STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2021AP1732-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC J. DEBROW,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JOHN D. HYLAND, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

In March of 2020, a jury convicted Defendant-Appellant Eric. J. Debrow of sexually assaulting his girlfriend's daughter. Debrow, who was sentenced to life imprisonment under the persistent repeater statute, seeks to overturn that conviction, arguing that multiple errors infected his trial. Those putative errors include the trial court's decision not to grant a mistrial after a witness mentioned looking Debrow up on CCAP, the court's admission of evidence that Debrow viewed pornography purportedly involving a man and his stepdaughter, and the court's admission of other acts evidence involving a separate time Debrow entered the victim's room. Debrow also asks this Court to grant him a new trial in the interest of justice.

This Court should affirm Debrow's conviction and decline his request for a new trial. The circuit court properly exercised its discretion when it denied Debrow's request for a mistrial as well as when it admitted the evidence in question. Moreover, any error in the admission of evidence was harmless as it is clear beyond a reasonable doubt that the cumulative effect of any errors did not affect the outcome of Debrow's trial. Finally, this Court should not grant Debrow's request for a new trial because he has not shown that his case is an exceptional one warranting this extraordinary remedy.

ISSUES PRESENTED

1. Did the circuit court erroneously exercise its discretion when it denied Debrow's motion for a mistrial following testimony by a witness that he had looked up Debrow's record on CCAP?

The circuit court denied Debrow's request for a mistrial and instead instructed the jury to disregard the comment.

This Court should affirm.

2. Did the circuit court erroneously exercise its discretion when it allowed the State to introduce evidence that Debrow had watched a pornographic video with a title suggesting intercourse occurring between a girl and her stepfather?

The circuit court found the evidence to be "highly relevant" and allowed its introduction.

This Court should affirm.

3. Did the circuit court erroneously exercise its discretion when it allowed the State to introduce evidence that Debrow had previously entered the victim's room at night?

The circuit court allowed the evidence, concluding that it was relevant because it demonstrated intent.

This Court should affirm.

4. Even if any evidence was erroneously admitted, was that error harmless beyond a reasonable doubt?

The circuit court did not reach this question.

If it reaches this question, this Court should conclude that any error was harmless and affirm Debrow's conviction.

5. Is Debrow entitled to a new trial in the interest of justice?

The circuit court did not reach this question.

This Court should decline to extend this extraordinary remedy to Debrow.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This Court can resolve this case by applying settled legal principles to the facts, all of which are adequately described by the parties' briefs.

STATEMENT OF THE CASE

This appeal arises out of Debrow's conviction at trial of one count of second-degree sexual assault of a child as a persistent repeater in Dane County case number 2018CF202. (R. 106:1.) Debrow was also charged with a separate count of first-degree sexual assault of a child as a persistent repeater in Dane County case number 2018CF1787. (R. 63:1.) As will be discussed, the Dane County Circuit Court joined the two cases for trial,[1] and the jury convicted Debrow on the count in 2018CF202 but acquitted him on the count in 2018CF1787. (R. 118:103.)

Investigation & Pre-Trial Proceedings

On the morning of January 22, 2018, Madison Police responded to Safe Harbor where staff were conducting an interview of MMW, who was then 13 years old. (R. 1:1.) MMW reported that about one week earlier, Debrow—her mother's boyfriend—came into her room while she was sleeping and touched her. (R. 1:2.) According to MMW, she awoke to discover that Debrow had flipped her covers up and was "rubbing her legs and gripping her butt." (R. 1:2.) MMW screamed at Debrow to get out of her room, which caused the family dogs to start barking. (R. 1:2.) Debrow left, closing the bedroom door as he did. (R. 1:2.)

In an information dated February 27, 2018, the State charged Debrow with one count of sexual assault of a child under the age of 16 as a persistent repeater. (R. 13:1.) Because Debrow had been convicted of first-degree sexual assault of a child in 2004, the persistent repeater charge carried with it a

[1] The circuit court denied the State's motion with respect to its request to join Dane County case nos. 2018CF2282 and 2018CF2409, each of which involved multiple counts of bail jumping. (R. 63:2; 127:33–34.) Those cases are not at issue in this appeal.

mandatory life sentence without the possibility of early release. *See* Wis. Stat. § 939.62(2m)(b)–(c). Debrow pleaded not guilty (R. 126:15), and the case moved toward trial. During the lead up to trial, Debrow violated the conditions of his release multiple times by contacting MMW and her mother, KKL, by text and through Facebook. (R. 34; 38.) Debrow also changed counsel multiple times, resulting in significant delays to the trial schedule. (R. 65:1–2.)

In November of 2019, the State moved to join the case involving the assault against MMW with a separate case involving an assault against MMW's younger sister, NNM. (R. 63.) In that case, NNM stated that Debrow entered her room one night and unbuttoned her pants. (R. 63:2.) NNM also stated that she would sometimes sleep in bed with her mother when she was not feeling well, and that on multiple occasions when she was in bed with her mother, Debrow put his hand down her pants and rubbed her vagina. (R. 63:2.) The State also moved to join the two cases involving the bail jumping charges that resulted from Debrow's contact with MMW and KKL following his release on bail. (R. 63:2–3.) Debrow opposed joinder (R. 68), and the circuit court held a hearing to discuss the matter on February 12, 2020 (R. 127). After argument by the parties, the circuit court determined that the cases involving the allegations by MMW and NNM would be joined, but the bail jumping cases would remain separate. (R. 127:30–33.)

On March 5, 2020, the State requested the circuit court's permission to introduce other acts evidence against Debrow at trial. (R. 72:1.) Specifically, the State indicated that it planned to use the incident where Debrow unbuttoned NNM's pants and an incident where Debrow went into MMW's room in the night and touched her, waking her up and causing her to scream. (R. 72:2.) The State argued that the incidents were relevant to show plan, absence of mistake, and intent on Debrow's part. (R. 72:2.)

The court took up the State's request on the morning trial was set to begin. (R. 120:30–31.) The State reiterated its arguments in the motion as its reasoning for why the court should allow the evidence. (R. 120:32.) Debrow opposed the motion, arguing that the other acts alleged were too different from the charged acts to have much relevance while they would also be highly prejudicial. (R. 120:34–35.) The court noted that the law told courts to be "very, very encompassing when dealing with these issues involving sexual assaults and specifically child sexual assaults." (R. 120:37.) The court agreed with the State that the other acts tended to show a lack of mistake, intent, and opportunity, and it found that the probative value outweighed the risk of prejudice. (R. 120:38–39.) It therefore granted the State's motion to use the evidence. (R. 120:39–40.)

The same morning, the court also addressed a motion in limine that addressed evidence that Debrow viewed pornography titled "Stepdaughter is scared to get fucked while wife sleeps." (R. 120:14.) The State proposed to introduce text messages and a phone call recorded while Debrow was in jail wherein KKL confronted Debrow about finding the pornography on his computer. (R. 120:14.) The State argued that the evidence was relevant to Debrow's intent and his sexual gratification, which it had to prove as part of "sexual contact." (R. 120:15.) Debrow opposed introduction of the pornography evidence, saying that it was irrelevant because it suggested intercourse, which was not at issue in the charged cases. (R. 120:16.) He further argued that even if the evidence was relevant, it was still unduly prejudicial and risk the jury convicting him based on the video title alone. (R. 120:16.)

The court commented that the nature of the video—inasmuch as it claimed to involve a stepdaughter whose mother was sleeping—was highly relevant to the allegations against Debrow, who was alleged to have assaulted MMW

and NNM while their mother slept. (R. 120:22.) The court presumed that Debrow came upon the video by using related search terms, which it also found relevant. (R. 120:22–23.) It agreed with the State that the video tended to show sexual gratification, and it therefore allowed the State to introduce the text messages and phone call discussing it as evidence. (R. 120:23.)

After several other evidentiary rulings, the court took a break for lunch to allow Debrow to decide whether he would accept the State's final plea offer. (R. 120:61–62.) Following the break, Debrow told the court he rejected the State's plea offer and proceed to trial. (R. 129:7–8.) The court called in the jury[2] and trial began. (R. 129:13.)

Trial

The State's first witness was MMW. (R. 129:37.) MMW testified that Debrow was her mother's boyfriend and lived with the family in early 2018. (R. 129:41.) She identified a diagram as a mirror image of the apartment the family and Debrow were living in at that time. (R. 129:44.) She identified the rooms where she, her mother, her sister NNM, and her brother slept. (R. 129:47.)

MMW said that on January 17th, 2018, she woke up very early in the morning "to somebody touching [her] butt and thigh." (R. 129:50–51.) She screamed, which caused the dogs to start barking. (R. 129:51.) MMW then stayed awake until it was time for her to go to school. (R. 129:51.) MMW reported that she was "100 percent" sure that the person who touched her was Debrow. (R. 129:56.)

When MMW returned from school later that day, her mother was telling Debrow to leave and that he should have been gone before MMW got home. (R. 129:58.) At some point,

[2] Jury selection occurred the previous day, but the court did not swear in the jury at that time. (R. 130.)

MMW's brother called the police, who arrived and spoke with MMW and NNM. (R. 129:58.)

Asked if there was ever another time she had awoken to Debrow in her room, MMW testified that when the family first moved into the apartment, she once woke up to Debrow sitting on her bed saying "shh, it's just a game" and instructing her not to tell her mother. (R. 129:60.) MMW also stated that she once had a discussion with her mother about what to do "if anything were to happen" while she was in her room in the night, and "[t]he general consensus was" that she should scream. (R. 129:65.)

MMW's brother IS testified next for the State. (R. 129:88.) IS stated that the arrangement of his bedroom in the apartment allowed him to see directly out his bedroom door. (R. 129:93.) He had been lying awake in bed on the morning of January 17th when he saw Debrow enter MMW and NNM's bedroom. (R. 129:94.) Debrow was in the room for five to ten minutes when IS heard his sister scream. (R. 129:96.) Debrow then immediately left the room to go back to KKL's room. (R. 129:96.) IS was angry about what he saw all day while he was at school, so when he got home later that day, he called the police. (R. 129:97.)

IS confirmed that the dogs began to bark after he heard his sister scream. (R. 129:99.) He also confirmed that he and Debrow would occasionally fight and that sometimes the fights involved punching and kicking. (R. 129:100.) He added that he viewed Debrow as a sort of father figure "until all this stuff happened." (R. 129:100.)

On cross-examination, IS said that he stayed awake and watched MMW and NNM's bedroom door after Debrow left it "just to see if he was going to go back in there." (R. 129:108.) He also noted that he generally could not control how he slept and was on medication for sleeping, which was why he was awake that night to begin with. (R. 129:108.)

During re-direct examination, the State requested a sidebar and sought permission to ask a leading question. (R. 129:110.) The State indicated that it wanted to address why IS was being particularly vigilant about Debrow and his sisters without IS responding in a way that told the jury that Debrow had previously been convicted of sexually assaulting a minor. (R. 129:110–11.) Debrow's attorney opposed the State's request and said that if IS gave the "wrong answer," he would request a mistrial. (R. 129:112.) He further contended that the State should not be allowed to address IS's "feeling" about Debrow because the State originally brought it up during direct examination and the defense only followed up on it during cross-examination. (R. 129:113–14.) The State re-emphasized that it wanted to address why IS was watching his sisters' bedroom door "in a leading way so we don't accidentally get a mistrial about this." (R. 129:115.)

The court sustained Debrow's objection to the State asking a leading question. (R. 129:117.) It said that the State could "go into this area in not a directly leading fashion but in a very direct or indirect but not leading manner." (R. 129:116–17.) The State responded that it was concerned where IS's mind would go "with such a vague question," but would "try to be quick to interrupt" if need be. (R. 129:117.) The court said that it would "be happy to be on pins and needles as well as to jump in if [IS] starts saying something" related to Debrow's criminal history. (R. 129:117.)

After the sidebar, the following exchange took place:

> Q [IS], I want to draw your attention to the timeframe of when you moved into [the apartment] with [Debrow] and your two sisters and your mom, okay?
>
> At any point from when you moved in, had you learned anything or heard anything that led you to be on alert that night on January 17th of 2018?
>
> A Yes.

> Q And were those based on things your sisters had mentioned?
>
> A No.
>
> Q Are those things that you heard from your mom?
>
> A It's things that I - -
>
> Q - - I don't want to get into that - -
>
> (Unreportable simultaneous interjections by Counsel.)
>
> (R. 129:118.)

Debrow moved to strike the response and indicated that he would make another motion shortly. (R. 129:118.) The court then said, "I'll - - I'll move to strike. The question was were those things you heard from your mother, and if you can just give a yes or no as far as whether those were things you heard from your mother. We can't get into what they are, because that's hearsay." (R. 129:119.) IS began to respond with "Well, my mom did tell me - -" and the court cut him off, saying "we can't put her words into your mouth in front of the jury." (R. 129:119.) The State added, "that's why I had to speak over you, and I apologize for doing that." (R. 129:119.) The State then ended its re-direct examination, and the court directed the jury "to strike anything else that they . . . heard beyond the witness's statement that he heard from his mother but not the content of anything." (R. 129:119.)

Shortly thereafter, the court dismissed the jury and the parties stayed on the record to discuss what happened. (R. 129:121–22.) The court stated that the State asked a question that was not leading, and when IS started to interject, the court heard the words "I looked on CCAP." (R. 129:122.) At that, both attorneys and the court interrupted IS. (R. 129:123.) The court noted that it granted Debrow's motion to strike, and it said that it would "give that instruction in the end as well." (R. 129:123.)

Debrow moved for a mistrial. (R. 129:123.) He argued that even though the court struck IS's response, "the jury still heard it." (R. 129:123.) He contended that the jury would wonder what IS found on CCAP that led him to be so vigilant and concluded that the jury would surmise that Debrow had previously been convicted of sexual assault. (R. 129:123–24.) And because Debrow believed that a curative instruction would not correct the error, he felt the trial needed to start over with a new jury. (R. 129:124.)

The State disagreed that a mistrial was necessary. (R. 129:124.) It noted that a mistrial was a "drastic" remedy, and that it would be sufficient to either issue another instruction to the jury to disregard the response, or, if Debrow preferred, to not address the issue again so as to call no further attention to it. (R. 129:124–25.) The State also commented on the court's statement to IS that the problem with his response was hearsay, which the State believed minimized the risk that the jury would understand that IS was likely referring to Debrow's criminal history. (R. 129:125.)

The court noted that a mistrial is "the most serious of remedies." (R. 129:128.) It said that a few reasons reduced the necessity of granting a mistrial in Debrow's case. (R. 129:128.) First, there was no way to know how many of the 14 jurors heard IS mention CCAP and whether they knew what CCAP was. (R. 129:128–29.) Regardless, the court noted that IS did not say specifically what it was he saw on CCAP that caused him to be alert. (R. 129:129.) Second, the reason given to the jury for the interruption of IS's response was that it was getting into matters of hearsay, which were not allowed. (R. 129:129.) Finally, there were less drastic measures than a mistrial available to address IS's response. (R. 129:130–31.) For those reasons, the court denied Debrow's request for a mistrial. (R. 129:131.)

On the second day of trial, the State began by calling NNM. (R. 119:21.) NNM testified that Debrow once entered

her room while she was sleeping and unbuttoned her pants, but she could not recall when. (R. 119:26–27.) She further testified that she would occasionally have nightmares, and when she did, she would go to her mother's room and sleep in her mother's bed. (R. 119:30.) She said that one time when she was sleeping in her mother's bed, Debrow touched her vagina over the top of her clothes. (R. 119:32–33.) However, she was unable to remember when or provide many other details about it. (R. 119:33–34.)

The State also asked NNM about another time she was in her mother's bed while sick and Debrow touched her vagina. (R. 119:34.) NNM struggled to remember the event or provide details about it or what she said at her Safe Harbor interview two years prior. (R. 119:34–44.) However, she did remember the incident occurring. (R. 119:44.)

The State's next witness was KKL. (R. 119:59.) KKL testified that she set a "ground rule" with Debrow while he was living with her family that he was not to go into MMW and NNM's room. (R. 119:66.) KKL also confirmed that NNM reported to her that Debrow had unbuttoned her pants. (R. 119:66.) KKL went to Debrow's mother's home after the incident, but she did not contact the police at that time. (R. 119:66.)

KKL said that NNM once told her that she awoke to MMW yelling "Get out!" at Debrow in the middle of the night. (R. 119:67.) KKL asked MMW about it and MMW "kind of played it off." (R. 119:68.) Nevertheless, KKL told MMW that if anything like that happened again, MMW should yell loud enough to wake everyone up. (R. 119:68.) However, she did not contact police about the incident at that time. (R. 119:68.)

KKL confirmed that on the morning of January 17th, 2018, she awoke to MMW screaming "get out" over and over. (R. 119:76–77.) The dogs woke up and began to bark, and then Debrow returned to the room and claimed that he was

"getting the dogs." (R. 119:78.) She recalled that the incident happened at 5:39 in the morning. (R. 119:78.) After that, the children went to school and KKL took Debrow's mother to a medical appointment. (R. 119:79–80.) After she returned home, she told Debrow that he had to leave. (R. 119:80.) An argument ensued, and it continued when MMW got home from school. (R. 119:80–81.) The argument escalated until KKL pointed a gun at Debrow and told him to "pack his shit and get out." (R. 119:81.) The police arrived a short time later, having been contacted by IS. (R. 119:81.)

In the days that followed, Debrow continued to contact KKL via text message. (R. 119:108.) In those conversations, Debrow denied touching MMW. (R. 119:115.) KKL then confronted Debrow about the pornography she found on his computer titled "Stepdaughter scared to get fucked while wife sleeps." (R. 119:115.) Debrow did not deny watching the video and replied that he "watched all type[s] of shit like stepbrother fucked sister." (R. 119:116.) Debrow went on to admit that he was not perfect and that he had "problems like everybody." (R. 119:116.) KKL retorted,

> No matter what you say, it won't change my mind. I know you did it. And I really believe that [NNM] was telling the truth about you unbuttoning her pants. I would have told the detective that if I could remember when it happened. No matter your excuse, nothing makes this right. I don't care if the devil himself molested you. You are grown and you know right from wrong.
>
> (R. 119:117.)

After cross-examination, the State recalled NNM to the stand. (R. 119:148.) She confirmed that she awoke on the morning of January 17th to MMW screaming "get out." (R. 119:148–49.) She then saw Debrow leave the room and close the door. (R. 119:149–50.) She did not talk to MMW about what happened between the time of the incident and when

she arrived home from school to find the police there. (R. 119:150–51.)

Next to testify for the State was Officer Rayvell Gillard. (R. 119:152.) Officer Gillard responded to the home on the afternoon of January 17th and interviewed both KKL and IS. (R. 119:158.) He learned from IS at that time that Debrow had touched MMW's buttocks. (R. 119:160.) The case was then handed over to a detective. (R. 119:160–61.)

The State's next witness was Sergeant Joseph Engler, who arrested Debrow on the afternoon of January 17th. (R. 119:168–71.) When effectuating the arrest, he explained to Debrow that he was being arrested for second-degree sexual assault of a child. (R. 119:172.) Debrow's response was to ask why he could not be arrested for fourth-degree sexual assault, instead. (R. 119:172.) Sergeant Engler explained that fourth-degree sexual assault involves contact between a nonconsenting adult and another adult. (R. 119:172.)

After Sergeant Engler's testimony, the State called Detective Amelia Levett. (R. 119:183.) On January 17th, Detective Levett was a neighborhood resource officer for the district that included KKL's home. (R. 119:183–84.) She heard officers being dispatched to the home over her police radio and decided to respond as well. (R. 119:185–86.) When she arrived, she spoke to MMW and NNM separately. (R. 119:187–88.) MMW recognized Detective Levett from the neighborhood and almost immediately embraced her and began to cry. (R. 119:188.)

Following Detective Levett's testimony, the State called Detective Lisa Wing. (R. 119:199.) Detective Wing testified about NNM's accusations against Debrow and introduced a recording of a call Debrow placed to KKL as well as voice messages Debrow left NNM, including several where he seemed to believe he was contacting MMW. (R. 119:220–22,

229–33.) At the conclusion of Detective Wing's testimony, the State rested. (R. 119:242.)

Debrow did not testify in his own defense, nor did he call any witnesses. (R. 118:3.) After closing arguments, the jury returned verdicts of not guilty on the count of second-degree sexual assault of a child (NNM) under the age of 13 and guilty on the count of second-degree sexual assault of a child (MMW) under the age of 16. (R. 118:99–100.) The court entered judgment on the guilty verdict. (R. 118:103.)

At a sentencing hearing on August 4, 2020,[3] the court sentenced Debrow to life imprisonment without the possibility of early release pursuant to the requirements of the persistent repeater statute. (R. 111:33.)

Debrow now appeals.

STANDARDS OF REVIEW

"A motion for mistrial is committed to the sound discretion of the circuit court." *State v. Ford*, 2007 WI 138, ¶ 28, 306 Wis. 2d 1, 742 N.W.2d 61. "An erroneous exercise of discretion may arise from an error in law or from the failure of the circuit court to base its decisions on the facts in the record." *Id.*

Appellate courts "will uphold a circuit court's evidentiary rulings if it examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." *Pinczkowski v. Milwaukee Cty.*, 2005 WI 161, ¶ 15, 286 Wis. 2d 339, 706 N.W.2d 642. "Whether the circuit court applied the proper legal standards, however, presents a

[3] Debrow requested sentencing in person, and the delay from the end of trial to sentencing in August was to accommodate that request; the courthouse had been closed due to the COVID-19 pandemic. (R. 111:4.)

question of law subject to independent appellate review." *Id.*; *see also State v. Sarnowski*, 2005 WI App 48, ¶ 11, 280 Wis. 2d 243, 694 N.W.2d 498 ("A trial court's admission or exclusion of evidence is a discretionary decision that we will sustain if it is consistent with the law. We review *de novo* whether that decision comports with legal principles." (citation omitted)).

Whether an error is harmless is a question of law that an appellate court reviews de novo. *State v. Monahan*, 2018 WI 80, ¶ 31, 383 Wis. 2d 100, 913 N.W.2d 894.

ARGUMENT

I. The circuit court properly exercised its discretion when it denied Debrow's request for a mistrial.

A. A mistrial is appropriate only when there is a "manifest necessity" for one.

The decision whether to grant a mistrial is within the circuit court's discretion. *See State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998). "The trial court must determine, in light of the entire proceeding, whether the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial." *Id.*

However, "not all errors warrant a mistrial." *Id.* In fact, the law favors less-extreme alternatives when they are available and practical. *Id.* When a defendant seeks a mistrial on grounds unrelated to the prosecution's conduct, this Court gives the circuit court's decision "great deference." *State v. Bunch*, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995) (citation omitted). A circuit court "is in the best position to determine the seriousness of the incident in question, particularly as it relates to what has transpired in the course of the trial." *United States v. Clarke,* 227 F.3d 874, 881 (7th Cir. 2000).

B. The circuit court properly determined that there was no manifest necessity for a mistrial because the curative instruction was a reasonable alternative.

Debrow sought a mistrial based on IS's statement that he was watching Debrow because he "looked on CCAP." (R. 129:122–23.) Debrow claimed that it was an "easy assumption and leap to the idea that . . . what he found on CCAP was a sexual assault." (R. 129:124.) He argued that the statement was "very damaging" and that a curative instruction was not adequate to solve the issue. (R. 129:124.)

The circuit court disagreed. The court noted that even though IS referred to seeing something on CCAP, he did not say what that was. (R. 129:129.) IS did not, for example, say that he knew Debrow had been convicted of sexual assault previously. (R. 129:130.) Furthermore, the court noted, there was no indication as to what the jurors actually heard or whether they knew what sort of information is available on CCAP.[4] (R. 129:129.) And finally, as soon as IS began his answer about CCAP, the interjections by counsel and the court related to hearsay—the parties did not suggest that there was something objectionable in the substance of what IS was saying, but the fact that it was coming from someone else. (R. 129:129.) The court therefore told Debrow it would strike IS's response or issue a curative instruction, but it was not going to grant the request for a mistrial. (R. 129:131.)

This was an appropriate exercise of discretion. The court weighed the options available to it and—having concluded that the risk of the jury gleaning something

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[4] On this point, it is noteworthy that a mistrial is appropriate only where there is a "real likelihood" that an event during trial will prevent the jury from evaluating the evidence fairly and accurately. *United States v. Powell*, 652 F.3d 702, 709 (7th Cir. 2011).

improper from the statement was low—elected to continue the trial and allow Debrow to decide whether to strike the response or have the court issue a curative instruction. This decision is entitled to great deference, *see Bunch*, 191 Wis. 2d at 507, and nothing in the record suggests that the decision was improper.

Debrow argues that the prosecution's questioning got into an improper area unprovoked by the defense questioning, and that once the prosecutor asked IS the question, "pandemonium broke out." (Debrow's Br. 21–22.) This misses the point—the question is not why IS gave the answer he did, it is whether a mistrial was necessary once the answer was given.

Regardless, any implication that the prosecutor intentionally elicited an improper response is completely false. The prosecutor requested a sidebar *specifically* in an attempt to avoid IS giving any improper answers to the redirect questioning. (R. 129:110.) The prosecutor and the court suggested that allowing a leading question would be the best way to receive a "yes" or "no" answer that avoided any improper areas. (R. 129:113.) However, the court stated that because Debrow objected to the use of any leading questioning, it would instead allow the prosecutor to ask about IS's reasoning for watching his sisters' door for the remainder of the night "in a very direct or indirect but not leading manner." (R. 129:116–17.) The prosecutor again expressed concern about "not knowing where [IS's] mind would go with such a vague question," but said that he would "try to be quick" and interrupt if need be. (R. 129:117.)

Moreover, even if Debrow is correct that "[t]he jury had to have noticed [that IS's] statement created a furor," the circuit court correctly pointed out that there was no indication to the jury that the "furor" was about CCAP or Debrow's prior conviction. (Debrow's Br. 22.) After the prosecutor and the court interrupted IS and IS began to clarify that his mother

had told him something, the court explained to IS that "we can't put her words into your mouth in front of the jury." (R. 129:119.) The prosecutor added, "that's why I had to speak over you, and I apologize for doing that." (R. 129:119.)

Debrow argues that the circuit court erroneously exercised its discretion because it was "highly unlikely" that jurors would have assumed that IS watched his sisters' bedroom door all night for any reason other than discovering on CCAP that Debrow was a sex offender. (Debrow's Br. 23.) Debrow's argument is necessarily speculative, and it disregards the court's instruction to the jury to disregard IS's response related to CCAP. Courts generally "presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *See Greer v. Miller*, 483 U.S. 756, 767 n.8 (1987) (citations omitted). Here, there is no reason to think that the jury would be unable to follow the court's direction to disregard IS's response, much less an "overwhelming probability," nor is it clear that the mere reference to CCAP would be "devastating" to Debrow.

Because the circuit court weighed the options and reasonably concluded that striking IS's response about CCAP was sufficient to avoid any undue prejudice, it did not erroneously exercise its discretion when it denied Debrow's motion for a mistrial. This Court should affirm.

II. The circuit court properly exercised its discretion when it admitted relevant evidence of Debrow's searches for pornographic material.

A. Relevant evidence is generally admissible.

With respect to the evidence of Debrow's browser history including a pornographic video, Debrow seems to frame the issue as whether the evidence was relevant and admissible under Wis. Stat. §§ 904.01 and 904.02. (Debrow's Br. 27–28.) Of course, only relevant evidence is admissible. Wis. Stat. § 904.02. However, when evidence *is* relevant, it is always admissible unless some exception to its admissibility applies. *See id.* Relevance is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01.

Although Debrow does not raise it in his brief, one exception to the admissibility of relevant evidence exists in Wis. Stat. § 904.03: "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay." As applied to this case, relevant evidence is admissible if its probative value is not substantially outweighed by the risk or danger of unfair prejudice. *See State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998).

B. The evidence that Debrow watched a video titled "Stepdaughter Afraid to Get Fucked While Wife Sleeps" was relevant to Debrow's motive and intent.

The State charged Debrow with an offense involving "sexual contact" with a minor. To prove Debrow's guilt beyond a reasonable doubt, the State had to show that Debrow acted "with [the] intent to become sexually aroused or gratified." (R.

87:5.) The circuit court properly exercised its discretion when it concluded that testimony suggesting Debrow watched a pornographic video called "Stepdaughter Afraid to Get Fucked While Wife Sleeps" was admissible for that purpose. (R. 120:21–22.) *See State v. Normington*, 2008 WI App 8, ¶ 27, 306 Wis. 2d 727, 744 N.W.2d 867 ("The pornography is evidence of [defendant's] sexual interest, and it is reasonable to infer that he obtains some form of sexual arousal or gratification from viewing it.").

Debrow argues that the evidence was not relevant because there was no indication that he used search terms to arrive at the video, nor was it clear how the video ended up in his browser history. (Debrow's Br. 29–30.) He is mistaken—those arguments go to the weight of the evidence, not its relevance. Debrow was certainly free to argue that he did not seek out this video, and in closing, he did. (R. 118:78.) But the fact that the video existed in his browser history lends itself to an appropriate inference that Debrow watched the video and possibly sought it out, which makes it relevant.

To the extent Debrow argues that the circuit court based its admissibility decision on an incorrect view of the facts—i.e., the use of specific search terms—his argument misses the point. Even if Debrow did not use specific search terms, the evidence still suggested that he watched the video. That information was relevant. The State did not present the evidence as including specific search terms; rather, the evidence was simply that KKL found the video in Debrow's web history, and he did not deny watching it. (R. 95:7–8; 119:116; 120:14.)

Debrow does not argue that the evidence was unduly prejudicial; that is, he does not say that its prejudicial effect outweighed its probative value. Nevertheless, where the crime charged is the sexual assault of a child, relevant evidence may often be shocking to one's sensibilities. But the court is not obligated to exclude evidence simply because it

may be jarring to the jury. Rather, such evidence—if relevant—should be excluded only if the risk of *unfair* prejudice outweighs its probative value. Wis. Stat. § 904.03. The introduction of the evidence here was not unfair, and this Court should affirm the circuit court's decision.

III. The circuit court properly exercised its discretion when it admitted relevant other acts evidence.

A. Wisconsin law favors the admissibility of other-acts evidence.

Other-acts evidence is admissible if it meets a three-part test: (1) it is offered for a permissible purpose under Wis. Stat. § 904.04(2); (2) it meets the two relevancy requirements under Wis. Stat. § 904.01; and (3) its risk of unfair prejudice under Wis. Stat. § 904.03 does not substantially outweigh its probative value. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399 (citing *Sullivan*, 216 Wis. 2d at 772–73). "Once the proponent of the other-acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice." *Id.*

Wisconsin Stat. § 904.04(2) "favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). Indeed, the Wisconsin Legislature added the title "General admissibility" to section 904.04(2)(a) when it adopted the common-law "greater latitude rule" in 2014. 2013 Wis. Act 362, §§ 20, 38. Statutory titles "can be persuasive as to proper interpretation and indicative of legislative intent." *State v. Black*, 188 Wis. 2d 639, 651, 526 N.W.2d 132 (1994). The title "General

admissibility" shows the legislative intent to generally admit other-acts evidence with even greater latitude for admission in a case of a serious sex crime, such as the crime charged in this case.

The remaining prongs of the *Sullivan* analysis also favor admissibility of other-acts evidence. The second prong on relevance has a statutory presumption that relevant evidence is admissible. *See* Wis. Stat. § 904.02 (title stating "[r]elevant evidence generally admissible"). And the third-prong balancing test also "favors admissibility in that it mandates that other crimes evidence will be admitted unless the opponent of the evidence can show that the probative value of the evidence is *substantially* outweighed by unfair prejudice." *Speer*, 176 Wis. 2d at 1115; *see State v. Linton*, 2010 WI App 129, ¶ 26, 329 Wis. 2d 687, 791 N.W.2d 222 ("The balancing test of the probative value and danger of unfair prejudice favors admissibility.").

Further, "[i]n a sex crime case, the admissibility of other acts evidence must be viewed in light of the greater latitude rule." *State v. Hammer*, 2000 WI 92, ¶ 23, 236 Wis. 2d 686, 613 N.W.2d 629. "Under the common law, the greater latitude rule allows for more liberal admission of other-acts evidence." *State v. Dorsey*, 2018 WI 10, ¶ 32, 379 Wis. 2d 386, 906 N.W.2d 158. This rule "has traditionally been applied in cases of sexual abuse, particularly those involving children." *Id.* "This more liberal evidentiary standard applies to each prong of the *Sullivan* analysis." *Marinez*, 331 Wis. 2d 568, ¶ 20.

The Legislature adopted the common-law greater latitude rule in 2014 when it amended the other-acts statute. *Dorsey*, 379 Wis. 2d 386, ¶¶ 31, 35; *see also* 2013 Wis. Act 362, §§ 21, 38. Since then, the statute provides that "any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act." Wis. Stat. § 904.04(2)(b)1. Like the common-law rule, this

statutory rule applies to all three prongs of the *Sullivan* analysis. *See Dorsey*, 379 Wis. 2d 386, ¶ 33. This statutory greater latitude rule applies in, among other things, a criminal case "alleging the commission of a serious sex offense, as defined in s. 939.615(1)(b)." Wis. Stat. § 904.04(2)(b)1. The statute under which Debrow was charged, Wis. Stat. § 948.02(2), is a "serious sex offense." *See* Wis. Stat. § 939.615(1)(b)1.

B. The other acts evidence against Debrow met all three admissibility criteria.

The circuit court properly admitted the State's proffered other-acts evidence of Debrow previously going into MMW's room in the night because the evidence met all three prongs of the *Sullivan* test, especially when applying the greater latitude rule.

First, the State offered the evidence for a permissible purpose, which was to show plan or a lack of mistake on Debrow's part. *See Sullivan*, 216 Wis. 2d at 772. The circuit court agreed that the proffered other acts evidence met that purpose, also noting that the evidence that Debrow had gone into MMW's room previously could also show opportunity. (R. 120:38–39.) The proffered evidence was not, for example, Debrow's prior conviction for sexually assaulting a child, which occurred years prior with a different victim and certainly could have suggested to the jury that because Debrow had assaulted a child in the past, he certainly had done so again.

Second, the evidence was relevant, as the absence of mistake tended to show Debrow's intent in touching MMW was sexual gratification. It also showed that Debrow had the opportunity to get into MMW's room in the night without KKL realizing it. And third, the risk of unfair prejudice did not outweigh the probative value of the evidence. The other acts introduced were no more shocking than the allegations

actually charged in the case, nor was there a risk that they would confuse or mislead the jury.

Debrow argues there is "nothing but innuendo" suggesting he touched MMW during the incident in question. (Debrow's Br. 35.) This, again, goes to the weight of the evidence rather than its admissibility. The fact that Debrow went into MMW's room in the middle of the night causing MMW to scream shows that his later incursion into MMW's room was not an error and was likely planned out. Moreover, if Debrow is correct that the other acts evidence did not establish that he touched MMW the first time he went into her room, then the evidence was much less prejudicial than it may otherwise have been. Either way, under the greater latitude rule, the circuit court properly allowed the State to introduce the other acts evidence. This Court should affirm.

IV. Any evidentiary errors were harmless beyond a reasonable doubt.

A. Evidentiary errors do not require reversal of a conviction if the State can establish that they did not contribute to the guilty verdict.

"The harmless error rule . . . is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do." *State v. Harvey*, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189 (citing Wis. Stat. § 805.18(2)). "Wisconsin's harmless error rule is codified in WIS. STAT. § 805.18 and is made applicable to criminal proceedings by WIS. STAT. § 972.11(1)." *State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500.

"[I]n order to conclude that an error 'did not contribute to the verdict' within the meaning of *Chapman*,[5] a court must be able to conclude 'beyond a reasonable doubt that a rational

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[5] *Chapman v. California*, 386 U.S. 18 (1967).

jury would have found the defendant guilty absent the error.'" *Harvey*, 254 Wis. 2d 442, ¶ 48 n.14 (citation omitted); *see also State v. Martin*, 2012 WI 96, ¶¶ 42–46, 343 Wis. 2d 278, 816 N.W.2d 270 (reviewing harmless-error principles and factors).

Appellate courts consider several factors in a harmless error analysis: "(1) the frequency of the error; (2) the importance of the erroneously admitted evidence;" (3) the presence or absence of corroborating or contradicting evidence; (4) any duplication of properly admitted evidence; "(5) the nature of the defense; (6) the nature of the State's case;" and (7) the strength of the State's case. *State v. Jorgensen*, 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77. "The standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise." *Sherman*, 310 Wis. 2d 248, ¶ 8. "The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." *Id.*

B. Even if the circuit court erroneously admitted the complained-of evidence, this Court should affirm because any error did not contribute to the verdict.

Debrow's evidentiary complaints focus on two issues: the introduction of evidence that he previously went into MMW's room while she was sleeping and the evidence that he watched pornographic videos with themes relevant to the charges against him. (Debrow's Br. 27–34.) As discussed, this evidence was properly admitted. However, even if it was not, this Court still should affirm Debrow's conviction because it is clear beyond a reasonable doubt that these two things did not contribute to the verdict. *See Harvey*, 254 Wis. 2d 442, ¶ 48 n.14.

Neither piece of evidence was critical to the State's case. Although the evidence tended to show intent and lack of mistake, the prosecution with respect to Debrow's conviction

focused on the testimony of MMW, who described for the jury waking up to find Debrow squeezing her butt and screaming in response. (R. 129:50–51.) This testimony was corroborated by IS and KKL: IS testified that he saw Debrow go into MMW's room for five to ten minutes before MMW began to scream (R. 129:94–96), and KKL confirmed that MMW screamed, even noting the specific time it happened (R. 119:76–78). Detective Levett's testimony, too, supported MMW's testimony by describing MMW's apparent emotional state after the assault. (R. 119:188.)

The State also established lack of mistake and intent without the evidence in question. Specifically, the time of night as described by KKL and the length of time Debrow was in MMW's room as described by IS showed that Debrow went into MMW's specifically to assault her—there was simply no other reason for him to go into her room at that time of night and for that long. Likewise, there is no reason other than sexual gratification that Debrow would be squeezing MMW's buttocks while she was sleeping.

Without Debrow testifying, the trial came down to a matter of the victims' credibility. Neither piece of complained-of evidence bore on their credibility, and it is clear from the fact that the jury acquitted Debrow of one charge that the evidence did not have a significant influence on the jury. Even in the absence of the evidence, the result of the trial would have been the same. This Court should affirm.

V. Debrow is not entitled to a new trial in the interest of justice.

A. New trials in the interest of justice are reserved for extraordinary circumstances.

Wisconsin Stat. § 752.35 confers discretionary authority on this Court to review a claim of error, reverse a judgment, and order a new trial in the interest of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17–19, 456 N.W.2d 797

(1990). An appellate court may order a new trial in the interest of justice: "(1) whenever the real controversy has not been fully tried or (2) whenever it is probable that justice has for any reason miscarried." *Id.* at 16 (citation omitted).

The Wisconsin Supreme Court has recognized two situations when the real controversy has not been tried: first, when the jury does not have the opportunity to hear important evidence that bears on an important issue; and second, when the jury had before it improperly admitted evidence and "this material obscured a crucial issue and prevented the real controversy from being fully tried." *State v. Burns*, 2011 WI 22, ¶ 24, 332 Wis. 2d 730, 798 N.W.2d 166.

Because "reversals under Wis. Stat. § 752.35 are rare and reserved for exceptional cases[,]" this Court should exercise this discretionary authority only "after all other claims are weighed and determined to be unsuccessful." *State v. Kucharski*, 2015 WI 64, ¶¶ 41, 43, 363 Wis. 2d 658, 866 N.W.2d 697.

B. Debrow has not met his burden of demonstrating that his case is an exceptional one that warrants reversal in the interest of justice.

Finally, this Court should decline to exercise its extraordinary power to reverse Debrow's conviction in the interest of justice. Debrow argues that reversal is warranted because the introduction of the evidence that he watched pornography videos purportedly involving stepchildren was improperly admitted and clouded the jury's view of the evidence. (Debrow's Br. 36.) He is wrong.

As discussed, the circuit court properly exercised its discretion when it admitted the pornography evidence, so discretionary reversal is not appropriate. The Wisconsin Supreme Court has indicated that reversal under this theory is available only where "the jury had before it testimony or

evidence which had been *improperly* admitted." *See Burns*, 332 Wis. 2d 730, ¶ 24 (emphasis added). But even if the evidence was not properly before the jury, there is no reason to think that its introduction so infected the jury that it was unable to address the issue before it. Debrow was charged with two counts of sexually assaulting a child. He was acquitted of one of those counts. Surely if the introduction of the video was the only reason for his conviction, it would not have done so. Instead, it is clear that the jury's verdicts reflected a careful weighing of the evidence. This Court should leave the guilty verdict undisturbed.

CONCLUSION

For the reasons discussed, this Court should affirm Debrow's judgment of conviction.

Dated this 24th day of March 2022.

Respectfully submitted,

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FORM AND LENGTH 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 8,154 words.

Dated this 24th day of March 2022.

Electronically signed by:

John A. Blimling
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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 24th day of March 2022.

Electronically signed by:

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