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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP001732-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ERIC J. DEBROW,

Defendant-Appellant.

On Appeal from a Decision of
the Wisconsin Court of Appeals, District IV,
Reversing a Judgment of Conviction Entered in
the Dane County Circuit Court,
the Honorable John D. Hyland, Presiding

RESPONSE BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Whether the circuit court erroneously denied Debrow's motion for a mistrial after the state elicited prejudicial and inadmissible character evidence from the state's second witness on the first day of trial.

The circuit court denied Debrow's motion for a mistrial finding that the inadmissible testimony elicited by the state regarding a witness's knowledge of Debrow's prior conviction was not prejudicial enough to warrant a mistrial. The court of appeals reversed the circuit court's denial of Debrow's motion. The court of appeals concluded that the circuit court's ruling as to the prejudicial nature of the testimony and its jury instruction's impact on the jury was unreasonable. The court of appeals further held that the prejudice could not have been cured but for a mistrial.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Given this Court's grant of review, oral argument and publication are warranted.

SUPPLEMENTAL STATEMENT OF FACTS

Debrow supplements the factual background with information from the pre-trial hearing and trial.

On the morning of the first day of trial, the court heard arguments on various evidentiary issues initiated by the parties' pre-trial motions. (120). Relevant here is motion eleven of the defense's motion in limine, which requested that the state be prohibited from introducing any evidence of Debrow's 2004 conviction for first-degree sexual assault of a child. (75:2).

The state conceded that Debrow's prior conviction should be excluded because "the prejudice is significant" and the conviction was too "old compared to the allegations here." (120:6-7). However, it also argued for the ability to elicit rebuttal testimony about the conviction from Isaac[1], the older brother of the victim, in order to explain his "concerns about [Debrow] being around his sisters" and his "disdain towards [Debrow]." (120:6-7).

The state claimed that the defense would open this door, and if so, it would be entitled to explain Isaac's knowledge in order to prevent the jury from believing that Isaac is "an irrational young man who had disdain for somebody for no reason." (120:8). The state also explained that it had informed Isaac that he

[1] For purposes of consistency, this brief uses the same pseudonyms that the state gave the witnesses at trial pursuant to Wis. Stat. § 809.86.

could not testify about the prior conviction "unless and until [the court] provide[s] me permission to bring it up" after the state believes "the door has been opened" by the defense. (120:10).

> I've already informed the civilian witnesses, especially that its not to be brought it up unless and until you provide me permission to bring up, and then I would either very directly bring it up to them so they know they are now able to, but when we're done with all of this, I would like an opportunity to go and remind them.

(129:10).

The court granted the motion in limine "because it is obvious that no one should seek to introduce the evidence of this [prior conviction]." (120:12). But, the court assured the state that it can ask to revisit this ruling if "the playing field has changed," such as if the door was opened by the defense. (120:12).

The trial began later that day. (129). The state called Isaac as its second witness. (129:88). On direct examination, Isaac described what he remembered from the morning of Mary's allegations. Isaac explained that he saw Debrow enter Mary's room for a few minutes, heard Mary scream, and saw Debrow promptly leave. (129: 93-96). Isaac explained that he "immediately [thought] that he's going to go do something." (129:96). The state followed up on Isaac's commentary about feeling "pissed off…all day," and Isaac explained that he "immediately…called the

police" when he got home from school because he "had the feeling of something that was going on." (129:97).

The state also asked Isaac how he felt about Debrow. (129:99). Isaac explained that while he got along with Debrow "somewhat" and saw Debrow as a "father figure," he and Debrow would get into "physical altercations" that involved "punching, kicking, all types of stuff." (129:100).

On cross examination, defense counsel followed up on Isaac's "feeling" that caused him to call the police. (129:102). Isaac explained that this "feeling" happened "when [Mary] yelled get out." (129:102). Defense counsel also asked whether Isaac went back to sleep after seeing Debrow leave Mary's room given that Isaac testified on direct that he "woke up in the morning for school." (129:108). Isaac stated that he did not go back to sleep and "stayed up the whole night just to see if [Debrow] was going to go back in there." (129:108). Defense counsel concluded his cross examination. (129:108).

On re-direct, the state asked the court for a sidebar. (129:109). The state alerted the court that it planned to ask leading questions "about past incidents that Defense Counsel is eluding [sic] to…" and "follow up questions about Defense Counsel's points about why he thought something strange was going on inside of the room." (129:110). The state further asserted that "right now, the jury is left thinking that [Isaac] is jumping to conclusions based on absolutely nothing and now contacting the police based on absolutely

nothing." (129:111). So, the state argued, it needed to give an "explanation for why he was thinking the worst…" without getting "into the extremely prejudicial incident…that he says he was aware of…" (129:111).

Defense counsel objected. (129:110-11). Counsel argued that the door was not opened, that it only followed up on questions the state already asked, and that this line of questioning "could go into a series of things that are hearsay, that are objectionable…" and have been excluded because they "are impermissible." (129:111-113). Defense counsel argued that it was disingenuous and a misstatement of the record to assert that defense counsel opened the door given that defense counsel was simply following up on statements elicited by the state. (129:113-116).

The court ultimately permitted the state to ask a direct, but not leading, question about why Isaac "had concerns" but not about his "knowledge of 2004." (129:116). Both the court and the state indicated that they would step in if they heard impermissible testimony. (129:117).

The state proceeded to question Isaac:

> **Prosecutor:** [Isaac], 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?

> **Witness:** Yes.
>
> **Prosecutor:** And were those based on things your sisters had mentioned?
>
> **Witness:** No.
>
> **Prosecutor:** Are those things that you heard from your mom?
>
> **Witness:** It's things that I –

(129:122).

At this point, the court reporter was unable to transcribe Isaac's exact testimony. However, the parties agreed and the circuit court found that Isaac stated, "I looked on CCAP…" (129:122). The record continued:

> **Prosecutor:** -- I don't want to get into that --
>
> (Unreportable simultaneous interjections by Counsel.)
>
> **Court**: -- yeah, we can't get --
>
> **Prosecutor:** -- Isaac, I don't want to get into that --
>
> **Court:** You got to be responsive to the ques --
>
> **Defense Counsel:** -- Objection, Your Honor. Objection, move to strike. Another motion in a minute.
>
> **Court:** I'll -- I'll move to strike. The question was were those things you heard from your mother, and if you can just give yes or no as far as whether

> those were things your heard from your mother. We can't get into what they are, because that's hearsay.
>
> **Witness:** Well, my mom did tell me --
>
> **Court:** -- alright, that's fine. That's all.
>
> **Prosecutor:** I just wanted to say --
>
> **Court:** -- that's all --
>
> **Prosecutor:** --yes or no.
>
> **Court:** We can't -- we can't put her words in your mouth in front of the jury. That's why she's a witness if she testifies.
>
> **Prosecutor:** And that's why I had to speak over you, and I apologize for doing that. Your Honor, I have no further questions.
>
> **Court:** All right. And -- and to the extent that -- as the State was -- was raising an interjection the answer beyond what he gave just now-- I'll direct the jury to strike anything else that they -- they heard beyond the witness's statements that he heard from his mother but not the content of anything.

(129:118-19).

After both the state and defense said they had no further questions for Isaac, the court immediately sent the jury home. (129:121). The court directed the jury not to discuss the case with anyone and "[d]on't seek out information, research information, or

inadvertently be exposed to any information about the case while you are away from this room." (129:121).

Outside the presence of the jury, the court explained, for purposes of the record, that Isaac's answer to the prosecutor's question about what he learned from his mother was, "I looked on CCAP..." (129:122). The court continued, "…and that's where I think the jury couldn't possibly have heard anything else." (129:122). The court also stated that it granted the motion to strike and "will give that instruction in the end as well." (129:123). The court lastly explained that in response to the court's clarifying questions, Isaac said, "well, I learned -- my mother told me something and that was the end of it." (129:123).

Defense counsel moved for a mistrial. (129:123). "[T]he idea that he looked on CCAP, we can move to strike, but the jury still heard it." (129:123). Defense counsel also argued that any curative instruction would serve only to highlight the issue and do nothing to address the inevitable question of "what is there on CCAP, what is there in his background that made him consider that?" (129:123, 126). Defense counsel argued that given the context of the case, the jury will be speculating about what put Isaac on "high alert" and the "easy assumption" is that Isaac learned of a prior conviction of sexual assault. (129:123-24, 126). "There is no way around it, not even a curative instruction." (129:124).

The state argued that these errors did not warrant a mistrial. (129:124). It argued that it could not tell what the jury heard, that the statement had already been struck, and that the court's instruction suggested a hearsay issue. (129:124-25). The state argued that no curative instruction would be necessary and that a mistrial would be too drastic. (129:125).

The court determined that a mistrial was not necessary because (1) it did not know if any of the jurors knew what CCAP was; (2) Isaac did not state what he saw on CCAP sand therefore, even if the jury did know what CCAP was, the court did not know whether the jury would infer that Isaac saw criminal versus other public records; (3) the court tried to leave the impression of a hearsay issue through its jury instruction; (4) there were less drastic measures the court could take such as "curative instructions that don't redirect their attention to it two days from now," and concluded that it already instructed the jury to disregard Isaac's response. (129:128-31).

The court of appeals reversed the ruling denying a mistrial. It determined that the circuit court's conclusions were erroneous given the undisputed facts of the case:

> The circuit court properly concluded before testimony began that evidence of Debrow's prior conviction for first-degree sexual assault of a child was "unfairly prejudicial" to Debrow, and such evidence was excluded; [Isaac]'s pertinent testimony heard by the jury violated that order;

> one or more jurors would have known that the CCAP website has criminal court records that are available to the public; and one or more jurors would have reasonably understood that [Isaac] was "on alert" about Debrow and was watching the door to his minor sisters' bedroom at night because [Isaac] learned from the CCAP website that Debrow had a prior criminal conviction related to sexual misconduct involving a child. Those conditions support our conclusion that, in light of the whole proceeding, [Isaac]'s pertinent testimony was "sufficiently prejudicial to warrant a new trial."

State v. Debrow, 2021AP1732-CR, unpublished op., (Wis. Ct. App. July 21, 2022) (citation omitted). The court of appeals also determined it was erroneous for the circuit court to conclude that it sufficiently instructed the jury shortly after Isaac testified because the instruction failed to be clear or unequivocal about the evidence the jury was to disregard. *Id.*

SUMMARY OF ARGUMENT

As held by the court of appeals, the circuit court's denial of Debrow's motion for a mistrial was an erroneous exercise of discretion. It is undisputed that the circuit court properly excluded Debrow's prior conviction because it was unfairly prejudicial. *Debrow*, 2021AP1732-CR, unpublished op., ¶25. Yet, when the state elicited testimony from Isaac that he was "on alert" the morning his younger sister alleged Debrow assaulted her because he had looked Debrow up on CCAP, the circuit court erroneously underestimated

its prejudicial nature and overstated the curative effect of its confusing jury instructions. The prejudice left by this testimony was enough to warrant a new trial.

What's more, Debrow's motion for a mistrial stemmed from the prosecutor's overreach. Before trial even began, the state attempted to get around the pre-trial ruling by requesting to elicit testimony from Isaac about Debrow's prior conviction, speculating that defense counsel would "open the door." (120:6-7). Then, after being ordered by the circuit court to avoid Isaac's "knowledge of [Debrow's prior conviction]," the state asked Isaac what he "learned" that put him "on alert" knowing full well that the basis for Isaac's alertness was Debrow's prior conviction. (129:116-17).

Because of the prosecutor's overreach, this Court should "give stricter more searching scrutiny" to the circuit court's denial of Debrow's motion for mistrial. *State v. Barthels*, 174 Wis. 2d 173, 184, 495 N.W.2d 341 (1993) (abrogated on other grounds by *State v. Seefeldt*, 2003 WI 47, ¶33, 261 Wis. 2d 383, 661 N.W.2d 822). However, even if the circuit court's ruling is awarded more deference within the erroneous exercise of discretion standard, reversal is still warranted because the court inadequately considered relevant facts and did not "reason its way to a rational conclusion." *State v. Davis*, 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W.2d 62.

ARGUMENT

The circuit court erroneously denied Debrow's motion for mistrial after the state elicited prejudicial and inadmissible character evidence relating to Debrow's prior conviction.

A. Standard of Review.

The umbrella standard of review of a circuit court's decision on a mistrial is whether it erroneously exercised its discretion. *State v. Ford*, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61. Generally, this standard means that a reviewing court will overturn a circuit court's decision only when it fails to consider the relevant facts, apply the proper standard of law, or use a rational decision-making process to come to reasonable conclusions. *Bunch*, 191 Wis. 2d 501, 506-07.

But, the level of deference afforded to a circuit court's decision on a mistrial depends on the facts of the particular case. *Id.* at 507. The state asserts that the circuit court's denial of Debrow's mistrial is owed "great deference." (First Br. 16) (quoting *State v. Bunch*, 191 Wis. 2d 501, 507 (Ct. App. 1995)). However, if a defendant's request for a mistrial is prompted by prosecutorial overreach, then a circuit court's decision is reviewed more strictly[2]. *Bunch*,

[2] The level of deference owed to the circuit court's decision was not argued on appeal, nor was it addressed by the

191 Wis. 2d 501, 507 (stating that "[w]hen the basis for a defendant's mistrial request is that State's overreaching or laxness, we give the trial court's ruling strict scrutiny out of concern for the defendant's double jeopardy rights.").

Here, Debrow's motion for a mistrial was prompted by the state's overreaching questions that elicited the prejudicial and inadmissible testimony from Isaac. (120:123). The circuit court excluded evidence of Debrow's prior conviction with the state conceding it was impermissibly prejudicial. (120:12). Despite the court not finding the defense "opened the door," the state argued it was entitled to bring it up on redirect. (129:116-17). The state insisted that it did not intend to elicit Debrow's "extremely prejudicial" prior conviction. (129:111). Yet, it was the state's own assertion that Isaac's concerns were founded in his knowledge of Debrow's prior conviction. (120:6-7). So, the state reasonably should have known that asking Isaac about information that caused him to be "on alert" that morning, would reveal inadmissible testimony. (129:116-18, 122). Despite the state's argument, it was this line of questioning and improper testimony that prompted defense counsel's motion for a mistrial. (129:124-26, 132-33).

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court of appeals in its decision. *Debrow*, 2021AP1732-CR, unpublished op., ¶22.

This Court should review the circuit court's denial of Debrow's motion for mistrial under strict scrutiny because it was prompted by the state's overreach. Reversal, nevertheless, is still warranted under the traditional erroneous exercise of discretion standard because, as the court of appeals found, the circuit court failed to come to reasonable conclusions after consideration of all the relevant facts. *State v. Williams*, 2004 WI App 56, ¶29, 270 Wis. 2d 761, 677 N.W.2d 691 (citing *Seefeldt*, 261 Wis. 2d 383, ¶35).

B. The court of appeals correctly considered the effect of the circuit court's instruction to the jury as part of its analysis on whether a mistrial was warranted.

The state asserts that the court of appeals "erred" when it considered the circuit court's jury instructions in its review of the circuit court's decision. (First. Br. 19-21). However, the court of appeals correctly reviewed each of the circuit court's conclusions under the erroneous exercise of discretion standard. That included the circuit court's conclusion that its instructions—given after Isaac's testimony but before Debrow's motion—were sufficient to cure the error. (129:129-31). Because the instructions were unclear and misleading, the court of appeals correctly determined that this conclusion was unreasonable. Nonetheless, whether the court of appeals appropriately considered the jury instructions is not relevant to the merits of the issue now on appeal.

1. A circuit court must determine whether a mistrial is warranted in light of the whole proceeding.

To soundly exercise its discretion, a circuit court must determine whether there was sufficient prejudice to warrant a new trial, in light of the whole proceeding. *State v. Sigarroa*, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894. It includes the content of the material seen or heard by the jury and its likelihood to cause prejudice. *Id*; *see also State v. Genova*, 91 Wis. 2d 595, 621 (Ct. App 1979); *Taylor v. State*, 52 Wis. 2d 453, 457 (1971). And, it includes whether there are alternatives to a mistrial that could effectively erase the prejudice caused by the error. *State v. Collier*, 220 Wis. 2d 825, 837 (Ct. App. 1998); *Sigarroa*, 269 Wis. 2d 234, ¶27; *Johnson v. State*, 75 Wis. 2d 344, 365-66 (1977).

Sound discretion is not exercised when a circuit court fails to consider all the relevant facts and fails to reason its way to rational conclusions based on the facts. *Williams*, 270 Wis. 2d 761, ¶29. The state asserts that a circuit court properly exercises its discretions so long as it considered alternatives to a mistrial, regardless of whether that alternative actually cured the error. (First Br. 17-19). But the case law demonstrates that reviewing courts consider both whether the circuit court considered alternatives, and whether that alternative was actually effective at curing the error. *See e.g. Genova*, 91 Wis. 2d 595, 621-23; *Sigarroa*, 269 Wis. 2d 234, ¶24-26; *Johnson*, 75 Wis. 2d 344, 366.

In *Johnson*, this Court considered a trial court's jury instructions when it reviewed the trial court's decision to deny the defendant's motion for a mistrial. *Id*. at 365-66. The jury had mistakenly been given records indicating that the defendant was awaiting trial for a child sex offense and had previously been hospitalized for his mental health. *Id*. The trial court voir dired the jury panel about the documents and then directed them to "disregard…each and every one of those documents which were mistakenly placed before you." *Id*. Each juror agreed they could disregard the documents. *Id*.

This Court held that the mistrial was not warranted for several reasons, including that the trial court individually voir dired each juror and clearly instructed them to disregard the material. *Id*. "Balanced against the possible prejudicial nature of the documents, the steps taken by the trial court to mitigate any prejudice must be considered." *Id*. Ultimately, this Court determined that the prejudice was cured by the instructions and the trial court did not "[abuse] its discretion when the motion for a mistrial was denied." *Id*.

Its clear that the standard of review for mistrials recognizes that not all prejudice can be cured by jury instructions. A circuit court must consider alternatives to a mistrial, but, in light of the whole proceeding, those alternatives may not be reasonable or "practical." *Bunch*, 191 Wis. 2d 501, 512. Like any other discretionary decision, whether the prejudice from the claimed error can be cured by jury

instructions is a conclusion that a reviewing court will examine for rationality given the relevant facts and law. *Id.* at 506.

While courts generally presume that jurors follow instructions, some errors are so prejudicial that they cannot be cured. *See e.g. State v. Castillo*, 2020AP983-CR, unpublished op., (Wis. Ct. App. June 29, 2021); (App. 3-13). "[I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962). Besides, such a presumption relies entirely on the fact that the instructions were "proper" or "sufficient." *State v. Williamson*, 84 Wis. 2d 370, 391 (1978).

A curative instruction must clearly and unequivocally identify the prejudicial evidence and instruct the jury to disregard that evidence. *See e.g. State v. Penigar*, 139 Wis. 2d 569, 581-82 (1987); *State v. Sullivan*, 216 Wis. 2d 768, 780 (1998); *Peters v. State,* 70 Wis. 2d 22, 32 (1975) (disapproved of on other grounds by *State v. Poellinger*, 153 Wis. 2d 493, 504-05). So, when instructions are indirect or difficult to understand, the "smell" of the prejudicial error cannot be presumed to be cured. *Sullivan*, 216 Wis. 2d 768, 790-92.

Even when instructions are sufficiently clear, some errors—such as testimony on inadmissible character evidence—are so prejudicial that a circuit court's instruction cannot be "sufficient to prevent the jury from considering those statements and allowing

them to affect its deliberations." *Castillo*, 2020AP983-CR, unpublished op., ¶58 (App. 11); *see also See e.g. Sigarroa*, 269 Wis. 2d 234, ¶¶28-30 (admonishing courts for violations of motions in limine that are not met with sufficiently severe consequences for the parties involved). Thus, if the "proverbial odor of the improper statements was so strong," then a jury instruction is not a reasonable alternative to a mistrial, and denying a mistrial would be erroneous. *Id*.

2. The court of appeals correctly reviewed the circuit court's jury instructions for error.

The court of appeals did not err when it found it erroneous for the circuit court to deny the mistrial and find its instructions to be sufficiently curative. In its opinion, the court of appeals meticulously laid out why the circuit court's conclusions were erroneous. *Debrow*, 2021AP1732-CR, unpublished op., ¶¶24-28. More specifically, the court of appeals determined that Isaac's testimony, in light of the whole proceeding, was sufficiently prejudicial to warrant a mistrial despite the circuit court's attempts to downplay its effect. *Id*. The court of appeals summarized its analysis:

> The circuit court properly concluded before testimony began that evidence of Debrow's prior conviction for first-degree sexual assault of a child was "unfairly prejudicial" to Debrow, and such evidence was excluded; [Isaac]'s pertinent testimony heard by the jury violated that order; one or more jurors would have known that the

> CCAP website has criminal court records that are available to the public; and one or more jurors would have reasonably understood that [Isaac] was "on alert" about Debrow and was watching the door to his minor sisters' bedroom at night because [Isaac] learned from the CCAP website that Debrow had a prior criminal conviction related to sexual misconduct involving a child. Those conditions support our conclusion that, in light of the whole proceeding, [Isaac]'s pertinent testimony was "sufficiently prejudicial to warrant a new trial."

Id., ¶28 (citation omitted).

Then, the court of appeals addressed the state's argument on appeal and the circuit court's conclusion that the error was "ameliorated by the instruction given to the jury by the circuit court immediately after [Isaac] testified…" *Id.*, ¶29. It found that this conclusion by the circuit court was also erroneous because the instruction was unclear, misleading, and "failed to identify the evidence that the jury was to disregard." *Id.*, ¶17-35. Based on these findings, the court of appeals concluded that Isaac's testimony was unfairly prejudicial and the circuit court's "attempts to cure the prejudicial effect were insufficient…" *Id.*, ¶36. Thus, the court of appeals held, the circuit court erroneously exercised its discretion when it denied Debrow's motion for a mistrial. *Id.*

The court of appeals' analysis is a straightforward application of the erroneous exercise of discretion standard. The state claims that the court of appeals should have only considered "whether the

circuit court correctly determined that the evidentiary error *could* be corrected." (First Br. 21) (emphasis in original). But, that's exactly what the court of appeals did. It found that it failed to come to rational conclusions given all the relevant facts. One of the circuit court's conclusions was that its instructions to the jury were sufficient to cure any prejudice. (129:129-31). Not only was it appropriate for the court of appeals to review that conclusion, it was a necessary part of the erroneous exercise of discretion standard. *Bunch*, 191 Wis. 2d 501, 506. Nonetheless, whether the court of appeals erred in its analysis is not relevant to the merits of the issue now on appeal.

C. The circuit court erroneously denied Debrow's motion for a mistrial.

The circuit court's denial of Debrow's motion for a mistrial was erroneous because it came to irrational conclusions about the incurable and "extremely prejudicial" nature of the inadmissible character evidence elicited by the state. In light of the whole proceeding—including the state's overreaching questions and the circuit court's confusing and misleading instructions—the "proverbial odor" from Isaac's testimony was so strong that the jury could not be instructed to avoid it. *Castillo*, 2020AP983-CR, unpublished op., ¶58 App. 11). The only rational conclusion is that Isaac's testimony prevented Debrow from receiving a fair trial.

1. The circuit court failed to consider relevant facts leading up to Debrow's motion for a mistrial.

First, the circuit court failed to consider that, at this point in the trial, during the state's second witness, it was not exceedingly drastic to order a mistrial. The state argues that a mistrial was too extreme. (First Br. 18-19). Yet, the motion came within a few hours on the first day of the trial. Empaneling a new jury at this point is significantly less drastic than at the end of a multi-day trial where every witness would have to be called to testify again. Presumably, the court could have quickly rescheduled the trial as to avoid any undue delay because the parties had already prepared this case for trial and were ready to proceed in short order.

Second, the circuit court failed to consider the prosecutor's conduct that prompted Debrow's motion for a mistrial. *See Barthels*, 174 Wis. 2d 173, 188-89. Despite conceding to the "extremely prejudicial" nature of the prior conviction, the state argued in its next breath that it planned on eliciting testimony from Isaac about his knowledge of Debrow's prior conviction to explain his concerns about his sister. (120:6-7). What's more, it was the state that elicited this narrative from Isaac and then claims that defense counsel had "opened the door" about Isaac's "disdain towards Debrow" and "concern about [Debrow] being around his sisters." (120:7; 129:88-100, 110-15).

Although the circuit court never determined that the door had been opened by the defense, the circuit court permitted the use of limited questions on re-direct that directed Isaac away from Debrow's conviction. (129:116-17). Instead, the state chose to ask Isaac "had you learned anything…that lead you to be on alert that night…?" (129:118). Almost as if Isaac had been specifically told that the prosecutor may be given permission to bring out this information and too ask him about it, Isaac revealed that he looked Debrow up on CCAP. (120:10; 129:118).

Isaac's testimony was not an unintentional mistake, but the result of overreach by the prosecutor. The state was well aware that the predictable, obvious, and avoidable response to its questions would lead to the introduction of inadmissible and prejudicial character evidence. (129:115-17). By the state's own concessions, Isaac's concerns were founded in his knowledge of Debrow's prior conviction. (120:7). Indeed, at the pre-trial hearing, the state requested to revisit the order to exclude the prior conviction if the defense "opened the door." (120:6-7). The state even told Isaac to hold off on admitting he knew about this prior conviction "unless and until" the court gives the state permission to ask him about it. (120:10).

Even if, as the state claims, it did not intend for Isaac to testify impermissibly, the state failed to take reasonable precautions to avoid it. The state could have asked for a moment outside the presence of the jury to explain the circuit court's ruling to Isaac. *See e.g. Sigarroa*, 269 Wis. 2d 234, ¶30 (admonishing

attorneys and courts for violations of motions in limine that could be avoided by instructing the witness outside the presence of the jury). The state could have explained to Isaac to only answer its questions with either "yes" or "no." The state could have questioned the witness outside the presence of the jury first before the jury returned. *See e.g. U.S. v. Webster*, 734 F.2d 1191, 1192-193 (7th Cir. 1984) (holding that the prosecutor did not engage in subterfuge to get inadmissible evidence before the jury because the prosecutor requested to examine the witness outside the presence of the jury). Yet, the state chose to ask a series of questions that it knew, or reasonably should have known, would lead to the admission of inadmissible evidence before the jury.

2. The circuit court failed to use the relevant facts to come to any rational conclusions to deny a mistrial.

The circuit court came to four conclusions when it denied Debrow's motion for a mistrial, but each conclusion is irrational in light of the whole proceeding. (129:128-131). First the circuit court concluded that the testimony was not sufficiently prejudicial because it did not know if any of the jurors knew what CCAP was. (129:128-29). It is undisputed by the parties that Isaac stated he looked on CCAP and that the jury heard it. (129:122-23). But, there is no evidence that the jury misunderstood what was said. The circuit court did not voir dire the jurors or otherwise gather information about whether the jury

knew what CCAP was or what information was available on CCAP. *See e.g. State v. King*, 120 Wis. 2d 285, 296, (Ct. App. 1984) (when juror discovers he once knew a witness, circuit court may voir dire juror mid-trial in order to establish possible partiality). As the court of appeals held, given the accessible and public nature of CCAP, it is irrational to conclude that not a single juror was familiar with CCAP to some extent.

Second, the circuit court concluded that the testimony was not sufficiently prejudicial because, even if the jurors are familiar with CCAP, they would not infer that Isaac was referring to criminal records. (129:129-130). But, as the court of appeals correctly noted, Debrow was facing criminal charges that alleged repeated sexual assault of children, and the jurors were read those charges during opening instructions. (129:20-21). Isaac's testimony was primarily about what he observed the morning Mary alleged Debrow assaulted her. (129:88-100). Isaac's response to the state's question demonstrated his knowledge that something from CCAP caused him to be "on alert" that same morning. (129:118). It is, therefore, unclear why the circuit court to think that a juror would infer that Isaac was concerned about Debrow entering his younger sister's room early in the morning because of a small-claims, civil, or divorce proceeding he found on CCAP.

Third, the circuit court concluded that by interrupting and eventually instructing the jury regarding hearsay, it sufficiently diverted the juror's attention away from Isaac's testimony. However, the

circuit court's instruction was confusing, misleading, and did not effectively direct the jurors to anything. The court stated:

> **Court:** I'll -- I'll move to strike. The question was were those things you heard from your mother, and if you can just give 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.
>
> **Witness:** Well, my mom did tell me --
>
> **Court:** -- all right, that's fine. That's all.
>
> …
>
> **Court:** We can't -- we can't put her words into your mouth in front of the jury. That's why she's a witness if she testifies.
>
> …
>
> **Court:** And -- and to the extent that -- as the State was -- was raising an interjection the answer beyond what he gave just now will be -- I'll direct the jury to strike anything else that they -- they heard beyond the witness's statement that he heard from his mother but not the content of anything.

(129:119).

The circuit court "move[d] to strike" and asked Isaac the question again. (129:119). When Isaac responded, the circuit court interrupted again and explained that Isaac "can't put her words into [his]

mouth in front of the jury." (129:119). But, the first direction to the jury was to "strike anything else that…they heard beyond the witness's statement that he heard from his mother." (129:119).

This direction to the jury does not clearly identify which testimony the jury should disregard. *See e.g. Penigar*, 139 Wis. 2d 569, 581-82 (holding that the jury instructions were insufficient because it "did not explicitly direct the jury to disregard" the improper evidence and testimony regarding the complainant's prior sexual history). The court's other comments focused on "words" from mom that Isaac could not put "into [his] mouth." (129:119). Then, the word "beyond" could be reasonably interpreted as a direction to disregard anything Isaac said *after* "[w]ell, my mom did tell me…" (129:119). But, referring to any hearsay statements from his mom fails to directly address Isaac's testimony, "I looked on CCAP..." (129:122).

Then, the circuit court directed the jury *not* to disregard "the content of anything." (129:119). Again, it is unclear what the circuit court meant by this statement, or what testimony it referred to. A jury cannot simultaneously strike testimony while also somehow retain the content of that testimony, especially if they are not sure which testimony is stricken. The instructions to strike some testimony, but then to not disregard "the content of anything," provided competing and illogical information to the jury on what evidence should be ignored. *Poellinger*, 153 Wis. 2d 493, 504-05 (holding that a jury instruction "must be given in clear and certain terms"

and the jury in this case was not "clearly and unequivocally instructed" on which evidence to disregard).

Furthermore, the circuit court's conclusion that the commotion around Isaac's testimony, caused by the parties and court's interruptions, distracted the jury away from Isaac's testimony is likewise irrational. A jury instruction is not meant to distract away from the issue but to provide clear and certain terms for the jury. *Id*. Otherwise, a jury cannot be presumed to have followed such instruction and disregarded prejudicial errors. *Id*.

Even so, the commotion occurred during the last minutes of testimony the jury heard that day. Only moments after the confusing jury instruction, the circuit court sent the jury home. So, it is unlikely that the jurors just forgot what happened and ignored its implications. If it were to be presumed that the jurors simply forgot about the prejudicial testimony, then it would implicate the entire jury process by questioning whether any jurors actually retained the evidence they must carefully listen to and consider during deliberations. In the end, this jury had no idea what to do with this unfairly prejudicial testimony, and thus, had the unbridled ability to contemplate the evidence throughout the rest of trial and deliberations.

Fourth, the circuit court concluded that there are less drastic measures the court can take such as "curative instructions that don't redirect their attention to it two days from now." (129:130-31).

Basically, the circuit court concluded that the testimony was not very prejudicial, so leaving it alone until the final jury instructions would be enough to cure what little prejudice remained. However, the "odor" from Isaac's testimony, the commotion surrounding it, and the circuit court's confusing instructions could not be cured by a vague final instruction.

It is undisputed that evidence of Debrow's prior conviction is "extremely" and unfairly prejudicial. (129:111). It is also disputed that Isaac's testimony violated the circuit court's pre-trial order excluding it. The commotion, including the circuit court's attempts to cure the prejudicial impact, only served to highlight Isaac's testimony and confuse the jury. Instructing the jury again in two days without directing them specifically to Isaac's testimony would be equally futile. Ultimately, the jury was left thinking about Isaac's testimony for the next two days, and entered deliberations without a clear understanding of what to disregard. Thus, it is unreasonable to conclude that the circuit court could do anything to cure this prejudicial error other than grant a mistrial. *See e.g. Castillo*, 2020AP983-CR, unpublished op., ¶58 (App. 11).

D. Debrow did not forfeit review of the jury instruction employed by the circuit court as an alternative to his motion for a mistrial.

Debrow did not forfeit any argument related to the circuit court's jury instruction. The state claims that Debrow cannot argue for a different instruction because Debrow failed to "request a different instruction or object to the language used." (First Br. 21). However, Debrow objected to the use of a jury instruction from the beginning. Defense counsel objected to *any* alternative to a mistrial arguing that the prejudicial effect of Isaac's testimony cannot be cured by a jury instruction and therefore, requires a mistrial. (129:123-24, 126). On appeal, Debrow also argued that no jury instruction could cure the prejudice caused by this error. (Appellant Br. 25). Debrow's strenuous objections and adamant request for a mistrial are enough to demonstrate that Debrow did not forfeit review of the circuit court's jury instruction.

Further, the circuit court's own conclusion that its jury instructions immediately following Isaac's testimony and before Debrow's motion for a mistrial were sufficient must be reviewed for erroneous exercise of discretion. *Williams*, 270 Wis. 2d 761, ¶29. Again, a court erroneously exercises its discretion when it fails to consider all the relevant facts or come to reasonable conclusions based on those facts. *Id*. The circuit court's instructions are a relevant fact leading up to the motion that must be considered. And, each of

the circuit court's conclusions regarding why it would not grant Debrow's motion for a mistrial, including this conclusion, must be reviewed for erroneous exercise of discretion. Failing to do so would fail to abide by the clear doctrine on erroneous exercise of discretion. *Id.*

Facing life imprisonment, Debrow was deprived of his right to a fair trial. The state elicited unfairly prejudicial testimony that exposed the jury to inadmissible character evidence. The attempts by the circuit court to cure the state's overreaching questioning and improper testimony fell short. Despite these relevant facts, the circuit court downplayed the prejudice to the jury and unreasonably concluded that no further action was necessary to ensure a fair trial. The circuit court erroneously exercised its discretion when it denied Debrow's motion for a mistrial, and Debrow is rightfully entitled to a new trial.

CONCLUSION

For the reasons set forth above, Eric J. Debrow respectfully requests that this Court affirm the decision of the court of appeals, which reversed the judgement of conviction and order denying a mistrial, and remanded for a new trial.

Dated this 10th day of March, 2023.

Respectfully submitted,

Electronically signed by Megan Lyneis

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,560 words.

CERTIFICATION OF EFILE/SERVICE

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

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 10th day of March, 2023.

Signed:
Electronically signed by Megan Lyneis
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Assistant State Public Defender