STATE OF WISCONSIN

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

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 22AP194-CR

TODD EUGENE PAULUS, IV,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION, ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE SARAH HARLESS PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE CIRCUIT ERRONEOUSLY EXERCISED ITS DISCRETION IN EXCLUDING KCP'S PORNOGRAPHY SEARCHES, THEREBY VIOLATING PAULUS'S DUE PROCESS AND CONFRONTATION RIGHTS

A. The State's failure to address Paulus's argument that Wisconsin's rape shield law does not apply to complainant's conduct concedes the issue

The State argues that this Court should not address whether Wisconsin's rape shield law applies to KCP's conduct because the circuit court excluded the evidence on other grounds. (Respondent's Br.: 15–16). Paulus argued that this threshold issue must be addressed as it greatly impacted the evidentiary analysis. (Brief-in-Chief: 21). While the circuit court stated that it was excluding the phone search evidence on Wis. Stat. 904.03 balancing grounds alone, the court's prejudice analysis included "the many reasons that the rape shield statute exists" (Brief-in-Chief: 11,14, *citing* R170: 8–9).

On the substantive issue, the State provides only a footnote asserting it "does not concede" the issue (Respondent's Br: 16, n.6). By addressing the issue only in a footnote, the State offers no alternative argument responding to the defense's substantive arguments, supported by ample legal authority (*see* Brief-in-Chief: 21-23). Discussing this only in a footnote effectively forfeits the argument. See ***State v. Santana-Lopez***, 2000 WI App 122, ¶6 n.4, 237 Wis.2d 332, 613 N.W.2d 918 ("We do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review").

The State's failure to preserve an argument on this issue should be treated as a concession, and to the extent this Court believes it necessary to address the application of rape shield in order to reverse Paulus's conviction, it should accept his unrefuted arguments that rape shield does not apply. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

B. The evidence was relevant, and the State's response fails to account for the circuit court's reliance on erroneous facts

The State's response emphasizes the circuit court's explanations minimizing the relevance of the evidence with respect to the two purposes for which it was proffered. (Respondent's Br.: 15-16). However, the State never argues that the evidence was *irrelevant*; instead, it argues only that the court properly excluded the evidence based on undue prejudice. This court should thus accept the findings of the circuit court and the apparent concessions by the State that the proffered evidence has at least *some* relevance to both the accuser's sexual knowledge, and to explain how detail was gained between the two statements.

The circuit court's finding that relevance was "limited" rested on a clearly erroneous factual finding. Specifically, the court stated "[w]e have no information about what she was using her phone for six months before or six months after" (R170:9). Yet defense counsel had stressed the timing of KCP's pornography searches: the searches started right after the January 9 interview with Detective Nicks, and there were no pornography searches prior to KCP's statement to Detective Nicks (R166:15,17) (Brief-in-Chief:19). The defense made this abundantly clear:

> THE COURT: Does the search history go back before the accusation?
>
> MR. KRISCHE: It does not.

(R166:15).

> MR. KRISCHE: Now we do have evidence on this phone that this is a new phenomenon of the search because, as [KCP] had testified, she was given the phone December 30th of 2018. There are no pornography searches on December 30th, December 31st, January 1st through the 9th. It starts then, and that's where we have pornography.

(R166:208-09).

> MR. KRISCHE: [KCP] had an interview with Detective Nicks on January 10th, 2019.
>
> …
>
> Between that date and her forensic interview where she gave great detail, which I assume will match her testimony at trial, she did in-depth pornography searches at pornhub.com and porn.com on January 10th, 2019; January 12th, 2019; January 14th, 2019, even going into the 15th, when she gave her phone to Detective Nicks.

(R166:14).

The defense further made it clear the phone was seized as evidence and forensically examined, so there would have been no searches on the phone after January 15th:

> MR. KRISCHE: [T]hat cell phone was given to Detective Nicks on January 15th, 2019. He then gave it to, at the time, Detective Wade Beardsley…
>
> Detective Beardsley did a cell phone extraction on that phone and found that there were pornographic searches

> on January 10th, 2019; January 12th, 2019; and January 14th, 2019.

(R166:199).

None of these factual claims regarding the timing were contested by the State—either at trial, or before this court. Accordingly, the circuit court's factual finding about "no information" for how KCP was using her phone six months before or after is clearly erroneous; the information before the court showed KCP had the phone for about 11 days before the first interview, during which time there were no pornographic searches; and further that KCP didn't have that phone after January 15, 2019. All of this greatly supports the defense argument about how the timing of the searches supported their relevance to the charges, as KCP went from being unable to provide any detail to Detective Nicks on January 10th to providing a very detailed account just four days later, after the searches.

The State argues KCP's failure to provide an account of what allegedly happened was not due to *inability* to provide such an account, but rather because KCP "was traumatized by what she said occurred at Paulus's house." (Respondent Br.: 24). First, KCP's initial statement indicated the incident took place at a neighbor's house (R170:156–157), not Paulus's house, as implied in the State's fact section. (Respondent's Br.:9) Second, the State's explanation does nothing to account for the change in detail that occurred between the two interviews. If KCP was too traumatized to be able to describe what happened at the interview with Detective Nicks, one would expect that she would still be traumatized five days later. After all, the two interviews occurred weeks after the alleged incident.

Third, and most importantly, while that is one inference the jury *could* draw, the jury could also reasonably draw the inference Paulus sought to present, that the change

in degree of detail between KCP's statement to Detective Nicks on January 10th and her forensic interview on January 15th is explained by the numerous pornographic searches on KCP's cell phone occurring between those dates, which yielded videos with some similar physical acts to what she later described in the forensic interview. Paulus was entitled to present this argument to the jury.

With respect to the relevance of the evidence to show alternative source of knowledge, the State first argues that a typical 14-year-old wouldn't have to search the internet for pornography to understand the sexual activity that she described, and then points to all the times defense counsel made the argument that a typical 14-year-old would have this kind of knowledge. (Respondent's Br.: 22-23). Likewise, the State emphasized defense counsel's comment at closing argument that KCP had access to sexual content on her phone (Respondent's Br.: 24).

These arguments collectively demonstrate part of the problem. Since the court excluded direct evidence of KCP's pornography searches, defense counsel was left arguing that KCP's knowledge of sex *could have* come from other sources like television shows, her phone, or from other students. But there was *no actual evidence* that KCP had watched those shows, or that she had overheard her peers discussing those particular sexual acts, or that she accessed any sexual materials on her phone. Suggesting the mere possibility that KCP *could have* learned this information from her phone is not remotely comparable to documented, hard evidence that KCP *did* in fact search for and access pornography which included similar acts. Arguments are no substitution for actual evidence, as jurors were instructed that the remarks of attorneys are not evidence and "[i]f the remarks suggest certain facts not in evidence, disregard the suggestion." (R167:27).

Finally, the State argues that KCP must have had knowledge of sexual activities like "grinding" in order to look it up in her pornography searches, and therefore she wouldn't have learned how to describe this activity through her pornography research. (Respondent Br.: 25). The underlying factual assumption is false, because KCP could easily have learned that term from watching other pornography videos first. Attorney Krische argued in his offer of proof that the "first search" was for the unrelated "furry" pornography (R166:17), but subsequently KCP made a search for the generic term "porn":

> We also have from her phone a saved image of the search on Google for the word "porn" and the first two pop-ups that came up were pornhub.com and porn.com. That happened on January 10th, 2019 after her meeting with Detective Nicks but before she gave a detailed accusation.

(R166:15).

The exhibits offered by the defense showing KCP's web history (*see* R79-R83) demonstrate that the first time the word "grinding" appears is in titles on January 14, 2019 (R82) ("Grinding Stepdads Cock For Cash"). In other words, the evidence shows KCP initially made generic searches for pornography on January 10th, which led to viewing videos with more specific sexual terms over the next several days prior to the forensic interview—supporting the defense inference that KPC was researching sex.

C. The evidence was not unfairly prejudicial, and the court erroneously applied Wis. Stat. 904.03

The State acknowledges that the circuit court did not use the terms "unfair prejudice" or that such prejudice "substantially outweighed" any probative value in its

analysis, yet argues "there can be no serious question that the court concluded that the danger of unfair prejudice substantially outweighed the relevance" (Respondent's Br.: 21). The State's argument appears to be that while the circuit court did not use the correct legal terms, it nonetheless employed the correct legal standard. Yet as demonstrated *supra*, the court erroneously minimized the obvious probative value, and relied upon a clearly erroneous factual assumption, which undermine the court's balancing analysis.

Further, the court completely ignored the defense's reasonable alternative suggestion for minimizing prejudice—presenting the evidence through Det. Beardsley—which demonstrates a failure to exercise discretion. "The term 'discretion' contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards." *See* ***State v. Delgado***, 223 Wis.2d 270, 280, 588 N.W.2d 1 (1999). "The record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case." *See* ***id.*** at 281. By offering no reasoning based on facts or logic as to why the defense couldn't present this evidence through Det. Beardsley, the court failed to apply the proper legal standard. The State, notably, fails to address this issue as well.

The State instead echoes the circuit court arguing that a 14-year-old child searching the internet for explicit sexual terms posed a substantial risk of unfair prejudice since it could embarrass the child (Respondent's Br.: 25). First, the concern about embarrassing "a child" should be considered inversely proportional with the child's age, such that the closer they get to adulthood, the less "unfair" the prejudice would be—considering the State argues that it's common knowledge that 14-year-old children are already familiar with this information (Respondent's Br.: 22-23). KCP was 16 at

the time of trial. Questions about pornographic searches weren't likely to be more embarrassing than what already came in, as she'd already testified in detail about sexual acts when questioned about the alleged incident.

Second, and more importantly, the defense had no intention of questioning KCP about the content of search terms not relevant to the incident. Nor would there be a need to identify the specific categories of searches in order to allow the State to argue that some search terms were not similar to the alleged incident. Yet, the State, like the circuit court, fails to consider this solution and the many other ways that potential prejudice could be remedied, such as only questioning Detective Beardsly about that evidence.

The State argues the evidence is unfairly prejudicial because there is "a danger that a juror might have found [KCP] less credible because of her use of pornography." (Respondent Br.: 25). Of course, the purpose of the evidence is not to attack KCP's credibility *generally,* but to challenge the credibility of her sexual assault allegations based on the initial lack of detail compared to the subsequent interview with far more detail after repeatedly viewing pornography—some of which was factually similar to her allegations—on her cell phone. The argument that a jury could find KCP less credible *generally* because she looked up pornography on her phone is weak, and certainly not to the level required by applicable law, that this danger "substantially outweighed" the probative value. ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis.2d 568, 797 N.W.2d 399. Again, that standard was neither cited nor applied by the circuit court.

The evidence was not unfairly prejudicial, especially the option of presenting it through Detective Beardsly, which the circuit court ignored. The danger of unfair prejudice did not "substantially outweigh" the probative value to the

defense. The circuit court failed to apply the correct legal standard, and its analysis was fatally flawed.

D. The State fails to engage with the required constitutional analysis

The law is unambiguous: section 904.03 balancing alone is insufficient when defendant's constitutional rights are implicated. (Brief-in-Chief: 22–23). The State, like the circuit court, fails to engage in the necessary constitutional analysis. In order to determine whether a court's exclusion of evidence violates the defendant's constitutional rights, courts must (1) consider whether the exclusion infringed upon the accused's weighty interest in his constitutional right to present a defense; and (2) determine whether the exclusion was arbitrary to the purposes served by the rule. ***United States v. Scheffer***, 523 U.S. 303, 308 (1998).

The State's response touches superficially on prong (1), but minimizes the importance of this evidence to the defense, failing to address the defendant's theory about how this supports a claim that KCP fabricated the allegation, and then needed to manufacture details to support it. Instead, the State focuses on the evidence that *was* presented, without accounting for how the trial would have changed if the excluded evidence was admitted.

Moreover, the State utterly fails to address prong (2), failing to refute (and thereby conceding) Paulus's arguments that the exclusion of the evidence was disproportionate and arbitrary to the purposes that the rule was designed to serve. ***Charolais, id.*** at 109.

The State quotes ***State v. Hanson***, 2012 WI 4, ¶45, 338 Wis.2d 243, 808 N.W.2d 390, for the proposition that "[t]here is no right to present evidence that is 'inadmissible under standard rules of evidence'" (Respondent's Br.: 27).

This reliance is misplaced. First, ***Hanson*** only stands for the proposition that the constitutional right to present evidence is not absolute, i.e. that the rules of evidence place limitations on this constitutional right, citing ***Pullizano***. ***Hanson***, ***id.*** ¶45. ***Pullizano*** clarifies that even for otherwise inadmissible evidence, in a particular case the evidence may "be so relevant and probative that the defendant's right to present it is constitutionally protected." ***State v. Pulizzano,*** 155 Wis.2d 633, 646-47, 456 N.W.2d 325 (1990).

Second, the evidence in ***Hanson*** was not excluded under Wis. Stat. 904.03, but was inadmissible character evidence. ***Hanson***, ***id.***, ¶37. The evidence in ***Pullizano*** implicated Wisconsin's rape shield statute. Again, the evidence here is not covered by the rape shield statute. It did not fall under any excludable category of evidence; it was relevant evidence excluded under sec. 904.03 for concerns of undue prejudice. Accordingly, given the centrality of this evidence to the defense, the higher constitutional standard cited in ***Scheffer*** must apply, and both the circuit court and the State failed to do so.

E. The error was not harmless

The question on evaluating harmless error is not, contrary to the State's arguments, whether the jury "would have" acquitted Paulus of child enticement but for the error (Respondent's Br.: 27). The question is whether the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. ***Chapman v. California***, 386 U.S. 18, 24 (1967).

To argue the error harmless, the State attempts the mental gymnastics of arguing evidence pertaining to the credibility of KCP's allegations that Paulus sexually assaulted her in his room is somehow *not relevant* to proving beyond a reasonable doubt that Paulus caused her to enter his bedroom

with the intent to have sexual contact with her (Respondent's Br.: 29-31). To convict on child enticement, the jury had to find that Paulus had the intention of having sexual contact with KCP. The jury was instructed to consider "the defendant's acts, words and statements" to determine his intent (R97:6). The key evidence supporting that alleged intent was KCP's claims about the defendant's acts—specifically, that once inside the bedroom, *Paulus sexually assaulted her*.

If a jury learned that she'd only made vague allegations regarding the sexual acts prior to spending several days viewing pornography on her cell phone, some with similar acts to those she subsequently described in her forensic interview, a jury could reasonably have believed the State could not disprove beyond a reasonable doubt the defense theory that KCP fabricated the initial assault allegation and had to watch pornography in order to be able to describe detailed sexual acts in her subsequent interview.

KCP had been to Paulus's house many times before and had been to the bedroom before to play video games. (R170:31) There simply was no evidence—beyond KCP's description of the alleged incident—to suggest that on this day, Paulus led KCP to the room with the intent to have sexual contact. The improper exclusion of the crucial fabrication evidence cannot be deemed harmless beyond a reasonable doubt.

CONCLUSION

Paulus respectfully asks this Court to vacate his judgment of conviction, order a new trial and grant him such relief as the court may find appropriate.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,990 words.

Signed 10/18/2022:

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