COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP558-CR **Cir. Ct. No. 2011CF90**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

JOEL M. HURLEY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Reversed in part and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Following a jury trial, Joel Hurley was convicted of one count of repeated sexual assault of the same child. Hurley moved for postconviction relief, raising several arguments, the majority of which the circuit

court rejected. However, the court agreed Hurley was entitled to a new trial based on an improper remark the prosecutor made during his closing argument about certain other acts evidence. The court therefore entered an order vacating Hurley's conviction, granting him a new trial, and denying his remaining postconviction claims.

¶2 The State appeals from the circuit court's postconviction order, arguing a new trial is not warranted because the prosecutor's remark about the other acts evidence was not improper. Hurley cross-appeals, arguing the circuit court erred by denying his other postconviction claims. He first argues the charge against him should have been dismissed because the amended complaint violated his right to due process. He also argues he is entitled to a new trial based on a different remark the prosecutor made during his closing argument. Finally, he argues a new trial is warranted because the circuit court erroneously admitted the other acts evidence.

¶3 We agree with Hurley that the amended complaint violated his right to due process. We therefore reverse the circuit court's postconviction order in part and remand for the court to dismiss the charge against Hurley without prejudice. We also conclude the circuit court erred by admitting the other acts evidence, and the error was not harmless. Consequently, even absent dismissal of the charge, Hurley would be entitled to a new trial. Given our disposition of these two issues, we need not address the parties' remaining arguments regarding the prosecutor's closing argument. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on narrowest possible ground).

BACKGROUND

¶4 On July 29, 2011, an amended complaint was filed charging Hurley with one count of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025.[1] The charging section of the amended complaint alleged the assaults occurred "on and between 2000 and 2005[.]"

¶5 As probable cause for the charge, the amended complaint alleged fifteen-year-old M.C.N. reported to police in September 2010 that Hurley, her former stepfather, had placed his fingers inside her vagina about five times "between the ages of approximately 6 to 11[.]" M.C.N. stated

> these incidents began as [Hurley] played a type of game with her. [Hurley] would chase her around the house when her mother was gone and took her clothing off after he caught her. After that incident, [Hurley] began to come into her bedroom at night to say good night. He would get into bed with her and place his hand into her pajama bottoms and put his fingers inside her vagina. [M.C.N.] said she thought this occurred approximately five times during the time she lived with him. On these occasions, [Hurley] would also try to get her to touch him, which [M.C.N.] stated she did during one of these encounters.

¶6 The amended complaint also alleged that, "[a]round this time," when M.C.N. returned home from school Hurley would "have her take her clothing off and would put her on his shoulders to take her into the bathroom" to be weighed on a scale. These weighing incidents occurred "on a very frequent basis, [M.C.N.] thought a couple times per week." M.C.N. estimated Hurley weighed her naked more than twenty times when she was between six and eleven. During these

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

incidents, he "would not go any further than have her naked on his shoulders and weigh her."

¶7 The amended complaint also stated M.C.N. "did recall that one of these last occasions she was in the shower after school." Hurley got into the shower with her wearing only his underwear. He asked M.C.N. whether she was going to tell her mother, and when she responded affirmatively, he got out of the shower.

¶8 A preliminary hearing was held on August 11, 2011. M.C.N. was the sole witness. She testified Hurley inserted his fingers into her vagina "a few" times when she was "in elementary school." She did not know how many times, but she testified it was more than once. She remembered telling police it happened about five times, and she testified that sounded correct. She later clarified Hurley touched her at least three times. She could not say in which months, seasons, or years the assaults occurred, or how much time passed between the individual assaults. After M.C.N. testified, Hurley's trial attorney stated he was "not sure if there [was] enough information … to move forward," but the defense would "leave it up to the [c]ourt." The circuit court found probable cause and bound Hurley over for trial.

¶9 An information was filed on September 1, 2011, charging the same count as the amended complaint. Hurley subsequently entered a plea of not guilty, and his attorney asked that the court set the matter for a jury trial "raising all jurisdictional objections and the sufficiency of the [i]nformation." Trial counsel's apparent objection to the sufficiency of the information was not acknowledged by the circuit court, and counsel did not offer any further argument on the issue. A trial was scheduled for January 18 and 19, 2012.

¶10 Before trial, the State filed a motion in limine seeking leave to introduce other acts evidence. Specifically, the State sought to introduce evidence that Hurley had sexually assaulted his younger sister, J.G., when they were children. At a hearing on the State's motion, J.G. testified Hurley repeatedly sexually assaulted her during the mid-1980s when she was eight to ten years old and Hurley was twelve to fourteen years old. According to J.G., when their parents were out, Hurley would ask her to remove her clothes, put on a fur coat, and meet him in their parents' bedroom. When J.G. went into the bedroom, Hurley would be naked on the bed or underneath the covers. Hurley would tell her to slowly remove the coat, "like a strip tease[.]" Hurley would fondle himself while watching her. They would perform oral sex on each other, and Hurley would make her fondle him. J.G. testified Hurley penetrated her vagina with his fingers, and there was "a lot of … humping," but she could not recall whether Hurley penetrated her with his penis.

¶11 The State argued the acts J.G. described were similar to the assaults on M.C.N. because: (1) each victim alleged digital penetration of her vagina; (2) the victims were about the same age when assaulted; and (3) the assaults occurred in a "familial setting." The State therefore argued J.G.'s testimony was relevant to establish Hurley's opportunity to commit the assaults on M.C.N. and his intent or motive to be sexually gratified by the assaults. The State further argued a limiting instruction would sufficiently cure any unfair prejudice to Hurley.

¶12 The defense contended the State was not offering J.G.'s testimony for any permissible purpose, but rather to suggest that Hurley had a propensity to sexually assault children. The defense also argued J.G.'s testimony was not relevant because J.G. described "the act[s] of two children," whereas the charges

against Hurley involved "an adult acting towards a child[.]" The defense further asserted J.G.'s testimony was unfairly prejudicial to Hurley because it involved incest between a brother and sister, and "the term incest is so horrifying to a jury that they may find [Hurley] guilty based on that fact alone[.]" Finally, the defense pointed out it was virtually impossible for Hurley to defend himself against J.G.'s allegations of decades-old misconduct.

¶13 The circuit court granted the State's motion to introduce J.G.'s testimony. The court concluded the testimony was offered for two permissible purposes: to establish Hurley's opportunity to commit the charged crime, and to show his "method of operation[.]" The court then concluded the testimony was relevant because it "[went] towards [Hurley's] alleged method of operation" and bolstered M.C.N.'s credibility. The court emphasized the "great similarity" between J.G.'s and M.C.N.'s allegations, noting that: (1) both victims were in the same age range when assaulted; (2) M.C.N. alleged Hurley "play[ed] some kind of game with her[,]" while J.G. alleged Hurley "had her do this dress up game[;]" and (3) each victim alleged digital penetration of her vagina. The court further concluded admitting J.G.'s testimony would not be unfairly prejudicial to Hurley if a limiting instruction were given before the testimony and at the close of the case.

¶14 At trial, M.C.N.'s testimony essentially mirrored the allegations in the first amended complaint, and J.G.'s testimony was consistent with her testimony at the pretrial motion hearing. The jury found Hurley guilty of the charged offense.

¶15 Hurley subsequently moved for postconviction relief, arguing his trial attorney was ineffective by failing to move to dismiss the amended complaint

on due process grounds. Hurley also argued trial counsel was ineffective by failing to object to two remarks the prosecutor made about the other acts evidence during his closing argument. Alternatively, Hurley argued the prosecutor's remarks required a new trial in the interest of justice. Finally, Hurley sought resentencing, arguing the circuit court had predetermined his sentence.

¶16 Following a ***Machner***[2] hearing, the circuit court entered an order granting Hurley's postconviction motion in part. The court agreed with Hurley that one of the remarks the prosecutor made during his closing argument was improper. The court therefore vacated Hurley's conviction and granted him a new trial. The court rejected Hurley's remaining claims for relief. The State now appeals from the order vacating Hurley's conviction, and Hurley cross-appeals.

DISCUSSION

I. Sufficiency of the amended complaint

¶17 In his cross-appeal, Hurley first argues the amended complaint violated his right to due process because the time period in which it alleged the sexual assaults occurred was not specific enough to give him adequate notice of the charge so that he could prepare a defense.[3] "A defendant is entitled to be

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] Hurley concedes his trial attorney did not clearly object to the amended complaint and did not file a motion to dismiss. Thus, he has failed to preserve the issue for review. *See* ***Door Cnty. DHFS v. Scott S.***, 230 Wis. 2d 460, 466, 602 N.W.2d 167 (Ct. App. 1999) (Generally, a party must object to an error to preserve the issue for appellate review.). However, Hurley argues the amended complaint constitutes "plain error"—that is, "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *See* ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984) (quoted source omitted). In the alternative, Hurley argues his trial attorney was ineffective by failing to clearly object to the amended complaint or file a motion to dismiss.

(continued)

informed of the charges against him … as well as the underlying facts constituting the offense, including the time frame in which the [offense] allegedly occurred[.]" ***State v. Fawcett***, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988) (citations omitted). Whether the time period alleged in a criminal complaint is specific enough to comply with due process is a question of constitutional law that we review independently. ***State v. R.A.R.***, 148 Wis. 2d 408, 410-11, 435 N.W.2d 315 (Ct. App. 1988). In so doing, we restrict our analysis to the charging documents and do not consider extrinsic evidence. ***Id.*** at 410 n.1.

¶18 We have previously recognized that time is "not of the essence" in sexual assault cases. ***Fawcett***, 145 Wis. 2d at 250. As a result, the date the assault was committed "need not be precisely alleged" in the criminal complaint. ***Id.*** Moreover, in cases involving sexual assaults committed against children, "a more flexible application of notice requirements is required and permitted." ***Id.*** at 254. "Child molestation often encompasses a period of time and a pattern of conduct. As a result, a singular event or date is not likely to stand out in the child's mind." ***Id.*** In addition, child molestation is "not an offense which lends itself to immediate discovery." ***Id.*** For these reasons, "[t]he vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance." ***Id.***

The State does not respond to Hurley's argument that, if the amended complaint violated due process, the plain error rule applies. The State also fails to respond to Hurley's argument that his trial attorney was ineffective. Arguments not refuted are deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). We therefore accept Hurley's argument that, if the amended complaint violated due process, he is entitled to relief either under the plain error rule or because he received ineffective assistance of counsel.

Nonetheless, a defendant is entitled to be informed of "the time frame in which the assault allegedly occurred" so that he or she may prepare a defense. ***Id.*** at 253.

¶19 Two seminal cases address how specifically the date of the offense must be alleged in a criminal complaint charging sexual assault of a child. *See* ***Fawcett***, 145 Wis. 2d 244; ***R.A.R.***, 148 Wis. 2d 408. In ***Fawcett***, the defendant was charged with two counts of first-degree sexual assault. ***Fawcett***, 145 Wis. 2d at 248. Each count alleged one act of sexual assault involving the same child. ***Id.*** Both counts alleged the assaults occurred "in the six months preceding December of 1985." ***Id.***

¶20 ***Fawcett*** set forth seven factors courts should consider to determine whether the dates alleged in a criminal complaint are specific enough to satisfy due process:

> (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately; (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged; (5) the passage of time between the alleged period for the crime and the defendant's arrest; (6) the duration between the date of the indictment and the alleged offense; and (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Id. at 253. Although the ***Fawcett*** court did not explicitly apply these factors to the case before it, it did highlight certain facts that appear relevant to some of the factors. For instance, the court noted the complaint alleged Fawcett committed two assaults during a six-month period. ***Id.*** at 254. This goes to the fourth factor—the length of the time period alleged in the complaint in relation to the number of criminal acts alleged. The court also observed that child molestation is

not an offense that lends itself to immediate discovery, but in Fawcett's case, the complaint was issued "immediately after [the victim] first reported the incidents to his teacher in December of 1985." ***Id.*** This goes to the fifth and sixth factors—the passage of time between the date of the alleged offense and the dates when the defendant was arrested and when the complaint was filed.[4] Finally, the court noted the victim was only ten years old when the assaults occurred. ***Id.*** "Considering all of the above factors," the court concluded the six-month charging period was "reasonable" and did not violate the defendant's right to due process. ***Id.***

¶21 The court of appeals next applied the ***Fawcett*** factors in ***R.A.R.***, 148 Wis. 2d 408. There, R.A.R. was charged with four counts of sexual assault of a child. ***Id.*** at 409. The first three charges involved the same victim, M. ***Id.*** at 409-10. The first charge alleged R.A.R. assaulted M. "during the spring of 1982." ***Id.*** The second charge alleged a second assault on M. "during the spring of 1982." ***Id.*** The third charge alleged R.A.R. assaulted M. "during the summer of 1982." ***Id.*** The fourth charge alleged R.A.R. assaulted another victim, D., "during the summer of 1983[.]" ***Id.*** M. was about eleven years old at the time of the assaults, and D. was fourteen years old. ***Id.***

¶22 The ***R.A.R.*** court concluded the complaint violated due process. ***Id.*** at 409. The court declined to consider the first three ***Fawcett*** factors, concluding those factors apply only when "the defendant claims that the state could have

[4] In ***State v. R.A.R.***, 148 Wis. 2d 408, 412 & n.3, 435 N.W.2d 315 (Ct. App. 1988), we examined the briefs filed in ***State v. Fawcett***, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988), and concluded the complaint in ***Fawcett*** was filed February 7, 1986. Thus, about two months passed between the end of the date range alleged in the complaint and the date it was filed.

obtained a more definite date through diligent efforts." ***Id.*** at 411. Considering the fourth ***Fawcett*** factor, the court noted that each count in the complaint alleged a single act that occurred during an approximately three-month period. ***Id.*** at 412. The court acknowledged these three-month periods were shorter than the six-month period in ***Fawcett***. ***Id.***

¶23 However, the court then concluded the fifth and sixth ***Fawcett*** factors strongly suggested the date ranges in the complaint were unconstitutionally broad. ***Id.*** The court noted the complaint was filed in August 1987, and a warrant for R.A.R.'s arrest was issued on August 21, 1987—four to five years after the offenses were alleged to have occurred. ***Id.*** The court observed this delay was significantly longer than the delay in ***Fawcett***. ***Id.*** The court explained, "While the four-to-five-year intervals between the alleged offenses and R.A.R.'s arrest and when the complaint was filed do not alone render the charges insufficiently definite, those intervals in combination with other factors present weigh heavily in favor of that conclusion." ***Id.***

¶24 Addressing the seventh ***Fawcett*** factor, the court observed the complaint "fail[ed] to state the ability of M. and D. to particularize the dates and times of the alleged offenses." ***Id.*** However, the court noted both victims were "at least a year older than the victim in ***Fawcett*** at the time of the claimed offenses." ***Id.*** This suggests the court believed the victims should have been able to provide more precise dates for the alleged assaults.

¶25 Guided by our analysis in ***Fawcett*** and ***R.A.R.***, we now proceed to apply the ***Fawcett*** factors to the facts of this case. As an initial matter, we observe that Hurley asserts the first three ***Fawcett*** factors do not apply in this case, pursuant to ***R.A.R.***, because Hurley does not allege the State could have obtained a

more definite date through diligent efforts. *See* ***R.A.R.***, 148 Wis. 2d at 411. The State questions the validity of ***R.A.R.***'s conclusion that the first three ***Fawcett*** factors apply only when the defendant alleges the State could have obtained a more definite date through diligent efforts. However, the State asserts that, "in light of ***R.A.R.***," it "elects not to challenge in this court Hurley's assertion that the first three factors do not apply in this case. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 185-97, 560 N.W.2d 246 (1997)." Elsewhere, the State concedes that, "[f]or purposes of this review," it "does not dispute [Hurley's] assertion [that the first three ***Fawcett*** factors do not apply]." Like Hurley, the State addresses only the fourth through seventh ***Fawcett*** factors.

¶26 For purposes of this appeal, we accept the parties' apparent agreement that the first three factors ***Fawcett*** factors do not apply because Hurley has not alleged the State could have obtained a more definite date through diligent efforts. Moreover, we note that, even if we did apply the first three ***Fawcett*** factors, doing so would not change our decision. The first and second ***Fawcett*** factors—the age and intelligence of the victim and other witnesses, and the surrounding circumstances—are implicitly considered in our discussion of the seventh factor—the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense. *See* ***infra***, ¶¶34-35. The third ***Fawcett*** factor—the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately—does not affect our analysis. We acknowledge that assaults like those alleged by M.C.N. are not likely to occur at a specific time and are not susceptible to immediate discovery. However, despite these considerations, we nevertheless conclude the amended complaint violated Hurley's right to due process, in light of the other ***Fawcett*** factors.

¶27 We therefore turn to the fourth ***Fawcett*** factor, which requires us to consider "the length of the alleged period of time in relation to the number of individual criminal acts alleged[.]" ***Fawcett***, 145 Wis. 2d at 253. The parties dispute both the length of the time period alleged in the amended complaint and the number of criminal acts alleged. With respect to the length of the time period, the amended complaint asserts Hurley assaulted M.C.N. "on and between 2000 and 2005[.]" At first blush, this language appears to refer to the six-year period including the years 2000, 2001, 2002, 2003, 2004, and 2005. However, the State asserts the language "on and between 2000 and 2005" encompasses a five-year period. The State does not identify which five years it believes the phrase "on and between 2000 and 2005" includes. Hurley's brief-in-chief asserts the amended complaint sets forth a five-year charging period, but his reply brief contends the charging period spans six years.

¶28 With respect to the number of individual criminal acts alleged, Hurley argues the amended complaint alleges only five criminal acts—one for each time he allegedly placed his fingers in M.C.N.'s vagina. In contrast, the State contends the amended complaint alleges twenty-six criminal acts: the five instances of digital penetration; one instance in which M.C.N. "touch[ed]" Hurley; and twenty instances in which Hurley removed M.C.N.'s clothes and carried her on his shoulders to be weighed.

¶29 We need not resolve these disputes because, even assuming the amended complaint alleges twenty-six criminal acts during a five-year period, we conclude the fourth ***Fawcett*** factor weighs in Hurley's favor. A five-year charging period is significantly longer than both the six-month charging period in ***Fawcett*** and the three-month charging periods in ***R.A.R.*** And, while the amended complaint alleges a greater number of criminal acts than the complaints in ***R.A.R.***

and ***Fawcett***, the amended complaint completely fails to specify when those acts occurred within the lengthy charging period. All of the acts could have occurred within a single month in 2000, or within a single month in 2005. Alternatively, they could have been evenly spaced throughout the five-year charging period, resulting in a frequency of 5.2 acts per year, or about one act every 2.3 months. Given the lengthy charging period, this lack of detail about the timing of the assaults would have significantly hampered Hurley's ability to prepare a defense.

¶30 The fifth and sixth ***Fawcett*** factors also weigh in Hurley's favor. Under those factors, we consider "the passage of time between the alleged period for the crime and the defendant's arrest" and "the duration between the date of the indictment and the alleged offense." ***Fawcett***, 145 Wis. 2d at 253. Both factors "address the problem of dimmed memories and the possibility that the defendant may not be able to sufficiently recall or reconstruct the history regarding the allegations." ***State v. Miller***, 2002 WI App 197, ¶35, 257 Wis. 2d 124, 650 N.W.2d 850.

¶31 The record does not reveal when Hurley was arrested. However, the amended complaint was filed on July 29, 2011. Thus, about five-and-one-half years elapsed between the end of the date range alleged in the amended complaint ("on and between 2000 and 2005") and the date the amended complaint was filed. This is slightly longer than the four- to five-year delay between the date of the offenses and the filing of the complaint in ***R.A.R.*** The ***R.A.R.*** court held that, while not dispositive, a four- to five-year delay strongly suggested the complaint violated the defendant's right to due process. ***R.A.R.***, 148 Wis. 2d at 412. Here, even the State concedes the five-and-one-half-year delay "appear[s] to weigh in favor of Hurley's claim." Moreover, as Hurley points out, all the assaults could have occurred in the year 2000, which would mean the delay between the assaults

and the filing of the amended complaint was over ten years. A ten-year delay would weigh even more heavily in favor of a conclusion that the amended complaint violated Hurley's right to due process.

¶32 The seventh ***Fawcett*** factor is the ability of the victim to particularize the date and time of the alleged offense. *See* ***Fawcett***, 145 Wis. 2d at 253. Here, it is undisputed that M.C.N. is completely unable to particularize the dates of the alleged assaults. We agree with Hurley that this factor weighs in favor of his due process claim.

¶33 The State argues M.C.N.'s inability to particularize the dates of the assaults is excusable because she was subject to a pattern of abuse. The State correctly notes that, in ***Fawcett***, we observed, "Child molestation often encompasses a period of time and a pattern of conduct. As a result, a singular event or date is not likely to stand out in the child's mind." ***Id.*** at 254. The State therefore argues the seventh ***Fawcett*** factor does not support Hurley's claim.

¶34 There are two problems with the State's argument. First, while M.C.N.'s inability to provide specific dates for each of the twenty-six assaults alleged in the amended complaint is understandable, her complete inability to narrow the five-year charging period is not. Second, it makes sense that a child subjected to a pattern of abuse would be unable to provide specific details about individual assaults when all or most of the assaults were similar. Here, though, M.C.N. has alleged assaults of two distinct types: six assaults that occurred in her bed when Hurley came into her room to say good night, and twenty assaults that occurred when Hurley carried her naked on his shoulders to be weighed. One would expect M.C.N. to be able to specify, at a minimum, when these two distinct classes of assaults occurred in relation to each other. Instead, the amended

complaint describes the assaults that occurred in M.C.N.'s bed and then vaguely states the weighing incidents occurred "around this time[.]"

¶35 The State also argues M.C.N.'s inability to particularize the dates of the offenses is understandable because she "was only six when the assaults began, and [eleven] when they ended." The State asserts that, "[a]s an elementary school aged child, [M.C.N.] would have had much greater difficulty identifying particular dates and times than the two victims in ***R.A.R.***[,]" who were eleven and fourteen. There is no support in the record for the State's assumption that the assaults began when M.C.N. was six. Rather, M.C.N. alleged the assaults occurred when she was somewhere between ages six and eleven. Because M.C.N. failed to identify how closely the assaults occurred in relation to each other, it is possible the assaults began when M.C.N. was six, but it is also possible they did not begin until she was eleven. If even some of the assaults occurred when M.C.N. was eleven, she would have been the same age as the younger victim in ***R.A.R.*** The ***R.A.R.*** court strongly suggested it believed an eleven-year-old victim should be able to particularize the dates of alleged offenses. ***R.A.R.***, 148 Wis. 2d at 412.

¶36 Finally, the State argues we should not rely on ***R.A.R.*** because it was decided before the enactment of WIS. STAT. § 948.025, the statute Hurley was charged with violating. Section 948.025, entitled "Engaging in repeated acts of sexual assault of the same child," makes it a crime to commit "3 or more violations under s. 948.02(1) [first-degree sexual assault of a child] or (2) [second-degree sexual assault of a child] within a specified period of time involving the same child." WIS. STAT. § 948.025(1). The State observes § 948.025

> was enacted to address the problem that often arises in cases where a child is the victim of a pattern of sexual abuse and assault but is unable to provide the specifics of an individual event of sexual assault. The purpose of the

> legislation was to facilitate prosecution of offenders under such conditions.

State v. Nommensen, 2007 WI App 224, ¶15, 305 Wis. 2d 695, 741 N.W.2d 481 (footnote omitted). To that end, the statute does not require that the jury unanimously agree on the specific assaults the defendant committed, as long as it unanimously agrees the defendant committed at least three assaults. *See* WIS. STAT. § 948.025(2); ***State v. Johnson***, 2001 WI 52, ¶15, 243 Wis. 2d 365, 627 N.W.2d 455.

¶37 Because WIS. STAT. § 948.025 was created to address problems inherent in prosecuting cases involving repeated sexual assaults of children, the State argues a complaint charging a violation of § 948.025 need not be as specific as a complaint charging sexual assault of a child under WIS. STAT. § 948.02. However, the State does not cite any authority for the proposition that the legislature could or did limit a defendant's right to due process by enacting § 948.025. We need not consider arguments unsupported by legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Further, even before § 948.025 went into effect, cases like ***Fawcett*** recognized that "a more flexible application of notice requirements" is necessary in child sexual assault cases. *See* ***Fawcett***, 145 Wis. 2d at 254. Despite recognizing that principle, those cases nevertheless required that complaints give defendants sufficient notice of the charges to satisfy due process.

¶38 In summary, after applying the relevant ***Fawcett*** factors, we conclude the amended complaint violated Hurley's right to due process. The five-year charging period, the five-and-one-half-year delay between the end of the charging period and the filing of the amended complaint, and M.C.N.'s complete inability to particularize the dates of the assaults, either in time or relative to one

another, convince us the complaint was not specific enough to give Hurley adequate notice of the charge against him in order to prepare a defense. We therefore reverse the circuit court's postconviction order in part and remand with directions that the court dismiss the charge against Hurley without prejudice.

II. Other acts evidence

¶39 Hurley also argues he is entitled to a new trial because the circuit court erroneously admitted J.G.'s testimony. "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2)(a). However, other acts evidence is admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.***

¶40 In ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998), our supreme court set forth a three-step analysis for courts to follow when determining the admissibility of other acts evidence. First, a court must consider whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2). ***Id.*** at 772. Second, the court must decide whether the evidence is relevant. ***Id.*** Third, the court must determine whether the evidence's 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, waste of time or needless presentation of cumulative evidence[.]" ***Id.*** at 772-73.

¶41 "[A]longside this general framework, there also exists in Wisconsin law the longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537,

613 N.W.2d 606 (citations omitted). The greater latitude rule applies to all three steps of the ***Sullivan*** analysis. ***Davidson***, 236 Wis. 2d 537, ¶51. "The effect of the rule is to permit the more liberal admission of other crimes evidence in sex crime cases in which the victim is a child." ***Id.***

¶42 Whether to admit other acts evidence lies within the circuit court's discretion. ***Sullivan***, 216 Wis. 2d at 780. We will uphold the court's decision if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Id.*** at 780-81. Here, we conclude the circuit court erroneously exercised its discretion in admitting J.G.'s testimony.

¶43 Under the first prong of the ***Sullivan*** analysis, we must consider whether the evidence was offered for a permissible purpose under WIS. STAT. § 904.04(2). The circuit court concluded J.G.'s testimony was offered for two permissible purposes: opportunity and "method of operation[.]" We disagree.

¶44 First, with respect to opportunity, Hurley argues convincingly that the assaults alleged by J.G. are not probative of Hurley's opportunity to assault M.C.N. fifteen years later. The State does not respond to Hurley's argument that J.G.'s testimony was not properly offered for the purpose of showing opportunity. We therefore deem the argument conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).

¶45 Second, J.G.'s testimony does not show that Hurley had a distinct "method of operation." The circuit court concluded the testimony showed a method of operation due to the "great similarity" between the assaults J.G. and M.C.N. alleged. The court noted that: (1) both girls were in the same age range when assaulted; (2) M.C.N. alleged Hurley "play[ed] some kind of game with

her[,]" while J.G. alleged Hurley "had her do this dress up game[;]" and (3) both victims alleged digital penetration of their vaginas. On appeal, the State also asserts the assaults are similar because they occurred within Hurley's immediate family. The State therefore argues J.G.'s testimony shows Hurley's method of operation was "preying upon girls of a particular age in his immediate family over whom he had some control, and using them for his own sexual ends over a period of years[.]"

¶46 We do not agree that the assaults alleged by M.C.N. and J.G. are similar enough to show a common method of operation. The only true similarity between the alleged assaults is the victims' ages. Although both J.G. and M.C.N. alleged digital penetration of their vaginas, J.G. alleged those acts were accompanied by more frequent and a wider variety of sexual contact. Further, while the circuit court found that Hurley played "games" with both victims, he did not play remotely similar types of games with each girl. Finally, while the assaults against both victims occurred in a familial setting, the victims' relationships to Hurley were not the same. Hurley is J.G.'s brother and was twelve to fourteen years old when he allegedly assaulted her. In contrast, Hurley was M.C.N.'s stepfather and was about twenty-seven to thirty-two years old when the alleged assaults occurred. In light of these differences, J.G.'s testimony does not show that Hurley had a distinctive method of operation that he also used in the assaults on M.C.N.

¶47 The State argues that, even if the purposes relied on by the circuit court were improper, J.G.'s testimony was nevertheless admissible to show Hurley's intent or motive in assaulting M.C.N.—specifically, that he was "motivated by sexual desire[.]" *See* ***State v. Hunt***, 2003 WI 81, ¶52, 263 Wis. 2d 1, 666 N.W.2d 771 (appellate court may consider purposes for the

admission of other acts evidence that were not contemplated by the circuit court and may affirm circuit court's decision on other grounds). We reject this argument for two reasons.

¶48 First, the State acknowledges its theory at trial was that Hurley committed the charged crime by engaging in five acts of sexual intercourse with M.C.N.—the five acts of digital penetration. Sexual intent—that is, intent to sexually arouse or gratify one's self or to sexually degrade or humiliate another—is not an element of sexual intercourse. *See* WIS. STAT. §§ 948.01(5)(a), (6). This court has previously questioned "whether [other acts] evidence could properly be admitted as evidence of motive and intent in a case where intent is not at issue." ***State v. McGowan***, 2006 WI App 80, ¶17, 291 Wis. 2d 212, 715 N.W.2d 631.

¶49 Second, and more importantly, we do not agree with the State that Hurley's conduct as a twelve- to fourteen-year-old child provides evidence of his motive or intent to sexually assault M.C.N. fifteen years later. Our reasoning in ***McGowan*** is instructive on this point. There, McGowan was charged with sexually assaulting his cousin, Sasha, during a two-and-one-half-year period beginning when Sasha was eight and McGowan was eighteen. ***Id.***, ¶2. At trial, the State introduced evidence that McGowan had sexually assaulted another female cousin, Janis, when she was five and McGowan was ten. ***Id.***, ¶9. On appeal, we concluded Janis's testimony was improperly admitted. We reasoned, "Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult." ***Id.***, ¶20 (quoting ***State v. Barreau***, 2002 WI App 198, ¶38, 257 Wis. 2d 203, 651 N.W.2d 12). Consequently, the "conduct of a ten-year-old child" did not "give 'context' to, or provide evidence of the motive or

intent of, an adult some eight or more years later." ***Id.*** The same reasoning applies here, where Hurley was twelve to fourteen years old when he allegedly assaulted J.G. and twenty-seven to thirty-two years old when he allegedly assaulted M.C.N.

¶50 Moving to the second prong of the ***Sullivan*** analysis, even if J.G.'s testimony had been offered for a proper purpose, we would nevertheless conclude it was improperly admitted because it was not relevant. Evidence is relevant when it has "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. "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." ***State v. Gray***, 225 Wis. 2d 39, 58, 590 N.W.2d 918 (1999). "Similarity is demonstrated by showing the 'nearness of time, place, and circumstance' between the other act and the alleged crime." ***Hunt***, 263 Wis. 2d 1, ¶64 (quoting ***State v. Scheidell***, 227 Wis. 2d 285, 305, 595 N.W.2d 661 (1999)). "The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." ***Sullivan***, 216 Wis. 2d at 787.

¶51 As discussed above, the assaults described by J.G. differ in significant respects from the assaults alleged by M.C.N. *See supra*, ¶45. Further, the assaults on J.G. occurred at least fifteen years before the assaults on M.C.N. Given these significant differences, we conclude J.G.'s testimony is not relevant to prove that Hurley assaulted M.C.N. We agree with Hurley that, under the circumstances, the fact that J.G. was assaulted made it no more likely M.C.N. was assaulted.

¶52 Finally, addressing the third prong of the ***Sullivan*** analysis, we conclude any relevance J.G.'s testimony may have had was substantially outweighed by the danger of unfair prejudice.

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Sullivan, 216 Wis. 2d at 789-90. We agree with Hurley that evidence he committed repeated acts of incest against his sister was likely to arouse the jury's sense of horror and provoke its instinct to punish. Further, because there were no witnesses to the incidents J.G. alleged, no physical evidence, and a significant amount of time had passed, Hurley had little ability to defend himself against J.G.'s allegations.

¶53 The State argues any unfair prejudice to Hurley was cured by the limiting instructions the circuit court gave before J.G. testified and following the close of evidence. In both instances, the court instructed the jury it could consider J.G.'s testimony "only on the issues of opportunity and method of operation." We have already concluded J.G.'s testimony was not properly admitted for either of those purposes. Accordingly, we reject the State's argument that the court's limiting instruction cured any unfair prejudice to Hurley.

¶54 Because J.G.'s testimony fails each prong of the ***Sullivan*** analysis, the circuit court erroneously exercised its discretion by admitting the testimony. Having determined the testimony was improperly admitted, we would typically next consider whether the error was harmless. *See* ***McGowan***, 291 Wis. 2d 212, ¶25. However, the State concedes the admission of J.G.'s testimony, if erroneous,

was not harmless. We therefore conclude that, absent dismissal of the charge against him, Hurley would nevertheless be entitled to a new trial based on the improper admission of J.G.'s testimony.

By the Court.—Order reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.