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,

v.

MICHAEL T. DEWEY,

Defendant-Appellant.

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

BRIEF OF THE PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 294-2907 (Fax)
kumferle@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES PRESENTED

1. Did the circuit court err in denying Dewey's motion to dismiss several of the sexual assault counts against him on the grounds that the time frames alleged were not specific enough for him to be able to prepare a defense to the charges?

The circuit court denied the motion.

This Court should affirm the circuit court.

2. Was Dewey's trial counsel ineffective for failing to object to the time periods stated for each charge in the jury instructions?

The circuit court held an evidentiary hearing and denied the motion.

This Court should affirm the circuit court.

3. Has Dewey established that lack of a unanimity instruction on the charges warrants this Court's exercise of its discretionary authority to reverse his convictions in the interest of justice?

Dewey has not shown that the real controversy was not fully tried, that justice has miscarried, or that there is any exceptional reason for this Court to exercise its discretionary reversal power.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe oral argument is necessary. If this Court chooses to address jury unanimity about which the criminal act of child sexual assault underlies a guilty verdict when the child testifies about multiple assaults, the opinion should be published. If this Court decides this case on other grounds, the decision will likely rest on well-settled law and publication will not be warranted.

SUPPLEMENTAL STATEMENT OF THE FACTS[1]

In October of 2014, Darren brought his 15-year-old son, Terry, to the Monroe County Sheriff's Office. (R. 4:9.) He told detectives that Terry recently revealed that his mother Delia's former boyfriend, Michael Dewey, had been sexually assaulting him for years, at least 80 times spanning nearly his whole life. (R. 4:9–18.) Terry's half-brother, 11-year-old Corey, also reported being sexually assaulted by Dewey over 70 times, beginning when he was three or four years old. (R. 4:19–23.)

Based on the boys' disclosures, the events they could remember with specificity, and corroborating information from their mother about various places they had lived and when, the State charged Dewey with 36 crimes. (R. 4:1–9.) Incidents for which the boys could not remember any specific date the State charged alleging generally a one to two year timespan based on how old the boys reported they were during the assaults and where they lived at the time. (R. 4:1–9.)

Dewey moved to dismiss all but the five counts for which the State gave a specific date—23, 25, 26, 27, and 28—on the grounds that the charging periods did not allow him to prepare a defense. (R. 25:4.) The State filed an amended information that narrowed some of the date ranges but was unable to do so for others. (R. 37.) After applying the relevant

[1] The State will use pseudonyms and first names only for the victims and their family members for ease of reading and to protect the victims' privacy. These correspond to the initials used in the Defendant-Appellant's brief as follows: TCE = Terry; CRC = Corey; DC = Delia; DE = Darren.

factors stated in *State v. Fawcett*[2] and *State v. Hurley*,[3] the circuit court denied the motion to dismiss. (R. 264:5–14.) The State amended the information twice more before trial. (R. 71; 81.)

Trial lasted four days. (R. 273; 274; 275; 276.) Terry, Corey, Delia, and Darren testified consistently with what they told police. (R. 81; 273:123–76; 274:36–100.) The State introduced testimony from the forensic interviewer who spoke to the boys about the assaults, medical professionals who performed SANE exams on them and the police who investigated and interviewed Dewey. The State also presented evidence from Dewey's computers showing that he had searched for and downloaded potentially hundreds of videos and pictures of children being raped, along with pictures of Terry in his underwear. (R. 106; 107; 108; 109; 274:13–35, 101–79; 275:156.)

Dewey testified that the assaults never happened, that he was a father to the two boys, and that he could prove he was working on some of the days the boys said the assaults occurred. (R. 275:114–81.) Dewey said he believed he was being set up by Delia and her family because they did not like him, or it was possible the boys made it up on their own. (R. 275:169–71, 177–78.) He claimed he did not conduct any of the searches or download any of the videos found on his computers either, and that multiple other people used them. (R. 275:122–23, 156–60, 172–76.) He also produced an expert witness, Dr. David Thompson, to testify about how children may be influenced to give false sexual assault allegations through improper interviewing techniques. (R. 275:30–108.)

---

[2] *State v. Fawcett*, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988).

[3] *State v. Hurley*, 2015 WI 35, ¶ 33, 361 Wis. 2d 529, 861 N.W.2d 174.

The jury found Dewey guilty on all 36 charges. (R. 276:187.) Postconviction, Dewey moved to dismiss several of the repeated sexual assault of a child convictions, contending that they violated Wis. Stat. § 948.025(3) and the Double Jeopardy clauses of the United States and Wisconsin Constitutions. (R. 197.) The State did not oppose, and the court dismissed those convictions and sentences. (R. 278:2, 11.)

With this Court's permission, Dewey filed another postconviction motion. (R. 232; 237.) He contended that trial counsel was ineffective for failing to object to the jury instructions on counts 32 through 36—the crimes committed against Corey—on the grounds of jury unanimity concerns allegedly created by the three disparate date ranges alleged. (R. 237:1–2.) The circuit court held a *Machner* hearing and trial counsel, Thomas Rhodes, testified that he did not remember why he did not object to the form of the jury verdicts containing three disparate date ranges. (R. 279:6–10.) He did recall moving to narrow the date ranges, however, and testified that he would typically not find it worthwhile to attempt to relitigate motions the court had already ruled on. (R. 279:12–17.) The circuit court denied the motion. (R. 282.) Dewey appeals.

ARGUMENT

I. The circuit court properly denied Dewey's motion to dismiss several of the sexual assault charges.

A. Specificity in dates of the offense is not required in child sexual assault cases.

Defendants have a due process and Sixth Amendment right to fair notice of the charges against them and an opportunity to defend against those charges. *State v. Fawcett*, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988).

Accordingly, "[a] criminal charge must be sufficiently stated to allow the defendant to plead and prepare a defense." *Id.* "However, where the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged." *Id.* Sexual assault cases do not require proof of an exact date and can be sufficiently charged by asserting a date range when the assault took place, particularly when the victim is a child. *Id.* at 249–50.

This leeway given the State in alleging dates for the charged offenses in child sexual assault cases results from several unique characteristics of such cases. *State v. Hurley*, 2015 WI 35, ¶ 33, 361 Wis. 2d 529, 861 N.W.2d 174. "Child sexual assaults are difficult crimes to detect and to prosecute, as typically there are no witnesses except the victim and the perpetrator." *Id.* "Often the child is assaulted by a trusted relative and does not know whom to turn to for protection." *Id.* "The child may have been threatened, or, as is often the case, may harbor a natural reluctance to come forward." *Id.* "These circumstances many times serve to deter a child" from reporting the assaults immediately, meaning "exactness as to the events fades in memory." *Id.* (citation omitted). Accordingly, "[y]oung children cannot be held to an adult's ability to comprehend and recall dates and other specifics." *Id.* (citation omitted). "A 'more flexible application of notice requirements is [thus] required and permitted [in child sexual assault cases]. The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution." *Id.* (citation omitted).

A court assessing a challenge that the criminal complaint was too vague as to date range for the defendant to prepare a defense looks to seven factors. These are:

> (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. A court may also consider any other relevant factors it finds appropriate. *State v. Kempainen*, 2015 WI 32, ¶ 4, 361 Wis. 2d 450, 862 N.W.2d 587.

B. The circuit court properly concluded that the dates alleged in the criminal complaint were sufficient to notify Dewey of the charges and allow him to prepare a defense.

The State's third amended information charged the following counts and time periods Dewey is challenging here:

- Counts 1, 3, and 4: Sexual assault of a child under 13 via sexual contact; causing a child to expose their genitals; and exposing Dewey's genitals to a child; all committed against Terry, occurring between March 9, 2005 and December 31, 2005 when Terry was 5 to 6 years old at a residence on East Veterans Street in the city of Tomah. (R. 81:1.)

- Counts 6, 7, 8 and 9: First-degree sexual assault of a child under age 13 via oral and or anal intercourse without bodily harm; child enticement; causing a child to expose genitals, and exposing Dewey's genitals to a child; all committed against Terry, occurring between August 1, 2006, and December 1, 2007, when Terry was age 6 to 8 at a residence on East Veteran's Street in the city of Tomah. (R. 81:2–3.)

- Counts 10, 11, 12, and 13: Sexual assault of a child under 13 years of age via anal intercourse; sexual assault of a child under 13 years of age via oral intercourse; exposing Dewey's genitals to a child; and causing a child to expose genitals; all committed against Terry, occurring between January 1, 2006, and December 31, 2006, when Terry was age 6 to 7 and lived in the Village of Oakdale. (R. 81:3.)

- Counts 14, 15, 16, and 17: First-degree sexual assault of a child under age 12 via oral intercourse; first-degree sexual assault of a child under age 12 via anal intercourse; causing a child to expose genitals; and exposing Dewey's genitals to a child; all committed against Terry, occurring between either November 9, 2010 and February 9, 2011, or between June 16, 2011, and September 2, 2011, when Terry was age 11 at a residence on Hollister Avenue in the city of Tomah. (R. 81:3–4.)

- Count 30: Incest, Corey age 9 to 10, between January 1, 2013, and December 31, 2013, in the Village of Kendall. (R. 81:7.)

- Counts 32, 33, 34, 35, and 36: First-degree sexual assault of a child under age 12, incest, child enticement, causing a child to expose his genitals, and exposing Dewey's genitals or pubic area to a child, Corey age six to seven, between January 1, 2010, and June 10, 2010, or between November 9, 2010, and February 9, 2010, or between June 16, 2011, and December 31, 2011, at a residence on Hollister Avenue in the city of Tomah. (R. 81:7–9.)

Application of the *Fawcett* factors to these charges shows that the circuit court properly denied Dewey's motion.

As a preliminary matter, it should be noted that the State made a diligent effort to narrow the charging periods

after Dewey's motion to dismiss. (R. 264:5–7.) The charging periods were based on the dates the children lived at different residences at which they reported being assaulted. (R. 266:4–15.) The dates finally alleged were based on the detective's discussions with the victims and were as narrow as the State could discern due to the age of the victims when the assaults occurred, the frequency of the assaults, and the time that had passed since the assaults began. (R. 264:5–6; 266:4–15.)

The first three *Fawcett* factors are the age and intelligence of the victim and other witnesses, the surrounding circumstances, and the nature of the offense—including whether it was likely to occur at a specific time or to have been discovered immediately. *Kempainen*, 361 Wis. 2d 450, ¶ 33. These factors overlap somewhat and are often assessed together. *Id.* ¶¶ 33–34. The circuit court properly found that these factors all weigh in favor of the State and the charges. (R. 264:9–11.)

Both Terry and Corey were very young when the bulk of the assaults happened. Terry claimed the assaults began when he was only three years old; he was between ages five to thirteen during the periods the State charged in the information. (R. 4:10; 81.) Corey was between ages six to ten. (R. 81:7–9.) And while there is nothing in the record that speaks to the boys' intelligence, it is well-known that, developmentally, young children lack the ability to identify specific dates and correlate them to the sequential passage of time.[4] (R. 264:10.) *Kempainen*, 361 Wis. 2d 450, ¶¶ 21–22; *Hurley*, 361 Wis. 2d 529, ¶¶ 42–44.

[4] *See, e.g.,* https://www.naeyc.org/sites/default/files/globally-shared/downloads/PDFs/resources/pubs/calendartime.pdf. These researchers found that "the ability to judge the relative time from a past event or until a future event in terms of the calendar year is not in place until sometime between 7 and 10 years of age."

Moreover, the boys said they were continuously assaulted over a period of years. (R. 4:9–23.) Child abuse "often encompasses a period of time and a pattern of conduct," meaning it is unlikely to occur at a specific time or be discovered immediately, and accordingly, "a singular event or date is not likely to stand out in a child's mind." *Hurley*, 361 Wis. 2d 529, ¶ 44 (citation omitted). The circuit court correctly recognized that in that situation it is far less likely that a child victim is going to be able to state dates with any particularity, because the details of any individual assault are likely to become meshed with the child's memory of other assaults. (R. 264:11.)

And here, as is often the case, the perpetrator of these assaults was "a trusted family member" who had a position of authority over the boys. *Hurley*, 361 Wis. 2d 529, ¶¶ 19, 45. Dewey was Terry's stepfather and Corey's father, and they lived with him the majority of the time. (R. 264:10–11.) Moreover, Dewey was physically overpowering the boys, bribing Terry not to tell anyone about the assaults by buying him things, and threatening Corey that he would be hit with a belt if he told anyone. (R. 4:15–19.) These are recognized factors that are likely to delay the children's reporting the assaults, which further makes it difficult for them to pinpoint specific dates when the assaults later come to light. (R. 264:11); *Hurley*, 361 Wis. 2d 529, ¶ 43.

The fourth factor, "the length of the alleged period of time in relation to the number of individual criminal acts alleged further belies [Dewey's] claim." *Hurley*, 361 Wis. 2d 529, ¶ 47. The criminal complaint alleged hundreds of sexual assaults spanning at least eight years. (R. 4:9–23; 264:11–12.) Most of the counts covered roughly a year time span. (R. 81; 264:12.) The circuit court appropriately recognized, based on *Hurley*, that "[t]his is not the type of situation that lends itself to an alibi defense" and therefore "this length of time in relation to the number of criminal acts goes more at the

credibility and weight of testimony." (R. 264:12.) And indeed, Dewey did not rely on an alibi defense and instead claimed that the boys' mother was trying to get back at him for reporting her to child protective services by having them lie about being assaulted, that the boys' memories had been influenced by improper interviewing techniques, and that he never assaulted either one of them in any fashion. (R. 275:42–54, 115–52.) The circuit court thus properly found that this factor weighed in favor of the State, because "no indication exists that a narrower charging period would have changed or aided [Dewey's] defense under the circumstances." *Hurley*, 361 Wis. 2d 529, ¶¶ 47–48.

The fifth and sixth factors are "the passage of time between the alleged period of the crime and the defendant's arrest, and the duration between the date of the complaint and the alleged offense." *Id.* ¶ 49. "These factors address the 'problem of dimmed memories and the possibility that the defendant may not be able to sufficiently recall or reconstruct the history regarding the allegations.'" *Id.* ¶ 50 (citation omitted).

The assaults committed against Terry began in approximately 2002 and the last assault took place in August of 2014. (R. 4:9–14.) The assaults committed against Corey began in approximately 2006 and the last one took place in late September, 2014. (R. 4:20–21.) The boys did not report the assaults until October 16, 2014 (Terry) and October 28, 2014 (Corey). (R. 4:9, 18.) Dewey was arrested after being interviewed by Detective John Brose five days later, on November 4, 2014. (R. 4:24–26; 105:1.) The State filed the criminal complaint against Dewey on November 21, 2014. (R. 4:27.) The circuit court found that there was no improper purpose for the delay between the crimes and Dewey's arrest and charging. (R. 264:12.) The State charged Dewey expeditiously after the crimes came to light, which was only a few weeks after the last assaults occurred. And the court

reiterated that an alibi defense was "not the likely scenario in this." (R. 264:12.) Accordingly, there was nothing improper about the delay between the charged offenses and the charges being brought that would require dismissal of the charges. (R. 264:12–13.)

The final factor is the ability of the victim to particularize a date and time of the offenses. *Hurley*, 361 Wis. 2d 529, ¶ 42. The circuit court properly found that, like in *Hurley*, this factor too weighed against Dewey. (R. 264:13.) This was so because "[t]he *Hurley* case points out that the ability to recall details in this type of situation is very limited." (R. 264:13.) The court found that "the *Hurly* case . . . makes it very clear that [the charging periods] [are] not too wide of a timeframe for these scenarios." (R. 274:13.) That conclusion is supported by the record. The boys were unable to recall specific dates of all of the assaults, but they could remember where they were assaulted. (R. 4:9–27.) Accordingly, the State charged time periods relating to the dates the boys and Dewey were at each residence. That was as specific as the boys were able to be under the circumstances, and given that "the date of the commission of the crime is not a material element of the offense[s] charged, it need not [have been] precisely alleged." *Fawcett*, 145 Wis. 2d at 250.

Dewey's defense was that he never committed any assaults against the boys at all. He was given adequate notice of the allegations against him and was able to prepare and present that defense. There was no due process violation. The circuit court properly denied Dewey's pretrial motion to dismiss the charges.

II. Dewey's trial counsel was not ineffective for failing to challenge the time periods alleged for his crimes against Corey in the jury instructions and verdict forms.

Dewey does not dispute that he did not object to the form or content of the jury instructions or verdicts related to the charges about Corey at the instruction conference. He has therefore admitted that he forfeited his jury unanimity challenge and any complaints about the instructions or verdicts. *State v. Marcum*, 166 Wis. 2d 908, 915, 480 N.W.2d 545 (Ct. App. 1992). Accordingly, his challenge is only reviewable via two avenues: showing his trial counsel was ineffective for failing to raise a challenge to the three distinct charging periods alleged in Counts 32 through 36, or by showing that the error in the instructions warrants reversal in the interests of justice. Dewey cannot meet either requirement.

A. It is the defendant's burden to establish both deficient performance and prejudice to prevail on an ineffective assistance of counsel claim.

Wisconsin has adopted the United States Supreme Court's two-pronged *Strickland* test to analyze ineffective assistance claims. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prevail under *Strickland*, a defendant must prove that his counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687.

The defendant does not show deficient performance "simply by demonstrating that his counsel was imperfect or less than ideal." *State v. Balliette*, 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334. Rather, "a defendant must show specific acts or omissions of counsel that are 'outside the wide range of professionally competent assistance.'" *State v.*

Arredondo, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted). To prove prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

"Determining whether particular actions constitute ineffective assistance of counsel is a mixed question of law and fact." *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). This Court "will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless they are clearly erroneous." *Id.* (citation omitted). "[W]hether counsel's performance was deficient and whether the deficient performance prejudiced the defense are questions of law" reviewed de novo. *Id.*

B. Trial counsel was not deficient in failing to challenge the charging periods for counts 32 through 36 as stated in the jury instructions and verdict forms.

Again, counts 32, 33, 34, 35, and 36 were the following: first-degree sexual assault of a child under age 12, incest, child enticement, causing a child to expose their genitals, and exposing genitals or pubic area to a child, against Corey. The charging period was between January 1, 2010, and June 10, 2010, or between November 9, 2010, and February 9, 2011, or between June 16, 2011, and December 31, 2011, at a residence on Hollister Avenue in the city of Tomah. (R. 81:7–9.) A sixth crime, repeated sexual assault of Corey over the same three time periods, was charged and the jury found Dewey guilty, but the conviction was vacated after trial because the repeated assault charge could not be brought alongside counts 32, 35, and 36. (R. 81:7; 87:1; 278:4–11.) The jury instructions and verdict forms for these counts contained the same three time periods and clarified that the charged

crimes occurred at the Hollister Avenue address. (R. 143:47–57; 87; 88; 89; 90; 91; 92.) Dewey claims that the inclusion of three discrete time periods rather than a continuous time period deprived him of his right to a unanimous verdict. (Dewey's Br. 52–59.) Dewey's trial counsel, Thomas Rhodes, did not object to the jury instructions or verdict forms on this ground at trial, which Dewey now claims was constitutionally deficient performance. He is wrong.

1. Juries are not required to agree on which specific instance of criminal conduct underlies a guilty verdict when evidence of a course of sexual assaults against a child is introduced to prove a single charge.

Dewey's argument is based on the mistaken premise that the jury had to unanimously agree upon "which acts occurred and when they occurred" to sustain a guilty verdict on each of these charges. (Dewey's Br. 57.) That is not the law. "Unanimity is required only with respect to the ultimate issue of the defendant's guilt or innocence." *Holland v. State*, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979). Stated differently, "[j]ury unanimity is required only on the essential elements of the crime." *State v. Badzinski*, 2014 WI 6, ¶ 5, 352 Wis. 2d 329, 843 N.W.2d 29. When the crime occurred is not an essential element of any of the crimes charged in counts 32 through 36. Wis. JI–Criminal 2102B (2008); Wis. JI–Criminal 2130 (2008); Wis. JI–Criminal 2134 (2018); Wis. JI–Criminal 2141 (2015); Wis. JI–Criminal 2140 (2015).

Furthermore, "Wisconsin has historically held that in 'continuing course of conduct' crimes, the requirement of jury unanimity is satisfied even where the jury is not required to be unanimous about which specific underlying act or acts constitute the crime." *State v. Johnson*, 2001 WI 52, ¶ 17, 243 Wis. 2d 365, 627 N.W.2d 455 (citation omitted). In other words, jurors need not reach unanimous agreement on

specific acts when the alleged crime is a series of conceptually similar acts collectively constituting a continuous course of criminal conduct underlying a single charged count. *See State v. McMahon*, 186 Wis. 2d 68, 81, 519 N.W.2d 621 (Ct. App. 1994).

So when, like here, a defendant engages in a continuous course of criminal conduct, the jury must only unanimously agree beyond a reasonable doubt that the defendant committed some act that met all of the elements of the crime at some point during the charged time frame; it does not need to unanimously agree as to which of several identical acts meeting those elements it believes the defendant committed. *See Holland,* 91 Wis. 2d at 139–41; *see also id.* at 142 (A jury need not "concur in a single view of the transaction disclosed by the evidence. If the conclusion may be justified on either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other.") (citation omitted).

The case law shows that the jury needs to unanimously agree that the defendant committed the *type of conduct* described in each count at some point within the charging period. *State v. Becker*, 2009 WI App 59, ¶ 12, 318 Wis. 2d 97, 767 N.W.2d 585. So, when multiple charges are brought *under the same statute* and the State introduces evidence that the defendant committed different types of conduct that could meet the elements of the crimes, the instructions and the verdict forms must explain which type of conduct relates to which count to ensure unanimity. *Id.*

For example, in *Becker*, the defendant was convicted of two counts of first-degree sexual assault of a child in violation of Wis. Stat. § 948.02(1). *Becker*, 318 Wis. 2d 97, ¶ 2. In the complaint, it was clear that one count was based on Becker touching the victim's vagina, and the other count was based on Becker causing the victim to touch his penis. *Id.* These two

events allegedly occurred on the same day. The information and jury instructions for each count, however, were worded in identical language that did not specify what type of conduct was the basis for each count; instead, they referred to "sexual contact" generally and the time frames involved for each count. *Id.* ¶ 3. The court then instructed the jury that "[s]exual contact is an intentional touching of the vagina of [the alleged victim]. . . . [s]exual contact is also an intentional touching by [the alleged victim] of the penis of the defendant, if the defendant intentionally caused or allowed" that touching. *Id.* ¶ 4.

The verdict forms, too, did not indicate what behavior was the basis for each charge and read "[w]e, the jury, find the defendant . . . guilty of, on or between June 1, 2003 and August 1, 2003 . . . having sexual contact with a child under the age of thirteen." *Id.* ¶ 5. The only difference in the verdicts was that they said "as charged in the first count of the information" and "as charged in the second count of the information," respectively. *Id.*

This Court held that these unspecific instructions and verdicts *could have* led to a jury unanimity problem if the jury had convicted on one count and acquitted on the other.[5] *Id.* ¶¶ 22–24. In the case of a split verdict, it would be "impossible to know if all twelve jurors agreed that [the defendant] committed the same act in the count where there was a guilty verdict." *Id.* ¶ 22. This was so because it would have been

---

[5] The *Becker* court ultimately affirmed Becker's two convictions after it concluded that Becker was not prejudiced by his attorney's failure to challenge the specificity of the instructions. *State v. Becker*, 2009 WI App 59, ¶ 23, 318 Wis. 2d 97, 767 N.W.2d 585. The court reached this holding because Becker was found guilty of both charges, meaning the jury clearly unanimously believed he had committed both types of conduct, thus it did not matter which type of conduct the jurors believed should be assigned to each count. *Id.*

possible that some jurors thought that Becker touched the victim's vagina but did not make her touch his penis, while the other portion of the jury thought that Becker did not touch her vagina but did make her touch his penis. *Id.* Accordingly, there would have been no way to know if the jury unanimously agreed that he had ever committed either type of conduct.

That was the exact situation this Court encountered in *Marcum*, 166 Wis. 2d at 920. There, the defendant was charged with three counts of first-degree sexual assault of a child for having hand to vagina, penis to vagina, and mouth to vagina contact with the child victim in September of 1989. *Id.* at 912–13. The instructions and verdicts on the three counts did not specify which of this conduct related to which charge. *Id.* Accordingly, when the jury convicted the defendant on one count but acquitted on the other two, there was a jury unanimity problem because it was not clear that all 12 jurors unanimously agreed that the defendant ever committed any of the charged conduct. *Id.* at 919–20.

The same result does not follow, however, when the State introduces multiple instances *of an identical type of conduct* committed during over the charging period—in other words, evidence that the defendant engaged in a continuous course of that conduct—to prove a *single charge*. *State v. Molitor*, 210 Wis. 2d 415, 565 N.W.2d 248 (Ct. App. 1997); *see also State v. Lomagro*, 113 Wis. 2d 582, 595, 335 N.W.2d 583 (1983). When a single count under a particular statute is charged[6] and evidence is introduced showing that the defendant committed the conduct described by the charge multiple times over the charging period in a continuing pattern, the jury does not have to agree on which specific act

[6] Or, for that matter, multiple charges under the same statute that clearly delineate what type of conduct is the basis for the charge.

underlies the guilty verdict. Rather, the jury needs only to agree that at least once during the charging period the defendant committed the conduct constituting the crime. *Molitor*, 210 Wis. 2d at 420 ("[W]hen the charged behavior constitutes 'one continuous course of conduct,' the requirement of jury unanimity is satisfied regardless of whether there is agreement among the jurors as to 'which act' constituted the crime charged.") (citation omitted).

Lomagro also shows that the jury does not need to agree on which specific act underlies a guilty verdict when the State introduces evidence that the defendant committed the criminal conduct underlying a single charge multiple times during the charging period. *Lomagro*, 113 Wis. 2d at 595. There, the defendant, Charles Lomagro, and an accomplice drove the victim to a secluded area and Lomagro forced her to engage in penis-to-vagina intercourse. *Id.* at 584. The codefendants then drove elsewhere, stopped, and forced her to engage in a second and third act of penis-to-vagina intercourse. *Id.* On the way to a gas station, the codefendant forced her to perform fellatio on him. *Id.* After leaving the gas station and arriving at another secluded area, she was forced to perform fellatio on both men. *Id.* They finally agreed to release her and took her to her friend's house. *Id.*

The State charged Lomagro with a single count of first-degree sexual assault for these events, and the jury returned a guilty verdict. *Id.* at 585. Lomagro appealed, arguing that he was deprived of his right to a unanimous jury and "that when the state presents evidence of separate crimes and charges only one count, the jury must agree as to the specific act that constituted the crime." *Id.* The supreme court disagreed. *Id.* at 587–88. It held that it was "up to the state to determine the appropriate charging unit for a particular criminal episode." *Id.* at 589. Accordingly, "[w]hen separate criminal offenses of the same type occur during one continuous criminal transaction, the prosecutor may join

these acts in a single count if they can properly be viewed as one continuous occurrence without violating the protections afforded the defendant by the rule against duplicity." *Id.*

Allowing the State to charge repeated instances of a specific type of sexual abuse against the same child by the same perpetrator as a continuing crime, even when the assaults span a period of months, is the only rational interpretation of the law. Child sexual assaults by a person who has continuing access to the child, like many continuing crimes, are episodic; they happen again and again, but only when the abuser has the opportunity to commit an assault without being detected. The sexual conduct toward the child is the crime, and the ongoing, repeating nature of it makes it continuous.

The acts underlying each count here were even more conceptually similar than those at issue in *Lomagro*, because here, the acts underlying each separate count consisted of performing the exact same type of conduct repeatedly. In *Lomagro* the victim testified that the defendant forced her to engage in both penis-to-mouth intercourse and penis-to-vagina intercourse and the court held that either could satisfy the single sexual assault charge without violating unanimity principles. *Lomagro*, 113 Wis. 2d at 598.

Here, Corey testified that Dewey forced him to engage in penis-to-anus intercourse on multiple occasions, penis-to-mouth intercourse on multiple occasions, committed incest with Corey on multiple occasions, forced Corey to expose his penis on multiple occasions, exposed Dewey's own penis on multiple occasions. (R. 273:159–72.) He told these same things to the forensic interviewer. (R. 4:18–23.) Video of Corey's interview was played for the jury. (R. 273:157.) There is no risk that the jurors were split on whether Dewey committed any particular type of assault and thus could have lacked unanimity about whether an assault occurred at all like in *Marcum*; they clearly agreed that Dewey forced Corey

to engage in each of these activities at least once during the charging period. And, as explained, Dewey was not relying on an alibi defense that charging a continuing crime could have affected.

There is nothing in any of the statutes under which Dewey was found guilty that suggests the Legislature meant to prohibit the State from opting to charge them as a continuing offense, where the evidence warranted. *See* Wis. Stat. §§ 948.02(1)(b); 948.06(1); 948.07(1); 948.10(1); 948.10(1)(a). And the charging period was narrowed to the times Dewey and Corey were specifically in that particular residence. The multiple assaults committed against the victim in *Lomagro* were committed at different times and in different places, but were still properly considered a continuing sexual assault. There is no reason for a different rule to apply here. And the law already recognizes that children, by nature, are far less capable of remembering specific dates and being able to pinpoint exactly when a particular event in a series of events took place than an adult. *See State v. Sirisun*, 90 Wis. 2d 58, 65–66 n.4, 279 N.W.2d 484 (Ct. App. 1979) ("A person should not be able to escape punishment for such a . . . crime because he has chosen to take carnal knowledge of an infant too young to testify clearly as to the time and details of such . . . activity.") Indeed, that is precisely the reason that specific dates are not required in prosecuting child sexual assaults. *Hurley*, 361 Wis. 2d 529, ¶ 34.

The assaults do not have to consist of a single unbroken event to be considered a course of conduct. Such a result would be absurd. The defendant in *George* committed multiple discreet acts on different days and at different times, and undoubtedly there were times when he was doing something other than taking bets. *State v. George*, 69 Wis. 2d 92, 100, 230 N.W.2d 253 (1975). But that did not prohibit the State from charging commercial gambling as a course of

conduct crime. *Id.* Indeed, even in *Lomagro* the court did not require the sexual intercourse to have continued in a single, unbroken assault for the State to charge a single offense. *Lomagro*, 113 Wis. 2d at 595–98. It would make no sense to hold that the State is prohibited from doing the same when child sexual assault crimes consisting of a pattern of conduct committed against the same victim by one perpetrator are charged.

And while Wis. Stat. § 948.025 offers an avenue for prosecution for the physical assaults in this situation, that statute does not cover the full range of criminal conduct that may occur when a child is assaulted. Here, Dewey's child enticement, exposing genitals to a child, and causing a child to expose their genitals charges could not be brought under that section because they did not constitute violations of Wis. Stat. § 948.02. *See* Wis. Stat. § 948.025(1). And the State did indeed charge, and the jury convicted, Dewey on six counts of repeated sexual assault of the same child, including a charge that he repeatedly assaulted Corey over these charged time periods. (R. 81:7; 87:1.) However, section 948.025(3) states that the State may not charge a defendant with repeated sexual assault of a child under section 948.025(1) and also with a single sexual assault of the same child or exposing genitals to the child, unless those violations occurred outside the time period charged in the repeated sexual assault count. Pursuant to this Court's decision in *State v. Cooper*, 2003 WI App 227, ¶¶ 1, 15, 267 Wis. 2d 886, 672 N.W.2d 118, the proper remedy in this situation is to dismiss the repeated sexual assault charge and allow the remaining charges for the individual acts to stand. Accordingly, Dewey's six repeated sexual assault of the same child convictions were vacated. (R. 206; 278:4–11.)

In these circumstances—where the State appropriately charged and convicted the defendant on charges of repeated sexual assault of the same child, but those charges were

vacated after conviction pursuant to *Cooper* and section 948.025(3)—overturning the remaining verdicts on the individually charged counts because the child testified that multiple assaults occurred would be a perverse and absurd result. Defendants who assault a child so many times that the child can no longer distinguish between the assaults when they testify would receive a windfall from the very fact that they repeatedly assaulted the child. *Cooper* expressly recognizes the propriety of sustaining the individual charges in this situation. *Cooper*, 267 Wis. 2d 886, ¶ 15. And in cases where a child has been repeatedly assaulted, obviously if the child were able to be more specific about the assaults, the State would have charged them with specificity.

Moreover, requiring the jury to come to a consensus on a specific incident of conduct to sustain a guilty verdict in cases where there have been continuing assaults of a child would likely work to the defendant's disadvantage in certain cases, as well. If each assault had to be charged and proved separately, a defendant in a case like this would face potentially hundreds of charges with centuries of potential prison exposure. Such charges would also unduly prolong trials and likely confuse juries. Instead, the prosecutor here was able to group distinct types of conduct together and charge them as one offense. As the Sixth Circuit observed in a case involving a very similar set of facts, it should be "difficult to criticize the government's exercise of discretion when it redounds to the benefit of the defendant." *United States v. Alsobrook*, 620 F.2d. 139, 142–43 (6th Cir. 1980).

In sum, Dewey was charged with and convicted of six crimes against Corey: (1) repeated sexual assault of the same child; (2) first-degree sexual assault of a child under age 12 via sexual intercourse; (3) incest; (4) child enticement; (5) causing a child to expose his genitals; and (6) exposing Dewey's genitals or pubic area to a child, all committed between January 1, 2010, and June 10, 2010, or between

November 9, 2010, and February 9, 2010, or between June 16, 2011, and December 31, 2011, in a residence on Hollister Avenue. (R. 81:7–9.) The State introduced evidence showing that Dewey repeatedly committed conduct constituting all five of the individual crimes against Corey multiple times when he was at the Hollister Avenue address; this was a continuous pattern of conduct. The fact that the charging period alleged only the discrete dates that Corey and Dewey lived in the Hollister Avenue residence and that those dates were not completely continuous, along with the fact that Corey could not testify with specificity as to when any individual assault occurred, should be of no moment. The State appropriately charged and convicted Dewey on a count of repeated sexual assault of Corey during this period, which was later vacated due solely to operation of law and not any infirmity with the evidence. And neither the time nor the place the assaults took place are an element of any crime for which the jury found Dewey guilty.

Ergo, Dewey's right to a unanimous jury was not undermined by Corey's testimony that multiple assaults took place at the Hollister Avenue address. The jury clearly unanimously agreed that Dewey committed all of the essential elements of each charged crime when Corey and Dewey were at the house on Hollister Avenue. That was all that due process required. Dewey should not benefit from the fact that he assaulted Corey so many times that the child could no longer differentiate between particular assaults in his memory and the repeated assault conviction was vacated after trial pursuant to *Cooper*. Accordingly, Rhodes was not ineffective for failing to object to the form of the jury instructions or verdicts on these charges, because an attorney cannot be found deficient for failing to make unmeritorious objections. *State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441.

2. To the extent this situation is not addressed by the above case law, the law is then unsettled on the issue and counsel cannot be found ineffective for failing to advance a novel argument.

Finally, even if this Court is not convinced that the case law discussed above speaks to this situation—where three distinct date ranges were alleged for the charge rather than a single continuous period and the evidence showed multiple assaults occurred across a long time span—then the circuit court was correct that the law on this particular issue is unsettled, and Rhodes cannot be found deficient for failing to raise the argument. *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93.

"Failure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." *Id.* (citation omitted). "Rather, 'ineffective assistance of counsel cases should be limited to situations where the law or duty is clear . . . .'" *Id.* (citation omitted). Rhodes cannot be found deficient for failing to raise an argument that rests on unsettled law. *State v. Maloney*, 2005 WI 74, ¶ 30, 281 Wis. 2d 595, 698 N.W.2d 583.

While it's long been recognized that a jury must reach a unanimous verdict in a criminal case, there has been much debate on what exactly "the jury must be unanimous about." *Johnson*, 243 Wis. 2d 365, ¶ 11. Dewey contended postconviction that the jury must be unanimous about which particular offense in a series took place when there are multiple distinct charging periods for a single offense; but the State, Dewey, and the circuit court could not find any case law that directly addresses this situation. (R. 279:21–25; 282:8–9.)

Dewey himself described this case as "unique." (R. 279:22.) The closest case either party could locate was *Lomagro*, and it did not deal with whether a unanimity issue arises if the State alleges three distinct charging periods for a single count based upon a pattern of conduct; it dealt with whether there was a jury unanimity problem when the State presented evidence that the defendant engaged in several different types of conduct during a single sexual assault that each could have satisfied the elements of a single charge. (R. 237; 242; 279:21–28; 282:4–11); *Lomagro*, 113 Wis. 2d at 586–96. Indeed, none of the case law Dewey relies on in his appellate brief addresses the question at issue here, either. (Dewey's Br. 56–59.) It is all case law about jury unanimity as a general principle.

And this Court has already recognized that while *Lomagro* can be extended to address this situation, it did not squarely do so. *McMahon*, 186 Wis. 2d 68. In *McMahon*, this Court held that counsel could not be found deficient for failing to raise an extremely similar argument to that which Dewey raises here: an argument that *Lomagro* prohibited charging several sexual assaults that occurred over a six-week time period as a single count on jury unanimity grounds. *Id.* at 84–85.

Accordingly, Rhodes did not have a professional obligation to raise this objection because it is not at all clear that the instructions or verdicts were problematic. *Lomagro* has not been clarified on this point, as this Court recognized as recently as a few weeks ago. *State v. Larson*, 2021 WL 4438151, ¶¶ 2, 6–14 (Sept. 28, 2021) (recommended for publication). The circuit court summed it up perfectly when it observed that "[w]hile trial counsel should know that an objection needs to be made at the instructions conference to jury instructions if the unanimous verdict issue exists, the fact that a unanimous verdict issue was there would not have been clear to [Rhodes]" at the time. (R. 282:8–9.) There is no

clearly established law addressing this situation. Dewey thus failed to show that Rhodes performed deficiently by not objecting on unanimity grounds to the instructions or verdicts related to counts 32 through 36.

C. Dewey cannot show prejudice because the circuit court would have simply amended the instructions and verdicts to charge a continuous period, and any error in the instructions or verdicts was harmless.

Dewey has further failed to meet his burden on his ineffective assistance claim because he has not addressed prejudice at all. (Dewey's Br. 52–59.) A defendant does not show ineffective assistance simply by showing that his attorney made an error; he must also prove that there is a reasonable probability that the error affected the outcome of the trial. *Balliette*, 336 Wis. 2d 358, ¶ 24. This Court does not have a duty to develop arguments for a party. *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Dewey's failure to address this prong of the test means his claim must fail.

Nevertheless, the record shows that Dewey could not have met his burden even if he had attempted it. First, the trial court said that had Rhodes raised this objection, the court simply would have amended the jury instruction to include one continuous time frame. (R. 282:9.) It also observed that the jury clearly believed Corey that these particular acts took place while Dewey and Corey were living at the Hollister address. (R. 282:9–10.) Accordingly, Dewey would have been convicted of these offenses anyway had the court amended the instructions to cover the entire continuous time period during which Corey, if not Dewey, lived at the Hollister residence.

Second, the court gave the jury the standard unanimity instruction informing the jurors that "before the jury may return a verdict which may be legally received, the verdict

must be reached unanimously. In a criminal case, all 12 jurors must agree in order to arrive at a verdict." (R. 143:66.) The jurors were also instructed after the explanation of each count that they had to find beyond a reasonable doubt that all of the elements had been proved to find the defendant guilty. (R. 143:1–56.) The instructions as a whole accurately explained the elements of each offense and gave the specific date ranges for each count which were also reflected in the verdict forms, including those for the offenses charged in counts 32 through 36. (R. 88; 89; 90; 91; 92; 143.)

And, like in *Becker*, the jury did not return a split verdict; it convicted Dewey on all five charges. The jury was obviously unanimously convinced that the State proved that Dewey committed every element of each of these offenses, and proved that the conduct occurred during one of the charged time periods. There is no possibility that Rhodes' failure to raise an objection and ask that the charging period be continuous prejudiced Dewey.

III. Any error in the instructions or verdict forms relating to the charging periods in counts 32 through 36 does not warrant use of this Court's discretionary reversal power.

As shown above, his counsel was not ineffective for failing to challenge the jury instructions or verdicts on this ground. That means Dewey can only succeed on this challenge if this case is one of the "exceptional cases"[7] warranting this Court to use its discretionary power to reverse in the interests of justice, because this Court lacks the authority to directly review unobjected-to jury instructions.

In *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988), the Wisconsin Supreme Court held that it

[7] *State v. Kucharski*, 2015 WI 64, ¶ 23, 363 Wis. 2d 658, 866 N.W.2d 697.

may directly review unobjected-to jury instructions, but this Court may not do so. Wisconsin Stat. § 805.13(3), applicable to criminal proceedings by way of Wis. Stat. § 972.11, requires the circuit court to hold an instruction conference where the parties have an opportunity to submit proposed instructions, and to inform counsel on the record of the instructions it is going to submit to the jury. It provides counsel with the opportunity to object to the proposed instructions "on the grounds of incompleteness or other error" at that time. Wis. Stat. § 805.13(3). It then states that "[f]ailure to object at the [instruction] conference constitutes a waiver of any error in the proposed instructions or verdict." Wis Stat. § 805.13(3). This statute superseded all of the common law doctrines that allowed this Court to review unobjected-to jury instructions. *Schumacher*, 144 Wis. 2d at 401–05. This prohibition applies equally to un-objected-to verdict forms. *Marcum*, 166 Wis. 2d at 916.

The only way this Court can review an argument about unobjected-to instructional error is through the lens of its discretionary power of reversal granted by Wis. Stat. § 752.35. *Schumacher*, 144 Wis. 2d at 408. "Relief is not warranted [under Wis. Stat. § 752.35] unless the court is 'persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury.'" *In re Commitment of Sanders*, 2011 WI App 125, ¶ 13, 337 Wis. 2d 231, 806 N.W.2d 250 (citation omitted).

As explained above, the instructions as a whole properly stated the law. The jury was informed that it had to find that the State proved each element of each offense beyond a reasonable doubt to return a guilty verdict. (R. 143.) It was informed that it had unanimously agree that the State met that standard for each charge or it had to acquit Dewey on that count. (R. 143:66.) It was informed specifically which time periods attached to each count. (R. 88; 89; 90; 91; 92;

143:1–53.) And there isn't any indication that the instructions confused the jury or clouded a crucial issue.

Dewey has not articulated any error that actually occurred with the instructions, let alone explain how that purported error "permeate[d] the underlying meaning" of any instruction. (Dewey's Br. 60–63 (citation omitted).) He instead says, in conclusory fashion, that "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." (Dewey's Br. 62.) He fails to cite any case law to this effect or explain how the instructions did not relay this to the jury. Nor does he explain how he reaches the conclusion that the instructions did not allege that each assault occurred "over a set period of time." (Dewey's Br. 63 (emphasis omitted).) This contention is untenable: the instructions and verdict forms were very specific about the "set period of time" in which the jury had to find that Dewey committed the crimes charged. Indeed, this contention would appear to undermine Dewey's entire ineffective assistance claim—there, he was claiming Rhodes was ineffective for failing to challenge the instructions and verdicts on the ground that the set periods of time were not broader.

Dewey cannot have it both ways. The instructions set forth clearly what conduct the State had to prove beyond a reasonable doubt for the jury to find guilt, that the jury must find guilt unanimously, and instructed the jury about which acts were attached to which time periods. There was no error, plain or otherwise, in the jury instructions.

CONCLUSION

This Court should affirm the decision of the circuit court.

Dated this 7th day of October 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 294-2907 (Fax)
kumferle@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,898 words.

Dated this 7th day of October 2021.

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 7th day of October 2021.

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER
Assistant Attorney General