of this was done.
>
> And I understand that these are not the charges, that the investigation centered around the charges. I do understand that. But you cannot then ask for admission of the evidence when a full and complete investigation has not been done.
>
> The prejudice, unfair prejudice, far outweighs the probative value in this case. If there would be any kind of corroboration, even with the outside circumstances involving any of these, it would be relevant. Relevance is not the issue. Why they would be admitted, purpose, is not an issue. It's just the vagaries around these are too great to put the defense in a position of defending not only the charges, but these additional allegations.
>
> So for those reasons, the motion to admit other acts is denied.

(R32: 33-38).

At the later-held hearing on the State's motion to admit the audiovisually recorded statement of Evelyn, the court evaluated the motion in light of the factors enumerated in Wis. Stat. § 908.08(4), as a result of the fact that Evelyn was at that time 13 years of age, meaning that her audiovisually recorded statement is only admissible if admission of the recording would serve the interests of justice. (R33: 4). *see* Wis. Stat. §§ 908.08(3)(a)1.-2. The court first determined that Evelyn appeared "to be in fine physical and mental health." (R33: 4). The court noted that the events about which Evelyn spoke in

the recording did constitute criminal conduct against her, but also said that Evelyn was not in the custody of Coria-Granados, but rather that of her parents. (R33: 4).

Moving to the other factors, the court noted further that Coria-Granados had been a close friend of the family and had known Evelyn for a very long time, that Evelyn's behavior during the interview indicated that while she was affected by giving the interview, she was also able to clearly and articulately answer the questions. (R33: 5). The court then stated that it believed (but was apparently unsure) that Evelyn had been told not to disclose, but also that Evelyn did not appear to blame herself for these events. (R33: 5-6). The court then noted that the State had alleged that Evelyn was suffering from nightmares, mood changes, and problems concentrating, but there was nothing to indicate that she had been diagnosed with post-traumatic stress disorder or any other mental disorders. (R33: 6). Finally, the court noted that admission of the recording would not reduce the number of times Evelyn would be required to testify, as she would be required to be put on the witness stand for cross-examination regardless of whether the recording was admitted, concluding its analysis of this last factor by stating that the court did not "see that [admission of the recording] would reduce any strain" on Evelyn resulting from having to testify. (R33: 6).

Wrapping up its ruling, the court stated the following:

> Again, when I viewed this video, I was actually taken by **her ability to compose herself, her ability to articulate what happened, her ability to understand that it was not her fault.** Coming into a courtroom is difficult for everyone, be they adults or children. It is a nerve-racking sort of situation, but I don't think that her nervousness rises to the level of interests of justice, so I am going to deny the State's motion.

(R33: 7). The State then a notice of appeal, pursuant to Wis. Stat. § 974.05(1)(d) of the circuit court's rulings on its other acts motion and its motion under Wis. Stat. § 908.08(4). This appeal follows; additional facts shall be stated as necessary below.

ARGUMENT

I. The circuit court properly exercised its discretion in denying the State's other acts motion *in toto,* as some of the other acts evidence was too dissimilar to the charged acts to be probative of anything other than propensity, and the rest was of such minimally probative value as to be substantially outweighed by the dangers of unfair prejudice and confusion of the issues.

A. Standard of Review

Evidence of other crimes or acts committed by the defendant in a criminal action is generally inadmissible to prove that the defendant has a particular character and that the defendant acted in conformity with that character on a particular occasion. Wis. Stat. § 904.04(2)(a). That said, such evidence is admissible if it is relevant to prove motive, intent, or other non-propensity purposes, and in the context of a sexual assault of a child trial, courts are to give "greater latitude" when applying the other acts analysis. Wis. Stat. §§ 904.04(2)(a) and 904.04(2)(b)1.-2.[2]; *see also* ***State v. Davidson***, 2000 WI 91, ¶¶ 44, 46, 236 Wis. 2d 537, 613 N.W.2d 606; *and* ***State v. McGowan***, 2006 WI App 80, ¶14, 291 Wis.2d 212, 715 N.W.2d 631.

Assuming the evidence was offered for a permissible, non-propensity purpose, other acts evidence is inadmissible even when applying the greater latitude rule if it lacks probative value, or relevance, with respect to one or more permissible purposes and not simply with respect to the defendant's general character. ***McGowan***, 291 Wis.2d 212, ¶18 ("However, if the other acts evidence is probative of nothing more than the defendant's propensity to act a certain way, the evidence is not admissible.") "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act. Similarity is demonstrated by showing the nearness of time, place, and circumstance between the other act and the alleged crime."

[2] As is explained in ***State v. Dorsey***, 2018 WI 10, ¶35, 379 Wis.2d 386, 906 N.W.2d 158, Wis. Stat. § 904.04(2)(b)1.-2. codifies the prevailing common law "greater latitude" rule in child sexual assault cases and should be applied using the common law analysis.

State v. Meehan, 2001 WI App. 119, ¶14, 244 Wis.2d 121, 630 N.W.2d 722 (internal citations and quotation marks omitted). "Stated otherwise, the greater the similarity between the two acts, the greater the relevance and probative value." ***Id.*** In addition, in order to be admissible, the other acts evidence much be of sufficient probative force so as to allow a reasonable jury to first find that the other acts took place at all. ***State v. Gribble***, 2001 WI App 227, ¶40, 248 Wis.2d 409, 636 N.W.2d 488. Other acts evidence, even if offered for a permissible purpose and relevant to that purpose, is nonetheless inadmissible if its probative value is substantially outweighed by its cumulativeness or by the dangers of confusion of the issues, unfair prejudice, or other concerns listed in Wis. Stat. § 904.03. ***State v. Marinez***, 2011 WI 12, ¶19, 331 Wis.2d 568, 797 N.W.2d 399.

Finally, the decision whether to admit other acts evidence is an exercise of the circuit court's discretion, which "[a]n appellate court will sustain . . . 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 (brackets and ellipsis added). This is so even if this or another appellate court would have reached a different conclusion, so long as the circuit court did not erroneously exercise its discretion. ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37 (Ct.App. 1991).

B. The evidence regarding the alleged inappropriate texts as well as the evidence regarding the alleged incident in which Coria-Granados allegedly went into Michaela's room and picked up her bra were so dissimilar to the charged acts as to have no relevance to any purpose other than the forbidden purpose of proving Coria-Granados's general propensity to engage in sexualized interactions with underage girls.

Here, two of the five proffered items of other acts evidence were not only uncorroborated and low in probative value to start with therefore, but were also so dissimilar to the charged acts as to have no relevance whatsoever to any proposition other than the proposition that Coria-Granados has

a poor character generally. As such, the circuit court properly excluded those items of evidence. *See* ***State ex rel. West v. Bartow***, 2002 WI App 42, ¶7, 250 Wis.2d 740, 642 N.W.2d 233 (an appellate court should affirm right result reached for wrong reason). The charged acts here consisted of first, an incident in which Coria-Granados allegedly was at her house watching soccer with her dad, and when Evelyn's dad went into the bathroom, Coria-Granados is alleged to have attempted to slide his hand under her shorts, but she was able to stop him from actually touching her vagina. (R1: 3-4). The second charged act involves an allegation that while Coria-Granados and his wife were at Michaela's house in Fitchburg, Wisconsin during the summer of 2017, Coria-Granados slapped and grabbed Michaela's butt, then when asked, stated that he had done so because "he just wanted to touch it." (R1: 5).

The proffered other acts, however, include two items that bear virtually no resemblance to the charged acts other than being examples of inappropriately sexualized interactions between Coria-Granados and the alleged victims. The charged acts, for example, each involve actual or attempted touching of the alleged victims' intimate parts, whereas the items of other acts evidence in question here involve (1) a series of inappropriate texts and (2) an incident in which Coria-Granados is alleged to have picked up Michaela's bra while in her room and to have made sexual comments to her. These acts are even more dissimilar than other acts that have been found to have been improperly admitted even though the greater latitude rule applied in at least two published opinions of this court.

For example, in ***State v. McGowan***, the charged act was repeated sexual assault of the same child, and involved alleged repeated and frequent assaults by an adult against a child who was three years older than the child who was the alleged victim in the other acts evidence. ***McGowan***, 291 Wis.2d 212, ¶20. In addition, McGowan was ten years old at the time the other act was alleged to have taken place, and the alleged victim of the prior act was five years old at the time and was a cousin of McGowan's. ***Id.***, ¶9. The allegation was that on one occasion, McGowan had forced the alleged victim of the prior act to perform oral sex on him, resulting in him urinating in her mouth. ***Id.*** This court stated the following in holding that the

other acts were too dissimilar to the charged act to be admissible, even when applying the greater latitude rule:

> we conclude that a single assault, by one young child on another young child, eight years before repeated assaults by an adult on a different child who was three years older than the first victim, together with the significant differences in the nature and quality of the assaults, does not tend to make the latter frequent and more complex assaults of Sasha more probable.

Id., ¶20.

Similarly, in ***State v. Meehan***, "the other act occurred in a private bedroom following an illegal entry, in the middle of the night, while the victim was sleeping; the sexual contact was through the victim's clothes." ***Meehan***, 244 Wis.2d 121, ¶15. "The charged act [was] drastically different: it occurred in a public place, during the day, while the victim was awake; the sexual contact was directly to the skin, and no illegal entry was involved." ***Id.*** This court rejected the State's argument that because both acts involved young male strangers who were isolated in places close to the perpetrator's home and neither incident involved the use of force and both involved contact with the victim's penis, the other acts were sufficiently similar to not constitute propensity evidence. ***Id.*** This court in so doing stated that the "differences greatly reduce[d] the probative value of the 1992 conviction, and lean toward making the earlier act propensity evidence." ***Id.*** Further, this court continued, stating that "[e]ven with the application of the greater latitude rule, we cannot conclude that [the State's] suggested list of similarities overcomes the greater dissimilarities." ***Id.***

The same analysis applies here, but with greater force, given that the other acts evidence offered involved words and non-assaultive actions which are best described as somewhat 'creepy', while the charged acts involved actual touching in each case, and importantly the touching occurred in one case in public and another in the living room of Evelyn's home, not in private as each of the incidents presently under discussion did. Even applying the greater latitude rule, as is appropriate here, these two items of other acts evidence are so dissimilar to the charged acts as to be relevant only to proving general

propensity, which is forbidden. *See* ***Meehan***, 244 Wis.2d 121, ¶15. Accordingly, the circuit court correctly excluded these two items of other acts evidence, albeit for a different reason. *See* ***Bartow***, 250 Wis.2d 740, ¶7.

C. Contrary to the State's assertions, the circuit court did not find that no reasonable jury could find by a preponderance of the evidence that the other acts at issue actually occurred, but instead correctly concluded that the proffered other acts' probative value, in light of the lack of corroboration, was substantially outweighed by the dangers of confusion of the issues and unfair prejudice to the defense.

The State mischaracterizes the nature of the circuit court's ruling denying its other acts motion when it states that the circuit court failed to apply the correct legal standard and therefore found that the State had failed to show that a reasonable jury could find that the other acts in fact occurred by a preponderance of the evidence. (State's Br. at 16-17). The circuit court did not so find, and in fact, by ruling that the State had shown that the other acts were offered for proper purposes and minimal probative value to prove those purposes, the circuit court at least implicitly found that a reasonable jury *could* find, by a preponderance of the evidence, that the other acts proffered by the State in fact occurred. (R32: 37) ("Relevance is not the issue. Why they would be admitted, purpose, is not an issue."); *see also* ***Gribble***, 248 Wis.2d 409, ¶40.

Instead, the circuit court grounded its ruling on the strictures of Wis. Stat. § 904.03, and ruled that the lack of corroboration and failure on the part of the State to engage in a diligent investigation which led to such deficiencies in the evidence lowered the probative value of the other acts evidence to the point that said value was substantially outweighed by the dangers of confusion of the issues and unfair prejudice to the defense. (R32: 36-37). The problems with the evidence proffered by the State in support of its motion were addressed separately and seriatim by the circuit court; accordingly, each of the court's determinations regarding said problems are addressed seriatim below.

1. The Milwaukee Incident

The court referred to this incident, in which Coria-Granados allegedly touched Evelyn's breast over her shirt, as Evelyn's "breast touching," (R32: 32), and besides noting that it happened "sometime in the summer of 2017," and that it did not result in a conviction, (R32: 32), the court addressed this incident as follows:

> Here we have information which could potentially have been corroborated. We know that it was around a salon at which the defendant's wife had an appointment. However, the salon could not be located so that the schedule could be checked.
>
> . . .
>
> There was no church found which had the characteristics, physical characteristics, described by the child. This was divulged only in relation to an inquiry on the charges in this case. There is no direct evidence that this touching occurred. There is no circumstantial evidence that this touching occurred. It was not reported to police prior to the divulging at Safe Harbor and, although referred to the Milwaukee DA's office, it was not charged.

(R32: 33-34). In so addressing this incident, the circuit court was clearly commenting on the weakness of the evidence that it happened, but did not at any point while either addressing this incident specifically or ruling on its admissibility state that no reasonable jury could find that the incident in fact happened.

2. The Soccer Game Incident

With respect to the allegation that Coria-Granados grabbed Michaela's butt at a soccer field in Madison, the court began by noting that the specific soccer field referred to had been located, (R32: 34) but then addressed the difficulties with the proof of that incident as follows:

> The date is anywhere in a two-year period of time between 2015 and 2017. No witnesses have been found to this grabbing while they were at the soccer field. There's no direct evidence. There's no circumstantial evidence. It was never reported to police. It was only divulged at the

> Safe Harbor involving these charges.
>
> There was apparently, or at least allegedly, a text message from the defendant basically admitting to the touching. [Michaela] indicates that was deleted. There was no forensic analysis of [Michaela]'s phone to try and get that text message back and the incident was not charged by the Dane County DA's office.

(R32: 34). Again, the court did not state that it found that no reasonable jury could not find that this incident in fact happened by a preponderance of the evidence, either at this point or in its final ruling.

3. The Bra Incident

The court discussed this incident as follows:

> With respect to picking up [Michaela]'s bra when she was at home after a surgery, this was alleged to have happened somewhere between 2015 and 2017, which is somewhat amazing to me because we're talking about a child here, and I don't know if she's had enumerable surgeries, but let's assume, as with most children, that a surgery is a rather rare event. We couldn't pin down a year, a month, surrounding a date of surgery? We don't know who else was in the home to corroborate that the defendant even came over?

(R32: 34-35). It then made similar comments to its comments regarding the other items of other acts evidence, noting that there was no evidence that this incident took place other than the contents of Michaela's Safe Harbor interview, and that it wasn't reported to police at the time it happened, either. (R32: 35). As with the previously discussed items, the court did not state that no reasonable jury could not find that this incident happened by a preponderance of the evidence, but instead pointed out the weakness of the case that it did in fact happen.

4. The Thigh Incident

The court's discussion of this incident was as follows:

> We have the inappropriate comments and touching [Michaela]'s thigh in a car. This was supposed to have happened in the summer of 2017, with [Evelyn] in the

> back seat. [Evelyn] was not even interviewed to find out if she could corroborate any of this, even that they were in a car from a soccer game with [Evelyn] in the back seat and [Michaela] in the front seat. Nothing, although one would think it would be relatively easy to corroborate, nothing was corroborated. There's no direct evidence, no circumstantial evidence, not reported to police, divulged only with relation to these charges.

(R32: 35). Once again, the State is incorrect when it argues that the court found that no reasonable jury could believe that this incident took place by a preponderance of the evidence; the court was instead, as with the other items, commenting on the weakness of the proof that the incident took place.

5. Texting

Finally, the court's discussion of the alleged inappropriate text conversations between Coria-Granados and Michaela proceeded as follows:

> Then we have texts between the defendant and [Michaela] again between years 2015 and 2017. These texts were allegedly transmitted via an app that was on the phone, but [Michaela] indicates that she deleted these apps. The phone was not checked to even see if the app was on the phone. There was no forensic analysis of the phone which could bring back the texts. No witnesses to the text. She indicates, [Michaela] indicates that she told her mother not only about the texts, but about the butt grab, and the mother was never interviewed to find out, to corroborate what [Michaela] has just said. No direct evidence, no circumstantial evidence, not reported to police, only divulged at the Safe Harbor.

(R32: 35-36). As with each of the other proffered items of other acts evidence, the court's analysis pointed out the deficiencies in the proof that these incidents took place not in support of a ruling it never made, i.e., that no reasonable jury could find that the incident took place by a preponderance of the evidence, but that in support of its ultimate ruling that the probative value of each piece of evidence was not substantial, as shall be seen below.

D. The circuit court properly exercised its discretion when it ruled that the probative

> **value of the proffered other acts evidence to any permissible purpose was slight, and that said probative value was substantially outweighed by the dangers of jury confusion and unfair prejudice to the defense.**

What the circuit court did in fact rule regarding the State's proffered other acts evidence was not, as the State contends, rule that no reasonable jury could find that the other acts in fact took place by a preponderance of the evidence, but was instead to rule that given the slight probative value of each item, predicated in part by the weakness of the evidence in support of said items, the evidence was inadmissible because that slight probative value was substantially outweighed by the dangers of jury confusion and unfair prejudice. This much is quite clear from the words the court used in describing its ruling:

> There is, frankly, simply not enough in any of this to say anything more than this possibly happened. None of this evidence corroborates the charges. None of it corroborates the charges. **It's just more he said/she said, and it will, aside from the fact that it will completely confuse the jury as to what it is that they have to decide, which act is at issue in the trial, there is no way, given the lack of evidence, that the defense can even take any steps toward figuring out a defense.**
>
> We're talking about a time period two to four years ago, without witnesses, which potentially could have been there in some of these acts but which were not found or, probably, looked for. They do not have access to a child's phone for a forensic analysis. All of this, all it does is put in more questions than there are answers.
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> Just one piece of corroboration is all I would be -- have been looking for. Just corroborate for me that someone went to a salon in Milwaukee. Just corroborate for me that everyone was at a particular soccer field at a particular game. Just corroborate for me that an app even exists on a phone. None of this -- none of this was done.
>
> And I understand that these are not the charges, that the investigation centered around the charges. I do understand that. But you cannot then ask for admission of the evidence when a full and complete investigation has not been done.

> **The prejudice, unfair prejudice, far outweighs the probative value in this case. If there would be any kind of corroboration, even with the outside circumstances involving any of these, it would be relevant. *Relevance is not the issue. Why they would be admitted, purpose, is not an issue.* It's just the vagaries around these are too great to put the defense in a position of defending not only the charges, but these additional allegations.**
>
> So for those reasons, the motion to admit other acts is denied.

(R32: 36-38) (emphasis added). Accordingly, the question is not, as the State frames it, whether the circuit court erred by finding that no reasonable jury could believe by a preponderance of the evidence that the alleged other acts did in fact take place; the language above which is both bolded and italicized makes that much clear.

The question, rather, is whether the court's clear determination that the probative value of the other acts evidence was slight and that said value was substantially outweighed by the dangers of jury confusion and unfair prejudice represents an erroneous exercise of discretion. As mentioned above, so long as the court examined the facts of record, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion a reasonable judge could reach, the court's ruling must be upheld, even if this court on the same facts would rule differently. ***Burkes***, 165 Wis.2d at 590; *see also* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981) (proper exercise of discretion must be upheld even if appellate court would have reached a different conclusion were it in the circuit court's place). Indeed, an appellate court should "look for reasons to sustain a trial court's discretionary decision." ***State v. Wiskerchen***, 2019 WI 1, ¶18, 385 Wis. 2d 120, 921 N.W.2d 730.

As to the probative value of the other acts evidence, the circuit court properly found that such value was low. This was a proper exercise of discretion for a variety of reasons. First, the evidence consisted solely of allegations from the same two alleged victims as those who are alleged to have been the victims of the charged offense; there was no other direct or

even circumstantial evidence offered by the State to corroborate those allegations. Proof of the same victims' allegations of sexual contact (actual in one case, attempted in the other) and allegations of inappropriately sexualized communication does not make the allegation charged more probable and therefore more credible than it would be without the evidence. Logically, direct independent evidence of other acts between this defendant and these victims would have more probative value. The circuit court could reasonably conclude that because the other acts evidence here involved only assertions by the same victims that other acts had occurred, it is of little probative value of the same victims' credibility, which from the State's argument appears to be the primary purpose for which the State sought admission of the other acts evidence.

Second, the court's concern that the other acts evidence would be unfairly prejudicial to the defense is well-founded, and not just because the vagueness of the evidence of the other acts renders it difficult to impossible for the defense to contradict said allegations. Allegations that Coria-Granados engaged in other acts of sexual contact and inappropriately sexualized communications with minors is strong evidence of bad character which may well improperly influence a jury in its desire to convict a defendant on the basis of bad character rather than on the evidence introduced in the crimes charged. ***State v. Sullivan***, 216 Wis.2d 768, 789-90, 576 N.W.2d 30 (1998) ("Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.").

In addition, the evidence involves the same two victims on different occasions but over the same general period of time. As a result, the potential for the jury confusing the issues and improperly relying on the other bad acts evidence even with a cautionary instruction by the court is substantial. In this case, as in ***Sullivan*** itself, "the danger of unfair prejudice [is] that the jurors would be so influenced by the other acts evidence that they would be likely to convict [Coria-Granados] because the other acts evidence showed him to be a bad man." ***Sullivan***,

216 Wis.2d at 790.

The State's argument also fails to come to grips with the court's conclusion that beyond being unfairly prejudicial, the danger that the evidence would confuse the jury as to what exactly it was supposed to be deciding substantially outweighed the minimal probative value of said evidence. A simple perusal of the complaint illustrates this danger vividly; from reading the probable cause section, it is difficult if not impossible to determine exactly which allegation the State intended to support each of the only two charged offenses. (R1: 1-7). Accordingly, admission of the other acts evidence proffered by the State can reasonably be viewed as raising the specter of a trial within a trial, confusing the issues in the eyes of the jury, which is an outcome the application of Wis. Stat. § 904.03 seeks to avoid. *See*, *e.g.*, ***State v. Ringer***, 2010 WI 69, ¶41, 326 Wis. 2d 351, 785 N.W.2d 448 (reversing trial court order allowing admission of prior allegedly untrue accusations of sexual assault by the alleged victim in part because the proof was so vague as to raise the danger of a trial within a trial, thereby confusing the issues the jury is to decide).

Given the weakness of the proof that the other acts even took place, the danger that the other acts evidence will result in five mini-trials within the trial of the actual action is real and substantial. The fact that the other acts evidence was only weakly supported, lacking in corroboration via either direct or circumstantial evidence, renders the court's conclusion that the probative value of the evidence was low reasonable. *See* ***Davidson***, 236 Wis. 2d 537, ¶77 (holding that "[t]he high degree of reliability of the evidence of the Cindy P. assault increased its probative value[,]" and implicitly holding that where, as here, the evidence of the other act is unreliable, the probative value of the other act is correspondingly decreased). When balanced against the above-discussed dangers of jury confusion and unfair prejudice, evidence of such low probative value thus fails the test mandated by Wis. Stat. § 904.03, and the circuit court was well within the limits of its discretion to so rule. *See* ***McGowan***, 291 Wis.2d 212, ¶23 (holding that where, as here, "the probative value of the evidence to prove a legitimate fact of consequence — which is not proof of the defendant's character — should be strong indeed[,]" and finding unfair prejudice required exclusion).

II. The circuit court's fact-finding was not clearly erroneous, and it properly exercised its discretion when it excluded from evidence the audiovisually recorded statement of Evelyn after application of the balancing test called for by Wis. Stat. § 908.08(4).

A. Standard of Review

Whether a recorded statement of a child between the ages of 12 and 16 is admissible despite not falling within an exception to the rule against hearsay and in the interest of justice under Wis. Stat. § 908.08(4) is a discretionary decision committed to the sound discretion of the circuit court. ***State v. Tarantino***, 157 Wis.2d 199, 211, 458 N.W.2d 582 (Ct. App. 1990). The circuit court's findings of fact will not be overturned unless they are clearly erroneous, ***id.***, and as with all discretionary decisions, the circuit court's decision must be upheld on appeal, even if this court would have balanced the factors listed in Wis. Stat. § 908.08(4) differently, so long as the circuit court examined the relevant facts of record, applied a correct standard of law, and reached a conclusion a reasonable judge could reach; indeed, this court is required to look for reasons to affirm the circuit court. ***Wiskerchen***, 385 Wis. 2d 120, ¶18.

B. The circuit court applied the correct legal standards to the State's motion to admit Evelyn's audiovisually recorded statement.

The circuit court here began by stating that because Evelyn was 13 years of age at the time of the motion hearing, her audiovisually recorded statement was presumed to be inadmissible. (R33: 4). Contrary to the State's argument, this was a correct statement of the law. Pursuant to Wis. Stat. § 908.01(3), hearsay is defined as an out of court statement offered to prove the truth of the matters asserted therein; because the audiovisually recorded statement does not qualify for either of the exemptions to that definition listed in Wis. Stat. § 908.01(4), it is clearly hearsay. Wis. Stat. § 908.02 clearly and succinctly states the general rule: "Hearsay is not admissible except as provided by these rules or by other rules

adopted by the supreme court or by statute." Finally, Wis. Stat. § 908.08(3) provides in relevant part that "[t]he court . . . shall admit the recording upon finding all of the following: [t]hat the trial or hearing in which the recording is offered will commence . . . before the child's 16th birthday and the interests of justice warrant its admission under sub. (4)." Wis. Stat. §§ 908.08(3)(intro), 908.08(3)(a), and 908.08(3)(a)2.

The State makes extensive arguments regarding the legislature's intentions in enacting this statute, all of which fail to refute the court's legal determination, based on the plain language of the relevant statutes, that the hearsay rule applies and creates a presumption of inadmissibility unless an exception applies; Wis. Stat. § 908.08 is clearly an "exception," and thus involves overcoming the presumption stated in Wis. Stat. § 908.02 of inadmissibility. The State's citation to ***State v. Lopez*** is unavailing; that case involved a defendant's attempted withdrawal of his pleas, and in discussing Wis. Stat. § 908.08 in that context, the court did so for the purpose of highlighting the prejudice to the State should Lopez have been allowed to withdraw his pleas:

> If Lopez were allowed to withdraw her pleas, the State could no longer admit the audiovisual recordings under § 908.08 and, thus, the purpose of the statute would be frustrated. Contrary to the purpose of the law, if Lopez were allowed to withdraw her pleas, A.O.'s "mental and emotional strain" would be maximized rather than minimized.

State v. Lopez, 2014 WI 11, ¶89, 353 Wis.2d 1, 843 N.W.2d 390.

In fact, and fatally to the State's argument that the circuit court applied an incorrect legal standard, ***Lopez*** rather clearly supports the circuit court's ruling that there is a presumption of inadmissibility absent a finding that admission of the recording would be "in the interests of justice." *See* Wis. Stat. § 908.08(3)(a)2. This is so because the court in ***Lopez*** clearly presumed inadmissibility of the recorded statement at issue there due to the fact that the recording would at that point, due to the child's having reached her 16th birthday, be presumptively inadmissible. *See* ***Lopez***, 353 Wis.2d 1, ¶81, 88 (noting that the alleged victim would be turning 16 two months after the hearing on Lopez's motion for plea withdrawal, and

stating that "The plain language of Wis. Stat. § 908.08 should mean something. Section 908.08 makes no room for admission of the recordings once the child turns age 16. *If audiovisual recordings could otherwise be deemed admissible and presented to the jury in the same way regardless of age, the limitations and the factors listed in § 908.08(4) would be of little significance*.") (emphasis added). The emphasized language clearly means that there is in fact a presumption of inadmissibility attached to a recorded statement of a child between the ages of 12 and 15 which can only be overcome by either a finding that admission would be in the interest of justice after application of the factors listed in Wis. Stat. § 908.08(4) or by a separate finding that the recording satisfies some other hearsay exception or exemption. The State's argument to the contrary fails.

C. The circuit court's findings as to the factors listed in Wis. Stat. § 908.08(4) were not clearly erroneous, and it did not erroneously exercise its discretion in finding that the interest of justice would not be served by admitting Evelyn's recorded statement.

The State argues that the circuit court's factual findings with respect to the factors listed in Wis. Stat. § 908.08(4) were clearly erroneous, specifically challenging the court's findings (1) that Evelyn did not blame herself for Coria-Granados's conduct and (2) that admitting the recording would not reduce the strain of testifying for Evelyn. (State's Br. at 28-29). The State, before developing its argument, then argues further, and erroneously, that due to the existence of the recording in the record, this court reviews the circuit court's exercise of discretion *de novo*, citing ***State v. Jimmie R.R.*** for that proposition; this is false, as ***Jimmie R.R.*** was concerned only with review of the circuit court's factual findings, not its ultimate exercise of discretion. ***State v. Jimmie R.R.***, 2000 WI App 5, ¶39, 232 Wis.2d 138, 606 N.W.2d 196 (addressing only the question whether a child understood that false statements are punishable, as is required by Wis. Stat. § 908.08(3)(c), and ruling that videorecording in the record allows appellate court to review factual findings regarding the videorecording *de novo*).

As to whether Evelyn blamed herself for Coria-Granados's conduct, the State's argument relies upon record citations that, far from demonstrating that the circuit court was in error when it found that Evelyn did not blame herself for Coria-Granados's conduct, clearly indicate that she laid blame with him, where it belongs. For example, the State notes that when asked why she was at Safe Harbor being interviewed, Evelyn stated that, in the State's words, "she was there to talk about *someone who had done something that **he** was not supposed to do.*" (R35: 9:53). Further, she identified Coria-Granados as that "someone." (R35: 9:55-9:56). Clearly, Evelyn blamed Coria-Granados for what happened to her, and nothing else about her Safe Harbor interview suggests otherwise. The other examples cited by the State in support of its argument merely demonstrate further that Evelyn remained angry with *Coria-Granados* regarding what she alleged he had done to her.

Before continuing, it is necessary to repeat the entirety of the State's findings regarding each of the Wis. Stat. § 908.08(4) factors as well as its ultimate ruling, as the State only selectively cites them in its brief. The circuit court properly addressed and found facts as to each factor before making its ruling:

> First, the child's chronological age is 13, so she is between ages 12 and 16, which means that the presumption is that the audiovisual recording does not come in. The Court must find that it is in the interest of justice to let it in.
>
> B, the child's general physical and mental health. I have reviewed, again, the recording and she looks to be in fine physical and mental health.
>
> C. Yes, the events about which the child is talking do constitute criminal conduct against the child.
>
> D, the child's custodial situation. That is with her parents, not with the defendant.
>
> E, the familial or emotional relationship. The defendant, according to the child, was a close friend of the family and she had known him, wow, for a very long time. I'm not sure if it was her entire life or short of that, but it was a long time.

F, the child's behavior at a reaction to previous interviews. Again, I saw the Safe Harbor tape. It is, you know, clear that the child is affected, but she was able to clearly and articulately answer questions. She seems like a very bright child, quite frankly.

G, whether the child blames herself for the events involved or has ever been told by any person not to disclose them.

I believe, Ms. LaSpisa, you can correct me on this, but I believe she indicated she was told by the defendant not to disclose. Am I right on that?

MS. LaSPISA: I believe so, but I have -- I haven't watched the video since I've been on vacation, so I do apologize. And I would just note, in your last statement regarding the Safe Harbor and being able to testify, that was in a developmentally sound child-friendly environment, which is different than the courtroom.

THE COURT: Of course.

All right. I did not see the child blaming herself for the defendant's conduct.

H, whether the child manifests symptoms associated with post-traumatic stress disorder or other mental disorders. I've not been provided, I believe -- the State's motion indicates that the child has been having nightmares, mood changes, problem concentrating.

And I, whether the 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. It would just be one time testifying. It would not reduce the number of times because she would be brought in for cross-examination and she would have to go over the whole story all over again through cross even if it was put in as her direct. So I don't, quite frankly, see that it would reduce any strain.

Again, when I viewed this video, I was actually taken by her ability to compose herself, her ability to articulate what happened, her ability to understand that it was not her fault. Coming into a courtroom is difficult for everyone, be they adults or children. It is a nerve-racking sort of situation, but I don't think that her nervousness rises to the level of interests of justice, so I am going to deny the State's motion.

(R33: 4-7). The State, despite quibbling with virtually all aspects of the circuit court's fact-finding, does not allege that any of the court's findings other than its findings that Evelyn did not blame herself for Coria-Granados's conduct and that admission of the recording would not significantly reduce the strain of testifying were clearly erroneous. Accordingly, the State has conceded that the circuit court's factual finding with respect to the factors listed in Wis. Stat. §§ 908.08(4)(a) to (f) and (h) was not clearly erroneous. *See* ***A.O. Smith Corp. v. Allstate Ins. Companies***, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998) (stating that "an issue raised in the trial court, but not raised on appeal, is deemed abandoned[,]" and further stating that "a party does not adequately raise an issue when it does not raise that issue in the brief-in-chief."); *see also* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 Wis.2d 633 (Ct. App. 1992).

Contrary to the State's assertions, the sections of the recording it cites for the proposition that Evelyn blames herself for Coria-Granados's conduct clearly indicate that she in fact blames *Coria-Granados* for his conduct. First, Coria-Granados hadn't done anything to Evelyn prior to the trip to Milwaukee which the State highlights. Second, Evelyn expressly mentioned that she did not ask for Coria-Granados to touch her. Third, Evelyn expressed outrage that Coria-Granados wouldn't explain to her why he had done what he allegedly had done. Fourth, the State's speculation about the meaning of Evelyn walking significantly behind Coria-Granados on the way back to the hair salon is just that, speculation, and further, more plausibly indicates that she knew immediately that what Coria-Granados had allegedly done was wrong, cutting against any finding that she blamed herself for what he did. Fifth, and finally, Evelyn's exclamations that she was "only 11" and that Coria-Granados was bigger than her further indicate that she fully recognizes that the alleged assault was not her fault, but rather that blame for it falls squarely on Coria-Granados's shoulders. *See* State's Br. at 33-34. Accordingly, the circuit court's finding that Evelyn did not blame herself for the alleged assault on her was not clearly erroneous.

Finally, and again contrary to the State's arguments, the circuit court quite properly considered how composed and articulate Evelyn appeared during her interview; whether she

could discuss these matters, which are deeply personal and embarrassing, with a stranger she had only just met in a composed and articulate manner, as she clearly in fact was able to do, is quite relevant to whether testifying on direct, as opposed to solely on cross and redirect, *see* Wis. Stat. § 908.08(5)(a), would constitute too great a strain upon her. *See* Wis. Stat. §§ 908.04(4)(i). The circuit court's conclusions were not clearly erroneous as to either factual finding the State actually alleges was clearly erroneous. The circuit court's other factual findings are likewise supported by the record, and as such, are not themselves clearly erroneous either.

Ultimately, the State's argument amounts to a long-winded complaint about the circuit court's balancing of the factors here, and in particular, about the weight the court gave to the factor regarding whether admission of the recording would reduce the strain of testifying for Evelyn. This is clearly a nonstarter when, as here, the State is attacking the circuit court's exercise of discretion. *See, e.g.*, ***Tarantino***, 157 Wis.2d at 210-11 (rejecting assertion that circuit court's discretionary decision admission of recording would be in the interest of justice was clearly erroneous despite the fact the court weighed two of the factors under Wis. Stat. § 908.08(4) much more heavily than the others). The State cannot show an erroneous exercise of discretion where, as here, the circuit court examined the relevant facts, applied the proper legal standard, and came to a conclusion a reasonable judge could reach, or at least it cannot do so based on its disagreement with the weight the circuit court gave to each factor. *See* ***State v. Huntington***, 216 Wis.2d 671, 680-81, 575 N.W.2d 268 (1998).

Finally, and as is noted above, this court is not at liberty to exercise its own discretion *de novo* regarding the ultimate discretionary determination made by the circuit court, namely, whether admission of the recording would be in the interest of justice as required under Wis. Stat. § 908.08(3)(a)2., and because the circuit court did in fact examine the relevant facts, apply the proper legal standards, and come to a decision a reasonable judge could reach, its determination on this issue must be upheld by this court, even if it would have weighed the factors differently had it been in the circuit court's shoes. *See* ***Wiskerchen***, 385 Wis. 2d 120, ¶18. Accordingly, this court should affirm the circuit court's decision denying the State's

Wis. Stat. § 908.08 motion.

CONCLUSION

For the reasons discussed in this brief, the defendant-respondent respectfully requests that the court reject the State's arguments and instead affirm the circuit court's determinations denying the State's motion to admit other acts evidence and denying the State's motion to admit the audiovisual recording of Evelyn's statement under Wis. Stat. § 908.08.

Respectfully submitted 7/27/2020:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,846 words.

Dated 7/27/2020:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). 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 7/27/2020

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CERTIFICATION REGARDING APPENDIX

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 Section 809.19(2)(a), Stats., and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (4) 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.

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

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