STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2021AP174-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MICHAEL T. DEWEY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND THE DENIAL OF A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN CIRCUIT COURT FOR MONROE COUNTY, HONORABLE TODD L. ZIEGLER PRESIDING

BRIEF OF DEFENDANT-APPELLANT

David R. Karpe
Attorney No. 1005501
Karpe Law Office
448 West Washington Avenue
Madison, Wisconsin 53703
Tel. (608) 255-2773
ATTORNEY FOR DEFENDANT-APPELLANT

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Questions Presented

1. Did the trial court err by denying the defense pretrial motion to dismiss due to vagueness?

The trial court found that there was sufficient notice to the defendant due to the nature of the charges.

The Court of Appeals should reverse because Mr. Dewey was not put on adequate notice of the charges so as to defend against them

2. Did trial counsel provide ineffective assistance of counsel by not objecting to the form of jury instructions with extended and divided charging periods?

The trial court found that there was no ineffective assistance of counsel because the law is unsettled on the question.

The Court of Appeals should hold that the question is not unsettled, and should reverse.

3. Should the Court order a new trial because the jury instructions contained plain and fundamental error?

The Court of Appeals should hold that error is plain and fundamental.

Statement on Oral Argument and Publication

Mr. Dewey does not oppose publication or oral argument.

Statement of the Case

The Defendant-Appellant, Michael Dewey, appeals from a conviction and sentence after a jury trial in Monroe County, which resulted in convictions for thirty-six counts, including Repeated Sexual Assault of the Same Child, in violation of Wis. Stat. § 948.025, nine counts of First Degree Sexual Assault of a Child, in violation of Wis. Stat. § 948.02, fourteen counts of Exposing Genitals to a Child, in violation of Wis. Stat. § 948.10 (eight counts were

felonies, six were misdemeanors), two counts of Incest with a Child, in violation of Wis. Stat. § 948.06, four counts of Child Enticement, in violation of Wis. Stat. § 948.07, and one count of False Imprisonment, in violation of Wis. Stat. § 940.30. R160, R161, *but see* R207 and R208.[1] Mr. Dewey brought two motions for postconviction relief, the first one of which resulted in dismissal of the six counts charging Repeated Sexual Assault of the Same Child under Wis. Stat. § 948.025. R182, R190, R192, R193.

The case began on November 7, 2014, when the State filed a criminal complaint charging Mr. Dewey. R4. Preliminary hearing took place on December 4, 2014, and the circuit court bound Mr. Dewey over for trial. R10, R266. An information was filed, which was amended three times. R12, R37, R71, R81. The fourth version of the

[1]This brief will use the following system for citing to the record: R followed by the item's number according to the clerk's record followed, if applicable, by a colon and page number, *e.g.*, R262:24 for the twenty-fourth page of the June 10, 2016 sentencing transcript.

information, that is, the third amended information, was filed on the morning of the second day of trial, April 12, 2016, R274:6,[2] and charged Mr. Dewey with the following crimes, the first 28 counts naming TCE as a victim and counts 29 through 36 naming CRC as a victim:

Count 1: § 948.02 sexual assault of a child against TCE (born 9/3/99) occurring from 3/9/05 to 12/31/05 (residence on East Veterans street).

Count 2: § 948.025 repeated sexual assault of a child against TCE, same dates as count one (residence on East Veterans street).

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[2]The difference between the amended information filed April 8, 2016, R71, and the one filed on April 12, 2016, R81, is that the April 8, 2016 information was missing dates from counts 31 through 36 that had been in the first amended information filed November 4, 2015, filed the day before the hearing on the defense motion to dismiss. R37. The omission in the April 8 version appears to have been accidental. The original information charged that counts 31-36 had been committed "on or between September 2, 2010 and September 2, 2012." R12:7-8.

Count 3: § 948.10 exposing child's genitals, against TCE, same dates as counts one and two (residence on East Veterans street).

Count 4: § 948.10 exposing own genitals, against TCE, same dates as counts one, two and three (residence on East Veterans street).

Count 5: § 948.025 repeated sexual assault of a child against TCE, occurring from 8/1/06 to 12/1/07 (residence on East Veterans street).

Count 6: § 948.02 sexual assault of a child against TCE, same dates as count five (residence on East Veterans street).

Count 7: § 948.07 child enticement against TCE, same dates as counts five and six (residence on East Veterans street).

Count 8: § 948.10 exposing genitals, against TCE, same dates as counts five, six and seven (residence on East Veterans street).

Count 9: § 948.10 exposing genitals, against TCE, same

dates as counts five, six, seven and eight (residence on East Veterans street).

Count 10: § 948.02 sexual assault of a child against TCE, occurring from 1/1/06 to 12/31/06 (Village of Oakdale).

Count 11: § 948.02 sexual assault of a child against TCE, same dates as count ten (Village of Oakdale).

Count 12: § 948.10 exposing genitals, against TCE, same dates as count ten and eleven (Village of Oakdale).

Count 13: § 948.10 exposing genitals, against TCE, same dates as count ten (Village of Oakdale).

Count 14: § 948.02 sexual assault of a child against TCE, 11/9/10-2/9/11 "or between 6/16/11 and 9/2/11" (oral sexual intercourse, at Hollister Avenue residence).

Count 15: § 948.02 sexual assault of a child against TCE, same dates as count 14 (sexual intercourse).

Count 16: § 948.10 exposing child's genitals, against TCE, same dates as counts 14 and 15 (at Hollister Avenue residence) (at Hollister Avenue residence).

Count 17: § 948.10 exposing own genitals, against TCE,

same dates as counts 14, 15 and 16 (at Hollister Avenue residence).

Count 18: § 948.025 repeated sexual assault of a child against TCE, occurring from 9/2/10 to 9/2/12 (at Hollister Avenue residence).

Count 19: § 948.02 sexual assault of a child against TCE, occurring from 9/3/11 to 9/2/12 (at Hollister Avenue residence).

Count 20: § 948.07 child enticement, 9/3/11-9/2/12 (same time frame as count 19) against TCE (at Hollister Avenue residence).

Count 21: § 948.10 exposing child's genitals, against TCE, same dates as counts 19 and 20 (at Hollister Avenue residence).

Count 22: § 948.10 exposing own genitals, against TCE, same dates as counts 19, 20 and 21 (at Hollister Avenue residence).

Count 23: § 948.02 sexual assault of a child (force or violence) against TCE, occurring on 9/10/13 (Village of

Kendall).

Count 24: § 948.025 repeated sexual assault of a child against TCE, occurring from 1/1/13 to 12/31/13 (Village of Kendall).

Count 25: § 948.07 child enticement, against TCE, same date as count 23 (Village of Kendall).

Count 26: § 940.30 false imprisonment, against TCE, same date as counts 23 and 25 (Village of Kendall).

Count 27: § 948.10 exposing genitals, against TCE, counts 23, 25 and 26 (Village of Kendall).

Count 28: § 948.10 exposing genitals, against TCE, occurring on 9/10/13 (Village of Kendall).

Count 29: § 948.025 repeated sexual assault of a child against CRC (born 8/2/03) occurring from 1/1/13 to 12/31/13 (Village of Kendall).

Count 30: § 948.06 incest against CRC, occurring from 1/1/13 to 12/31/13 (Village of Kendall).

Count 31: § 948.025 repeated sexual assault of a child against CRC, occurring from 1/1/10 to 6/10/10 or "on or

between" 11/9/10 and 2/9/11 or "on or between" 6/16/11 and 12/31/11 (at Hollister Avenue residence).

Count 32: § 948.02 sexual assault of a child against CRC, same dates as count 31 (at Hollister Avenue residence).

Count 33: § 948.06 incest against CRC, same dates as counts 31 and 32 (at Hollister Avenue residence).

Count 34: § 948.07 child enticement, against CRC, same dates as counts 31, 32 and 33 (at Hollister Avenue residence).

Count 35: § 948.10 exposing genitals, against CRC, same dates as counts 31, 32, 33 and 34 (at Hollister Avenue residence).

Count 36: § 948.10 exposing genitals, against CRC, same dates as count thirty-one (at Hollister Avenue residence).[3] R81.

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[3]As previously noted, Mr. Dewey was found guilty at trial on all counts, but the circuit court dismissed the counts charging violations of Wis. Stat. § 948.025 based on Mr. Dewey's first motion for postconviction relief. R197, R204, R206, R207, R278.

On August 19, 2015, the defendant filed a motion to dismiss counts one through twenty-two, twenty-four and twenty-seven through thirty-six,[4] along with a brief, challenging the reasonableness of the charging scheme in those charges that did not contain a specific date.[5] R25, R27. The circuit court entered an order regarding that motion on September 14, 2015, ordering that the State would be granted "time to narrow down the window of the allegations if possible" and that the state would submit either a letter or an amended information by September 30, 2015. R31. The State submitted a letter-brief on October 7, 2015, arguing that "the charging ranges on all of the counts in the information [were] sufficiently stated to allow the defendant to plead and prepare a defense ..." R32:1.

[4]The motion says "27-26," an obvious typographical error. R27.

[5]In its reply brief, the defense argued that counts 23, 25, 26, 27, 28 were the only counts that should survive the motion to dismiss, but discussed the option that the court order the State to define the allegations with greater accuracy. R33:3.

The State asserted that *State v. Hurley*, 2015 WI 35, 361 Wis.2d 529, 861 N.W.2d 174, supported its position. R32:2-5.

On October 9, 2015, the defense filed a response maintaining that the facts and circumstances of *Hurley* were so different that it did not control this case. R33. On November 4, 2015, the State filed an amended information. R37. That charging document narrowed down the time frame on some of the counts: counts one through four had a somewhat narrower time frame: March 9, 2005 to December 31, 2005, instead of all of 2005. The time frame on counts 14 through 17 was narrowed down to a period from November 9, 2010, to February 9, 2011, "or between June 16, 2011 and September 2, 2011, instead of the earlier version's time frame of September 3, 2010 to September 2, 2011. The time frame for counts 31 through 36 was somewhat narrowed down to January 1, 2010, to June 1, 2010, or "on or between" 11/9/10 and 2/9/11 or "on or between" 6/16/11 and 12/31/11. R30.

At a November 5, 2015 motion hearing, the State explained the amendments were "based on the recent conversations that Detective Brose had with the victims," R264:5, and went on to say "I don't know that it really makes the issues presented by the defense moot or anything like that. They're still relatively broad ranges of these charging dates." R264:5-6. Defense counsel confirmed that the amendments did not alter the defense position on this issue: "I realize it did shorten the gap in some of them. But in our view, there're still some pretty significant gaps that were not addressed that were part of the motion." R264: 6.

The court denied the motion orally, R264:13-14 ("So, I'm not granting the defense's motion to dismiss to dismiss any of the counts"), conducting the following analysis:

> The defense alleges that the time frames alleged violate the defendant's right to due process to prepare an adequate defense, and that the acquittal would not bar another prosecution for the same offense ... The law is clear that I have to address the seven factors under [*State v.*] *Fawcett,* [145 Wis.2d 244, 426 N.W.2d 91

> (Ct. App. 1988) and *State v.*] *Hurley*, [2015 WI 35,] 361 Wis.2d 529[, 861 N.W.2d 174].

R264:6, 8-9.

Comparing the case at bar with *Hurley,* the judge said,

> *Hurley* is a similar case in many respects. That case determined that the age, that the range didn't violate the defendant's rights with an approximate five-year time frame with 26 alleged acts over that time frame. It is noted ... that the count or counts [in *Hurley*] were repeated sexual assault of a child which in this case we have some of those counts; we also have other counts that are specifically sexual assault or exposing genitals, etc.
>
> Going over the *Fawcett* factors, first is the age and intelligence of the alleged victim, in this case victims. Here TCE was alleged to be assaulted from the ages of five through 14. TCE would've just turned 16. CRC, the alleged assaults occurred between the age of 7 to 10, and CRC is now 12. As far as comparing it to the *Hurley* case, which I think is the most pertinent case that I have, similar ages of the behavior, or alleged incidences starting for the two as in the alleged or the victim in *Hurley*. Also similar that father, stepfather is alleged to have committed

> supporting delay in reporting. We also have some repeated sexual assaults somewhere early, even more repeated with TCE. I know this is a discrepancy in the complaint or different versions, I believe, that at one point TCE alleged that it happened approximately 80 total times with Mr. Dewey. CRC, I believe, used the number 77 times. That's significantly more than the 26 times of the *Hurley* case.

R264:9-10.

The judge went on to say that he lacked information regarding the intelligence of the accusers, except to say, "There is nothing that specifically sticks out that they're not of average intelligence or they're not as well beyond average intelligence. So that factor looks to the court very similar to *Hurley*, so that in the court's opinion ways in favor of the state." R264:10. The judge then proceeded to consider the second and third *Fawcett* factors together, following the procedure the court believed the court had followed in *Hurley*. The court stated the factors as "the surrounding circumstances and the nature of the offense including whether it is likely to occur at a specific time or is likely to

have been discovered immediately." R264:10

The court continued to compare the facts of the case to *Hurley*:

> There is some similarities in that there is the victim or alleged victim living together similar to *Hurley*, as the children would have lived with Mr. Dewey for the majority of the time. I know there is some dispute as to the extent of that, but I don't think there's disputing that they live with they lived with Mr. Dewey a good majority of the time. No one was present witnessing the assaults obviously or alleged assaults. I believe there is some allegations that suggest family could have been in the home at the time. As pointed out in *Hurley*, child molestation often encompasses a period of time and a pattern. A singular date is not likely to stand out except I would like to note TCE remembered the similar date with count 23 which is not an issue ... So we have some alleged dissuasion of reporting vulnerability and not likely being discussed immediately.
>
> The fourth factor is the length of the alleged period of time in relation to the number of criminal acts [discussed above] TCE is 80 times over ... eight or nine years.

R264:10-11.

The court also referred to acts alleged to have occurred in a different county. "The longest time frame [of a single count] was up to two years, but I think that time frame was cut down in counts 31 through 36. As *Hurley* points out, this length of time in relation to the number of criminal acts goes more at credibility and weight of testimony. This is not the type of situation that lends itself to an alibi defense." R264:12.

Regarding the remaining *Fawcett* factors, the judge said,

> Factors five and six of the passage are of time since alleged and the period of time of arrest him the time of the complaint. This varies for TCE for less than a year up to nine years or so depending on the count. CRC is less than a year to about four years as far as the time from complaint to arrest the time is alleged to have occurred. I'm not finding any improper purposes necessarily for delay ... I don't see anything that suggests it affects greatly the ability to present a defense, again there is no alibi is not the likely scenario in this ... Finally, the seventh factor is the ability of alleged victim to particularize a date and time of the offenses. The *Hurley* case points out that the ability to

> recall details in this type of situation is very limited. They were able to recall where [they were] living for the most part when they occurred, where they occurred ... I think the *Hurley* case from my perspective makes it very clear that this is not too wide of a time frame for these scenarios.

R264:12-13.

The case proceeded to trial on April 11, 2016, lasting four days. R273-R276. The State's first witness was DC, the mother of the two alleged victims, TC and CC. R273:123. Michael Dewey is the father of the younger child, CC, who was 12 years old at the time of the trial. Id. DC was in a relationship with Mr. Dewey for 12 years, from 2000 to 2014, during which time they changed residences. R273:124-125. Prior to breaking up with Mr. Dewey, DC never saw signs that the children were being abused. R273:131. The accusations began arising after the couple broke up, when Mr. Dewey reported to the child protective authorities that DC had allowed the children to use alcohol. R273:128. This accusation upset DC, but she

testified that she had never told the boys to accuse Mr. Dewey of anything in order to get him into trouble. R273:129. It was around of the time of this dispute that CC first told DC that Mr. Dewey had sexually assaulted him. R273:128. The boys still saw Mr. Dewey as a father figure even after the accusations were made. R273:130. There was a dispute as to whether DC told the detective investigating the case that TC said he would kill Mr. Dewey when TC found out that Mr. Dewey had assaulted TC's brother — DC said she told the detective that TC did not make such a threat. R273:132.

DE, the father of TC, testified that he learned about the sexual assault accusation from a message on FaceBook. R273:140. He took TC to the sheriff's office to make an official report. Id. Prior to the FaceBook message, TC had denied that he had been touched sexually. R273:141. DE denied he had any problems regarding visitation with his son. R273:141.

CC testified that Mr. Dewey was his father.

R273:156. He told the detective that Mr. Dewey made CC rub Mr. Dewey's "thingy" and put the thingy in CC's mouth. R273:159-160. He estimated that when he was in the fourth grade, Mr. Dewey assaulted him seventy-seven times, always in the "butt" and not in the mouth. Assaults also happened in Janesville and in Elroy. R273:162-3. When CC was in the first grade, he told his mother that Mr. Dewey had assaulted him, but she did not believe him. R273:167. CC admitted to making inconsistent statements about when the assaults started, that is whether it started when he was three to four years old, or five to six years old. R273:168-9. He did not report the assaults because he feared he would be in trouble for causing his parents to break up. R273:171-4.

Betsy Parr, a social worker with Monroe County Social Services testified about her involvement in the case. R274:14(190)[6]. She conducted cognitive graphic interviews

[6]The trial transcript has two page numbering systems – a running total of the whole trial (reporter's system), and a page

of the boys, which meant that she did not ask about particular details of the assaults. R274:24(200). She also discussed the abuse accusation against the boys' mother, and reported that such accusation had been ruled as "unsubstantiated" by her agency. R274:30-35(206-211). There were no health issues that she determined, and the fact that the mother gave the boys alcoholic beverages was not grounds for protective service involvement, because state law permits parents to let their children drink alcohol. R274:35(211).

TE was the next witness. He testified that Mr. Dewey, his step-father, started raping him when the family lived in Hollister, when TE was three or four years old. R274:47(223).

TE testified that CC was his brother. R274:37(214). Mr. Dewey, CC's biological father, lived with TE, CC and their mother "off and on." R274:37-38. TE stated he lived

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number per volume (clerk's system). Where it is appropriate, I will put the reporter's system in parentheses.

in an apartment on Veteran's Road in Tomah, but never lived in the building in Oakdale where Mr. Dewey and TE's father lived together. R274:38-39(214-215).

Mr. Dewey would rub TE's genitals in the basement of their home on Hollister Avenue, and he usually did it when the two of them were alone in the house. R274:47-48(223-224). It happened no more than once a month, but increased in frequency over time, and accelerated into oral and anal sex. R274:48-49(224-225). TE estimated that he was 6 or 7 years old at the time, and the assaults took place mostly in the summer, but also on weekends in the winter. R274:49 (225). When they were living on Veterans Street, in 2006 or 2007, there were assaults about every week, oral and anal, taking place in Mr. Dewey's bedroom. R274:50 (226).

When TE was in the second or third grade, Mr. Dewey lived at the Oakdale Motel. R274:52(228). The assaults here were oral and anal, but unlike the previous oral assaults, Mr. Dewey did not have TE put TE's penis in Mr.

Dewey's mouth. R274:53(229).

They both moved back to the Hollister house when TE was in the fourth grade, in 2009-2010. R274:54-55(230-231). Over the course of about a year, Mr. Dewey decreased the frequency of the assaults to ten to fifteen episodes because he detected that TE's grandparents were suspecting something was amiss. R274:55 (231).

Isadora Luther, a LaCrosse emergency room nurse, testified that she conducted SANE (Sexual Assault Nurse Examiner) examinations of both boys in October 2014. R274:106-112 (282-288). She obtained verbal accounts regarding the assaults, and examined for any acute injuries but did not note any, and she did not examine the boys' rectums. Id. She opined that injuries from an assault occurring a month or more previously would have healed by the time she performed her examination. R274:113 (289).

The next witness was Dr. Kelly Kline, a Tomah pediatrician, who testified that is was not uncommon for victims of sexual assault to lack physical symptoms of the

abuse, even when children are penetrated. R274:122 (298). She examined the boys on October 8, 2014, a week after their emergency room visit in Lacrosse. R274:124 (300). CC told her that Mr. Dewey had penetrated his mouth with Mr. Dewey's "dingaling" and after some vacillation, also told her that Mr. Dewey had anally penetrated him "a while ago." R275:125 (301). CC said the assaults stared when CC was five or six years old. Id. The doctor examined CC and found no physical evidence of sexual assault. R274:127.

Dr. Kline also examined TE, who said the last incident of sexual conduct had occurred about a month and a half prior to October 8, 2014. R274:128 (304). TE also reported that Mr. Dewey had put his "dingaling" into TE's "bunghole," made TE suck Mr. Dewey's penis and swallow the ejaculate, and threatened to cut off TE's hands or penis. Id. TE denied rectal pain, but his anus dilated when the doctor examined it, which she found "suspicious" and consistent with repeated anal penetration, although there

were other possible explanations that the doctor ruled out, e.g., anesthesia or constipation. R274:131. On cross-examination, the doctor acknowledged that there was a lack of other indications of anal penetration in TC that have occurred in other victims such as fissures or tags. R274:134 (310).

Defective John Brose of the Monroe County Sheriff next testified that he interviewed TC in October 2014 about the allegations of sexual assault. R274:139 (315). The detective prepared a time line based on that interview, which was introduced as an exhibit at trial. R105.

Alyssa Crain, a digital forensic examiner with the Wisconsin Department of Justice, testified that she examined records taken from hard drives from Mr. Dewey's computers and found that he had visited, *inter alia*, "daddy raped me" and "amazing-studs-fucking-n-sucking" websites in July 2013. R274:171-173 (347-349). With that, the State rested. R275:28 (387).

The defense's first witness was Dr. David Thompson,

a psychologist who testified about the mechanism of memory processing. R275:33 (392). He opined that he disagreed with the opinion of Officer Brose that no specialized interview was necessary for TE. R275:40 (399). Dr. Thompson expressed concerns about the way that TE and CC were interviewed. R275:42 (401). For example, that multiple interviews were conducted had the potential to change the memory of the complainants. R275:43 (403). It was clear to the witness that TE and CC had discussed the accusations with each other. R275:43 (402).

Dr. Thompson noted that Officer Brose deviated from proper interview technique with TE by providing sympathetic statements and might tend to provoke what is called "negative stereotype induction. R275:45 (404). The examiner who interview CC also violated principles of forensic interviewing by using leading questions, thus providing CC with the information that she was seeking. R275:46 (405).

Dr. Thompson testified about source misattribtuion

error and source monitoring errors that could taint a child's memory so as to cause the child to believe a false event happened. R275:50(409).

Mr. Dewey testified on his own behalf. R275:115 (474). He testified that he was in an on-and-off relationship with the boys' mother, Demia. R275:117 (476). He got upset when he found out that the boys were consuming alcohol. Id. Mr. Dewey told Demia he was going to fight for custody of CC. R275:120.

Mr. Dewey agreed to give his computers to the police to examine. R275:121. Demia had given him the picture of one of the boys standing in just his briefs. Id. He did not take that photo. Id. Mr. Dewey also denied that he had conducted the "daddy raped me" Bing search or downloaded child porn. R275:122. He testified that friends of his, Donovan Williams and Kristin Ball, had access to the computers. R275:123. On cross-examination, he discussed that other people used him computers as well. R275:155(514).

Mr. Dewey presented his timecard from work, showing that on August 26, 2014, the day that TE testified that the last assault had occurred, Mr. Dewey had punched into work at 7:55 a.m. and punched out at 4:30 p.m. R275:125.

Mr. Dewey testified there was animosity between himself and TE's father over what kind of discipline should be used. R275:132. Mr. Dewey denied any kind of sexual conduct or threats between him and TE or CC. R275:133-134.

On cross-examination, Mr. Dewey expressed that he had been expelled from the Hollister address for infractions like having firecrackers and beer. R275:137. While he was separated from Demia, she would nonetheless bring the boys over for visits to Mr. Dewey's residence. R275:139. He knew what the allegations against him were from Demia when he spoke to Detective Brose. R275:141(500). Mr. Dewey had trouble remembering dates, but he remembered what had happened on August 26, 2014. R275:144(503).

He found out about the allegations in September 2014, and he was waiting for law enforcement to contact him about those allegations. R275:146 (505). He had contacted social services about the drinking allegations in August 2014, but did not contact the social worker in October to try to re-establish contact with eh boys. R275:147 (506).

The State's case consisted of the testimony of Donovan Williams and Kirsten Ball. Ms. Ball testified that she had never used Mr. Dewey's computer. R276:53 (599). Mr. Williams testified that he had not downloaded porn or done searches for child porn on Mr. Dewey's computer. R276:46-48 (602-604).

During the jury instructions conference, there was discussion about the charging periods that would be read to the jury, and defense counsel stated, "I think [the charging period for counts thirty-one through thirty-six] has to be left as is." R276:25 (581). The defense did not object to the instructions or the verdict forms. R276:38 (594).

The court read the jury instructions to the jury,

including the elemental instructions for counts 31 through 36, that these offenses took place, "on or between January 1, 2010, and June 10, 2010, or on or between November 9, 2010, and February 9, 2011, or on or between June 16, 2011, and December 31, 2011, at a residence on Hollister Avenue in the City of Tomah" R276:89-87 (645-653).

The jury was sent out at 2:26 p.m. R276:153(709). The jury sent a note about five hours later indicating they were "deadlocked" and requesting to review the recorded interviews of both victims. R726:159 (715). No party objected, so the portions of the interviews that had been played earlier were re-played. R276:163-168 (719-724). Two hours later, the verdicts came in, finding Mr. Dewey guilty of all charges. R276:170 (726).

The court ordered that a presentence investigation report be prepared. R146. R147. Sentencing took place on May 19, 2017. R149-R158. The court sentenced Mr. Dewey to nine months jail, concurrent to thirty-five years in prison on counts 1,2,5,6, 10, 11, 14,15,18 and 23, 24, 29,

31 and 32 years, consisting of twenty-five years of initial confinement and ten years of extended supervision, some counts to run consecutively, some concurrent, for a controlling sentence of 210 years, as all the other sentences ran concurrently with the controlling sentences. R160, R161.

Mr. Dewey filed a motion for postconviction relief on February 28, 2018. R197. In that motion, he requested relief in the form of dismissal of the § 948.025(1) counts (counts 2, 5, 18, 24, 29 and 31) on grounds that those convictions violated § 948.025(3), and also violate the jeopardy clauses of the Fifth Amendment of the United States Constitution and Article I, Section 8 (1) of the Wisconsin Constitution. Because there had been no specific objection by trial counsel to the violations of Wis. Stat. § 948.025(3), Mr. Dewey alleged that trial counsel's specific acts or omissions were outside the wide range of professionally competent assistance under *Strickland v. Washington,* 466 U.S. 668, 690 (1984). Id.

The circuit court held a hearing on that motion on July 26, 2018. R278. At that hearing, the State, by District Attorney Kevin Croninger, announced that although the State did not agree that ineffective assistance of counsel had occurred, the State would nonetheless agree that the §948.025(1) counts be dismissed. R278:2-4. After a discussion among the parties and the judge regarding whether it was necessary to have an evidentiary hearing on the issue of ineffective assistance of counsel in view of the State's concession, the judge found that under § 948.025(3) and *State v. Cooper*, 2003 WI App 227, 267 Wis.2d 883, 672 N.W.2d 118, the counts charged under § 948.025(1) should be dismissed. R278:11. The circuit court entered an order dismissing counts 2, 5, 18, 24, 29 and 31 on August 21, 2018. R206. That issue is thus not raised as part of this appeal, as the circuit court granted the relief without objection by the State.

Mr. Dewey filed a notice of appeal on August 28, 2018, to address other issues that were preserved, R209, but

voluntarily dismissed that appeal so that he could file a second motion for postconviction relief raising a jury unanimity claim regarding counts thirty though thirty-six, which claim had not been raised during trial. R235.

Mr. Dewey filed his second motion for postconviction relief on February 25, 2020. R237. The circuit court held an evidentiary hearing on that motion on October 23, 2020, but denied that motion orally on January 7, 2021, R250, R282, entering a written order denying the motion on January 8, 2021. R252. The circuit court judge in his oral ruling found that Mr. Dewey had failed to meet his burden to show that it was ineffective assistance of counsel for trial counsel not to objected to the instructions. R282:4.

The judge found,

> C.R.C.'s testimony and statements regarding this time period I think a fair assessment is was very vague. The allegations for these counts were related to the time period that C.R.C. lived at 200 Hollister in Tomah, Wisconsin. His testimony was that he lived there in the third and fourth grade when this happened. Based on his testimony that

would have been from approximately September 2011 to May or June of 2013. His brother, T.C.E., testified that they lived at 200 Hollister in 2010, 2011, and 2012. The testimony was not clear as to the exact dates C.R.C. lived at the Hollister address. Not only was the testimony vague to the dates, it was also vague as to the allegation of what happened at the Hollister address. At trial C.R.C. stated it happened there. In a statement to the social worker C.R.C. stated the same type of stuff happened at Hollister, referring to incidents that were more recent that he had already talked about. C.R.C. did talk in his statement to a more particular incident when Mr. Dewey assaulted both he and his brother, T.C.E., essentially at the same time. There was no date range given for when this specifically happened. Mr. Dewey points to *State v. Lomagro*, 113 Wis.2d 582 to support his argument. However, Mr. Dewey also acknowledges that he can find no case law addressing this situation where we have alternative time frames with a unanimous verdict issue, and I haven't found any specific case law either addressing this I think fairly unique issue. *Lomagro* holds that when separate criminal offenses of the same type occur during one continuous criminal transaction they can be joined in one count if they can properly be viewed as one continuous occurrence without violating the protection afforded a defendant by the rule against duplicity. While there were three distinct time frames on the jury instruction, it was clear that it was the time frame that C.R.C. lived at the Hollister address, noting that there were several unspecified

times that Mr. Dewey was not living at that residence with C.R.C. for various reasons, based on the testimony. Considering the evidence, it would meet the Lomagro standard as one continuous criminal transaction, with the understanding that, again, Mr. Dewey was in and out of that residence. The point I want to make as far as deficient performance is that the law related to this issue is clearly unsettled. Counsel is not required to object and argue a point of law that is unsettled ... In this particular case Mr. Dewey has not shown that there is a reasonable probability that the result of the proceeding would have been different if trial counsel had objected to the jury instruction for Counts 32 to 36. At best the Court would have amended the jury instruction to include one continuous time frame, however, the issue at trial came down to credibility. The jury found C.R.C. and T.C.E. credible that this occurred and Mr. Dewey not credible. That's clear from them finding him guilty of all the counts in the Information. The jury found that this did occur at the Hollister address to C.R.C., and I'm confident based on the arguments made and the evidence that the jury would have known that those specific dates were related to when C.R.C. would have been living at the Hollister address. Again, I want to point out that C.R.C.'s testimony was vague. It's not as though he testified or there was evidence specific to different incidences occurring in each of those specific time frames. In this case the jury wasn't picking between those time frames, only whether it happened at that particular

residence. In this case there is not an issue of jury unanimity. I could see it being an issue if there were different acts testified to within each of those specific time frames, but that simply isn't the case based on my review of the testimony.

R282:6-10.

Mr. Dewey filed a notice of appeal on January 26, 2021. R257.

Argument

I. The trial court erred in denying the defense's pretrial motion to dismiss counts because counts one, three, four, six through seventeen, twenty-seven, twenty-eight, thirty, and thirty-two through thirty-six lacked reasonable particularity as to a time frame.

In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation. U.S. Const. Amend. VI, XIV. This right applies to state prosecutions through the Fourteenth Amendment, thus guaranteeing state court defendants the fundamental right to be informed of the nature and cause of the charges

... so as to permit adequate preparation of a defense. *Cole v. Arkansas,* 333 U.S. 196, 201 (1948). This is also a right guaranteed under the Wisconsin Constitution, under Article I, §7. *See Holesome v. State,* 40 Wis.2d 95, 102, 161 N.W.2d 283 (1968).

A defendant must be informed with reasonable particularity as to the time, place, and circumstances of the alleged offense. *United States v. Cruikshank*, 92 U.S. 542, 558 (1875). Whether a complaint and information are sufficient to provide notice to the defense is a question of constitutional fact that Court reviews *de novo*, independently of the trial court's determination. *See State v. Fawcett*, 145 Wis.2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988).

The circuit court here employed the seven factor test that had been adopted in *Fawcett,* which is usually stated as,

> (1) The age and intelligence of the victim and other witnesses; (2) The surrounding circumstances; (3) The nature of the offense, including whether it is likely to occur at a specific time or is likely to have been

> discovered immediately; (4) The length of the alleged period of time in relation to the number of individual criminal acts alleged; (5) The passage of time between the alleged period for the crime and the defendant's arrest; (6) The duration between the date of the indictment and the alleged offense; and (7) The ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Fawcett, 145 Wis.2d at 253.

The Wisconsin Supreme Court has stated that in child sexual assault cases, courts may apply the *Fawcett* seven factor test, and may also consider any other relevant factors necessary to determine whether the complaint and information states an offense to which the defendant plead and prepare a defense. *State v. Kempainen*, 2015 WI 32, ¶4, 361 Wis.2d 450, 863 N.W.2d 587. "No single factor is dispositive, and not every *Fawcett* factor will necessarily be present in all cases." *Id.*

The Court needs to give adequate weight in this analysis to the defendant's due process and Sixth Amendment rights to fair notice of the charges and fair

opportunity to defend. *Fawcett,* 145 Wis.2d at 250. These rights seem to be balanced against a concern that a defendant would benefit from the fact that a victim is too young to testify clearly as to the time and details of the sexual activity. *Fawcett*, 145 Wis.2d 249-250.

While the motion for postconviction relief neutralized this question regarding some of the counts,[7] counts one, three, four, six through seventeen, twenty-seven, twenty-eight, thirty, and thirty-two through thirty-six are still at issue.

In the alternative, Mr. Dewey would submit that the circuit court's denial of the pretrial motion to dismiss should be reversed as to counts thirty-two through thirty-six, (all against CRC) because the prosecution did not amend those

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[7]The pretrial motion sought dismissal of counts one through twenty-two, twenty-four and twenty-seven through thirty-six. R27. (Typo noted in motion). The motion for postconviction relief obtained dismissal of counts two, five, eighteen, twenty-four, twenty-nine, and thirty-one on August 21, 2018. R190

counts to a time frame that could be perceived as reasonable, in that each of these counts is charged as occurring from 1/1/10 to 6/10/10 or "on or between" 11/9/10 and 2/9/11 or "on or between" 6/16/11 and 12/31/11.[8] This time period covers a period of time of a little over five months in early 2010, three months spanning late into early 2011, and over six months in late 2011. A charging period of fourteen months spread out over a two year period is not reasonable, and violates principles of due process, fair notice and opportunity to defend.

The circuit court's decision was that under *State v.*

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[8]Count 32: § 948.02 sexual assault of a child against CRC, same dates as count 31.
Count 33: § 948.06 incest against CRC, same dates as counts 31 and 32.
Count 34: § 948.07 child enticement, against CRC, same dates as counts 31, 32 and 33.
Count 35: § 948.10 exposing genitals, against CRC, same dates as counts 31, 32, 33 and 34.
Count 36: § 948.10 exposing genitals, against CRC, same dates

Hurley, 2015 WI 35, 361 Wis.2d 529, 861 N.W.2d 174, the length of time charged in relation to the number of criminal acts went more at credibility and weight of testimony, and that this is not the type of situation that lent itself to an alibi. However, Mr. Dewey did present at least a partial alibi by way of his time card and testimony that he was at work on the date of the accusation of the most recent assault (although not charged by the State) by TE.

Hurly involved a charge under the "repeated acts" statute, Wis. Stat. § 948.025. Since the § 948.025 counts are no longer in the equation, the time frame must be analyzed in the context of different statutes, that are less flexible in terms of charging scheme and acts charged. The State could have avoided this situation by charging only under the "repeated acts" statute, Wis. Stat. § 948.025, rather than under both § 948.02 and §948.025, but they got greedy and overcharged. Due to that, the State is stuck with the charges that do not allow conviction based on "any three acts" within a flexible time period.

In *Hurley*, trial counsel did not file a motion to dismiss, so that claim was brought under *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Hurley* at ¶22. The trial court granted the defendant's motion for postconviction relief in the interest of justice, based on prosecutor's closing argument, the Court of Appeals reversed, and the supreme court affirmed the Court of Appeals. *Hurley* at ¶24.

In child sexual assault cases, a more flexible application of the notice requirements is required and permitted, so that the charging document need not set forth precise allegations regarding the date of the assault. *Id.* However abhorrent the accusation may be, a defendant's due process rights may not be ignored or trivialized. *Fawcett*, 145 Wis. 2d at 250.

A lack of specificity of a child's memory regarding dates of an alleged sexual assault goes to credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution. *Fawcett*, 145 Wis. 2d at 254. However, while the date of the commission of the crime is

not a material element of the child sexual assault offense, it is nonetheless important so a defendant has adequate notice and can prepare a defense. *See Hurley*, 361 Wis. 2d 529. § 948.02(1) and (2) (proof of the exact date is not required). Few crimes do have the date of the commission of the crime as a material element, unless, for example, a crime gets charged for an act before a statute took effect. This was not due to lack of specificity of child's memory. In our case, both boys were specific about what acts occurred. The charging period in the information was just too long and disjointed.

The general policy reflects competing aims regarding sufficiency of notice of child sexual assault allegations. The due process requirement abuts a concern that perpetrators should not escape punishment for such a crime because the victim is too young to testify clearly as to the time and details of such activity. *See State v. Sirisun*, 90 Wis. 2d 58, 65 n.4, 279 N.W.2d 484 (Ct. App. 1979). But TE and CC both were specific enough about acts that there should have

been a tighter and unitary changing period.

The *Fawcett* seven-factor test militates in favor of the defense motion to dismiss:

(1) The age and intelligence of the victims and other witnesses: Both boys seem pretty smart. They readily communicated their understanding of the difference between a truth and a lie (which does not rule our their fabricating as a result of influences by others) and their obligations as witnesses. They were able to pinpoint where they remember living and were specific about the acts charged though using juvenile language for anatomical parts.

(2) The surrounding circumstances: There was a dispute over custody and contention over whether Mr. Dewey was too harsh a disciplinarian, circumstances that cast doubt on the reliability of the accusations and militate towards having a tighter accusation period.

(3) The nature of the offense:

a) whether it is likely to occur at a specific time: the

time pattern seems to be when the boys were alone with Dewey, and of course times when he would not be at work.

b) whether the offense was likely to have been discovered immediately: the grandparents were suspicious early on, and at least during sone of the charged time spans, other people lived in the residences and were liable to have discovered an act in progress.

(4) The length of the alleged period of time in relation to the number of individual criminal acts alleged: There are so many offense alleged and they are charged over such an extended and divided periods of time that it was impossible for Mr. Dewey to have notice of what he was charged with doing.

(5) The passage of time between the alleged offense period and the defendant's arrest. The last act that TE testified to (not within the time period) was the one for which Mr. Dewey showed he was at work that entire day. R111 (Exh. 18). That was just a few months before the arrest, and the investigation process was clearly proceeding enough that

Mr. Dewey understood that he needed not to initiate contact with the boys until things were cleared up. R275:147 (506).

(6) The duration between the alleged offense period and the date of the filing of the complaint: The complaint was filed on November 21, 2014. The last date mentioned in the charging documents is December 31, 2013.

(7) The ability of the victim or complaining witness to identify the date and time of the alleged offense.

While no single *Fawcett* factor is dispositive, and not every factor will necessarily be present in each case, *Kempainen*, 361 Wis. 2d 450, ¶4, these all have some bearing on the unfairness of the proceedings. The charging periods did not adequately inform Mr. Dewey of the charges against him.

II. Trial counsel was ineffective in not objecting to the time periods in the jury instructions.

A. Standards

Under the Sixth and Fourteenth Amendments to the

United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel. *State v. Balliette*, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). A defendant must establish two elements to show that his counsel's assistance was constitutionally ineffective: (1) counsel's performance was deficient; and (2) "the deficient performance resulted in prejudice to the defense." *Id.* As to the second prong of the ineffective assistance of counsel test, prejudice occurs when the attorney's error is of such magnitude that there is a "reasonable probability" that, but for the error, the outcome would have been different. *State v. Erickson*, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999). "Stated differently, relief may be granted only where there 'is a probability sufficient to undermine confidence in the outcome,' i.e., there is a 'substantial, not just conceivable, likelihood of a different result.'" *State v. Starks*, 2013 WI 69, ¶55, 349 Wis. 2d 274, 833 N.W.2d 146 (quoting *Cullen v.*

Pinholster, 563 U.S. 170, 189 (2011)).

The standard of review of the ineffective assistance of counsel components, deficient performance and prejudice, is a mixed question of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citing *Strickland*, 466 U.S. at 698). Thus, the trial court's findings of fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. *Id.* "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." *Id.* at 128. "[C]ourts may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." *Id.*

It is appropriate to review an alleged error in the jury instructions under a claim of ineffective assistance of counsel. *See State v. Schumacher,* 144 Wis.2d 388, 408 n.14, 424 N.W.2d 672 (1988); *State v. Smith,* 170 Wis.2d 701, 714 n. 5, 490 N.W.2d 40 (1992). To prove deficient

performance, the defendant must show that counsel's specific acts or omissions were outside the wide range of professionally competent assistance. *Strickland,* 466 U.S. at 690. While there is a strong presumption that a defendant received adequate assistance and that counsel's decisions were justified in the exercise of reasonable professional judgment, *see State v. Domke,* 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364, that presumption can be overcome where, for example, there is no basis to fail to the proposed instructions.

In response to the defense pretrial motion and circuit court pretrial order, the prosecution opted to amend only slightly the time frame in the counts at issue, despite each of these counts being charged as occurring from 1/1/10 to 6/10/10 or "on or between" 11/9/10 and 2/9/11 or "on or between" 6/16/11 and 12/31/11, in other words, a period of time of a little over five months in early 2010, three months spanning late into early 2011, and over six months in late 2011. During the instructions conference at trial, defense

counsel said, "I think [the charging period for counts thirty-one through thirty-six] has to be left as is." R276:25 (581). Trial counsel then stated that the defense had no objection to the instructions or the verdict forms. Id. at 32 (594). The issue is now moot only with regard to count thirty-one because that count was later dismissed as a result of Mr. Dewey's first motion for postconviction relief, but it is hardly moot with regard to counts thirty-two through thirty-six, as these all remain as counts of conviction. *See* amended judgments filed August 23, 2018. (R192, R193). These counts all name CRC, as the victim: Count 32: § 948.02 sexual assault of a child, Count 33: § 948.06 incest, Count 34: § 948.07 child enticement, Count 35: § 948.10 exposing genitals, Count 36: § 948.10 exposing genitals.

B. The law is not "unsettled" on this question.

There is a real question as to whether the jury made a unanimous decision regarding these counts. It was unreasonable for the trial court to analyze Mr. Dewey's

challenges to the jury instructions in isolation. *See Boyde v. California*, 494 U.S. 370, 378 (1990) (jury instructions "may not be judged in artificial isolation, but must be viewed in the context of the overall charge"). Further, "[t]he question ... is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." *Francis v. Franklin*, 471 U.S. 307, 315–316 (1985). Here, a reasonable juror could have understood the complete jury instructions as permitting a guilty verdict without agreement between the jurors as to which acts occurred and when they occurred. Examining defense counsel's failure to object to jury instructions in the context of the entire charge illuminates the unreasonableness of the trial court's rejection of Mr. Dewey's *Strickland* claim.

The law is not unsettled because there is well-established authority for asking for an instruction so that jury unanimity would be guaranteed. *See, e.g.*, Wis. JI–Crim. 517 (2010):

The problems that use of Wis JI-Criminal 517 may avoid are illustrated by the facts in *State v. Marcum*, 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992). The information involved multiple counts, each generally charging "having sexual contact in September 1989." Evidence was presented at trial that was inconsistent with regard to the number of occasions on which crimes were allegedly committed and with regard to the nature of the acts that took place on each occasion. Only the general unanimity instruction (Wis JI-Criminal 515) was given. The verdicts submitted were also general and failed to specify the acts that were the basis for each charge.

The court in *Marcum* reversed the conviction on the ground of ineffective assistance of counsel. Counsel was ineffective for failing to request a unanimity instruction and for failing to pursue more specific verdicts. The court held that “the jury must be presented with verdict forms that adequately distinguish each separately charged crime.” 166 Wis.2d 908, 923. The failure to do so creates a problem of jury unanimity under the sixth amendment and a problem of due process under the fifth amendment. [See Wis JI-Criminal 484, note 2, for a discussion of addressing this problem by being more specific in the verdicts.]

The problem in *Marcum* could have been cured by giving an instruction like Wis JI-Criminal 517 that would have required the jury to be unanimous about the specific act that formed the basis for each count.

Commentary to Wis. JI– Crim. 517 at 3.

The Wisconsin Constitution guarantees the right to a unanimous verdict with respect to the ultimate issue of guilt or innocence. Wis. Const., Art. I, §§ 5 and 7; *Holland v. State*, 91 Wis.2d 134, 138, 280 N.W.2d 288 (1979).

The unanimity problem could have been avoided by an instruction telling the jurors that they must be unanimous about the specific acts. *See also* Wis. JI – Crim. 255 (while State need not prove exact act of commission, but not applicable where evidence of more than one criminal act is admitted, citing *Jensen v. State*, 36 Wis.2d 598, 154 N.W.2d 769 (1967)).

III. Even if the question is unsettled, the jury instruction is reviewable as plain and fundamental error.

The State will claim that Mr. Dewey waived any error in the jury instructions because he did not object at trial. "A trial court has broad discretion in instructing a jury but must

exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law." *See State v. Ziebart*, 2003 WI App 258, ¶16, 268 Wis. 2d 468, 673 N.W.2d 369. "Whether a jury instruction violated a defendant's right to due process is a legal issue subject to de novo review." *Id.* "On review, the language of a jury instruction should not be fractured into segments, one or two of which, when considered separately and out of context, might arguably be in error." *State v. Paulson*, 106 Wis. 2d 96, 108, 315 N.W.2d 350 (1982). "Rather, the instruction must be read as a whole and for there to be reversible error, the error must permeate the underlying meaning of the instruction." *Id.* Additionally, the Court must "not view a single instruction to a jury in artificial isolation." *State v. Glenn*, 199 Wis. 2d 575, 590, 545 N.W.2d 230 (1996). Relief is warranted if the Court is persuaded that the instructions, when viewed as a whole misdirected the jury. *See Ziebart*, 268 Wis. 2d 468, ¶16. An error in the jury instructions that has been waived by trial counsel's failure to object may be reviewed under

the court's discretionary reversal authority under Wis. Stat. § 752.35. *State v. Beasley*, 2004 WI App 42, ¶17 n.4, 271 Wis. 2d 469, 678 N.W.2d 600 (regarding using request for discretionary reversal to challenge jury instructions).

"It is well established that even where there is no timely objection in the trial court, errors in instruction may be reviewed on appeal, even on the court's own motion, where the error is so plain or fundamental as to affect substantial rights of the defendant. Of course, a defendant is faced with a heavy burden when he has acquiesced in the instructions given by the trial court. We conclude to exercise our discretionary power of review in the instant case and to do so notwithstanding the plain waiver of the alleged error by the defendant. In doing so, the defendant must show that his substantial rights have been affected." *Claybrooks v. State*, 50 Wis. 2d 79, 84-85, 183 N.W.2d 139 (1971).

In *Lunde v. State*, 85 Wis. 2d 80, 88, 270 N.W.2d 180 (1978), the supreme court explained the procedure used when applying the "plain error" test.: "Under this test, the

question then becomes not whether the unobjected-to instructions were erroneous, but whether the error was so plain or fundamental as to affect the substantial rights of the defendant. The application of this test necessarily results in a process of circuitous reasoning, for the rule is that the alleged error will not be looked into if no objection has been appropriately made; but the exception to the rule provides that, even where no objection has been made, the court will take cognizance of the alleged error if the error is plain or fundamental. Obviously, therefore, the nature of the error must be inquired into before it can be determined whether the court will consider it further."

In order to convict, the jury should have been required to be unanimous at least as to which series of acts Mr. Dewey committed, even if it was not required to be unanimous as to a specific act. With these counts having such an extended and unusually divided allegation regarding dates of commission, the Court cannot be confident that the jury even agreed as to which series of acts was proven

beyond a reasonable doubt. Such unanimity would have been essential to a proper jury determination of guilt.

State v. Lomagro, 113 Wis. 2d 582, 335 N.W.2d 583 (1983), stands for the proposition that so long as a victim makes an accusation assault by one perpetrator, *over a set period of time*, the law can consider it as one continuous story with various chapters. *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). However, the dates here are not "a set period of time." The multiple acts are not all part of "one continuous criminal transaction." *Lomagro*, 113 Wis. 2d at 589.

Mr. Dewey was entitled to unanimous and specific jury verdicts upon each alleged "separate volitional act" of sexual assault that was committed in non-continuing episodes on different days. *Marcum*, 166 Wis. 2d at 921-924. The error affected Mr. Dewey's fundamental rights so as to justify reversal. *See Claybrooks v. State*, 50 Wis. 2d 79, 84-85, 183 N.W.2d 139 (1971).

Conclusion

For the reasons stated above, the Court of Appeals should reverse the pretrial order of the circuit court that denied dismissal of counts one, three, four, six through seventeen, twenty-seven, twenty-eight, thirty, and thirty-two through thirty-six. In the alternative, Mr. Dewey is entitled to a new trial regarding counts thirty-two through thirty-six.

Respectfully submitted this 6th day of August, 2021.

Electronically signed by
David R. Karpe
Wisconsin Bar No. 1005501
448 West Washington Avenue
Madison, Wisconsin 53703
Tel. (608) 255-2773

ATTORNEY FOR DEFENDANT-APPELLANT

SECTION 809.19 (2) CERTIFICATE

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 s. 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. 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.

Electronically signed by:
s/ David R. Karpe

SECTION 809.19(8) CERTIFICATE

I hereby certify that this brief and appendix conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,812 words.

Electronically signed by:
s/ David R. Karpe