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**COURT OF APPEALS**

STATE OF WISCONSIN  
C O U R T O F A P P E A L S  
DISTRICT IV  
Case No. 2021AP174-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,  
vs.  
MICHAEL T. DEWEY,  
Defendant-Appellant.

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**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**

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**REPLY BRIEF OF DEFENDANT-APPELLANT**

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## Argument

### **I. 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.**

These victims were not too young to testify clearly as to the time and details of the sexual activity. *Cf. State v. Fawcett*, 145 Wis.2d 244, 249-250, 426 N.W.2d 91 (Ct. App. 1988). The State cites [www.naeyc.org/sites/default/files/globally-shared/downloads/PDFs/resources/pubs/calendartime.pdf](http://www.naeyc.org/sites/default/files/globally-shared/downloads/PDFs/resources/pubs/calendartime.pdf), (viewed by Appellant's counsel October 26, 2021), which is an article by Sallee Benke *et al.* "Calendar Time for Young Children: Good Intentions Gone Awry," on the National Association for the Education of Young Children" website, but that authority is really not supportive of the State's position. That article cites a more academic authority, an article by W.J. Friedman, "The development of children's knowledge of the times of future events" 4 Child

Development 71 (2000), 913–932, which discusses that the ability to judge the relative time from a past event develops sometime between seven and ten years of age. The boys in this case were fifteen and eleven at the time of their reporting of the assaults on October 14, 2014, State Br. 8, and the trial started April 11, 2016, so they were certainly old enough at the time of their testimony to judge relative time.

**II. Trial counsel was ineffective in not objecting to the time periods in the jury instructions because the jury is not unanimous if different jurors find different acts committed at different times during a split-up time frame.**

A. A finding of “any old act at any old time” is insufficient to satisfy the requirement of jury unanimity.

The State is satisfied that jury unanimity is met if there is some indication that the jury settled on finding “some act” at “some point” during the charged time frame,

but that does not work here because the time frame is fundamentally flawed. *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. *See 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.

By the State’s logic, a charge to the jury specifying (or rather not specifying) “any old act occurring at any old time” would pass constitutional muster.

*State v. Becker*, 2009 WI App 59, 318 Wis.2d 97, 767 N.W.2d 585, cited by the State, State Br. 21, is inapposite, because that charging period, in each count was only a two-months time span, and not divided into multiple periods. Two continuous months. The counts did not

specify whether each applied to the defendant's touching the victim's vagina or the victim's touching the defendant's penis, and the evidence referred to both acts. The jury sent a question as to whether count one referred to vagina and count two to penis, and the court, without objection by either side, said "no." There was no prejudice in *Becker* because it was clear from the record that the jury had found the defendant guilty of both touching victim's vagina and having victim touch the defendant's penis, there being no evidence of any other act. *Id.* at ¶27. *See also id.* at ¶25 ("[W]e agree with the State that, at most, testimony reveals two acts with respect to which the chronological order was not entirely clear."). Moreover, the time period was specified even more narrowly for the jury charge in *Becker*, down to one month, apparently, *see id.* at ¶16. ("[T]he trial court inserted the month and year into each count..."). Finally, it is apparent that the assaults in *Becker* were alleged to have occurred on the same day, even if the victim was not sure about the exact day. In short, *Becker* does not



support the State's position.

**III. Regarding counts thirty-two through thirty-six, the jury should have been required at a minimum to be unanimous at least as to which *series of acts* Mr. Dewey supposedly committed.**

The State tries to turn Mr. Dewey's argument on its head by stating that Mr. Dewey wanted a broader charging period, State Br. 35, which is not what Mr. Dewey argued in his brief either explicitly or by implication. The State twists the Appellant's argument to make it seem Mr. Dewey would approve a charging period of two years (January 1, 2010 to December 31, 2011).

The State divided the charges into three periods separated by months, so the State chose to make these periods divided in time from each other. 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. Dewey cited *Lomagro*, Appellant's Br. 33-34, 56, which stands for the proposition that so long as a victim makes an accusation of assault by one perpetrator, *over a set period of time*, the law can consider it as one continuous story with various chapters. *See also McMahon*, 186 Wis.2d at 84. 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.

The State is thus incorrect in saying that no authority for this proposition was cited. 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.

While the law was considered unsettled at the time of *McMahon*, it was not unsettled once *McMahon* issued.

*McMahon* alleged twelve incidents spread out over one singular 45 day period. *McMahon*, 186 Wis. 2d at 79. At the time of that litigation, it was an open question whether an incest victim's story of assault by the perpetrator "over a set period of time" could be viewed as "one continuous story with various chapters. *Id.* at 84-85.

The offenses charged here were not "a continuing story," but rather had pages and chapters missing. The State cites *State v. George*, 69 Wis.2d 92, 230 N.W.2d 253 (1975), but that case is clearly inapposite, not only because it was a gambling case, but also because the charging period was "from on or about September 15, 1971, and regularly through about January 15, 1972." *Id.*, at 95, n. 1.

The jury instructions for counts thirty-two through thirty-six did not offer a constitutionally sufficient guarantee against factual nonconcurrence in the jury room. Mr. Dewey should get a new trial on those counts should the Court rule against him regarding the pretrial motion to dismiss that the trial court denied.

### **Conclusion**

For the reasons stated above, as well as those reasons Mr. Dewey cited in his main brief, the Court of Appeals should reverse the pretrial order of the circuit court that denied dismissal of counts one, three, four, six through seventeen, 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 31st day of October, 2021.

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SECTION 809.19(8) CERTIFICATE

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I hereby certify that this brief 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 1445 words.

Electronically signed by:  
David R. Karpe