COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2905-CR **Cir. Ct. No. 2009CF4756**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRYL J. BADZINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Darryl J. Badzinski appeals from a judgment entered on a jury's verdict convicting him of first-degree sexual assault of a child, *see* WIS. STAT. § 948.02(1) (1994-95),[1] and the circuit court's order denying his motion for postconviction relief. We conclude that the complaint was not unconstitutionally vague. Judge Fine's opinion, joined in by Judge Curley, concludes that the trial court erred in answering a question posed by the jury. Judge Fine's opinion is the decision of the court on that issue. *See* ***State v. Dowe***, 120 Wis. 2d 192, 194, 352 N.W.2d 660 (1984) (opinion upon which a majority of the court agrees is the court's opinion). Accordingly, we affirm in part, reverse in part, and remand for a new trial.

BACKGROUND

¶2 In April 2006, fifteen-year-old high school freshman A.R.B.[2] reported to Milwaukee County Deputy Sheriff Steven Schmitt at Children's Hospital that she had a past history of sexual abuse. This was the first time A.R.B. had mentioned past abuse and she refused to go into any further detail. In August 2009, however, A.R.B. came forward to her mother and gave further details of the assault. A.R.B. claimed that, when she was between the ages of four and six years old, Badzinski, A.R.B.'s uncle, once showed her his penis and made her touch it. A.R.B. reported the abuse to the police eight weeks after disclosing the event to her mother. As a result of A.R.B.'s report, in October 2009, the State filed a criminal complaint against Badzinski, charging him with first-degree sexual

[1] All other references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Throughout Badzinski's appellate submissions, Badzinski's appellate counsel refers to A.R.B. by her full name. We identify A.R.B. by her initials out of respect for her privacy. In the future, we suggest counsel do the same when dealing with sexual assault victims.

assault of a child under thirteen years of age. The complaint alleged that Badzinski had sexual contact with A.R.B. "when she [was] approximately 5 or 6 years old, either at Christmas or at Easter time, during that time period, which would be from approximately October 2, 1995 through April 30, 1998" at A.R.B.'s grandparents' house, to wit, Badzinski's parents' house.

¶3 Prior to trial, Badzinski filed a motion to dismiss the complaint on the grounds that it failed to state with sufficient particularity the date of the sexual assault and failed to give him adequate notice of the charge against him. At the hearing, the trial court said that it interpreted the complaint to set forth six specific dates: Christmas of 1995, 1996, and 1997, and Easter of 1996, 1997, and 1998. The trial court said: "I read that sentence as Christmas or Easter between that time period when she was five or six years old, which gets you in between those dates. Christmas or Easter." Trial defense counsel agreed that he could prepare a defense for those six specific dates, as long as the court assured him that at trial the State would be limited to arguing that the offense occurred on one of those dates. The court then instructed the State to amend the information accordingly. The State subsequently filed an amended information stating that Badzinski had sexual contact with A.R.B. "on or about December 25, 1995[] or Easter (April 7) 1996 or December 25, 1996 or Easter (March 30) 1997 or December 25, 1997 or Easter (April 12) 1998."

¶4 At trial, A.R.B. testified that the assault occurred when she was between four and six years old, on either Christmas or Easter, in a basement laundry room at her grandparents' house. A.R.B. stated that she had gone into the laundry room because she was probably playing a game of hide-and-seek, and Badzinski was already in the room masturbating when she entered. According to A.R.B., when she entered the room, Badzinski got up and closed the door.

Badzinski told A.R.B. that his penis was a toy and tried to make her touch it. A.R.B. did not recall how long the incident lasted or how it ended. At trial, Badzinski denied all of A.R.B.'s accusations.

¶5 Multiple family members testified at trial on Badzinski's behalf. It is undisputed that between twenty and twenty-five people were usually present for family gatherings at Badzinski's parents' home. These events would generally occur in the basement, where the adults would congregate and play cards. During the events, family members would regularly enter the laundry room to fill up the ice bucket and to get frosted mugs. The bathroom, which is located right next to the laundry room, was the primary bathroom used at these events. None of the family members who testified had ever seen Badzinski sexually assault A.R.B.

¶6 During deliberations, the jurors submitted a question to the trial court asking whether they must agree on the "place" that the sexual assault occurred. The parties agreed that the trial court would send back a note indicating that the jurors must all agree that the assault occurred at the grandparents' home address. The jurors then submitted an additional question asking whether they had to agree on which room the assault occurred in. Over the defense's objection, the trial court simply answered, "[N]o."

¶7 The following day, before the verdict was announced, the defense noted for the record that it objected to the trial court's one-word response to the jury question because the State failed to produce any evidence at the trial demonstrating that the sexual assault could have occurred anywhere other than the laundry room. The trial court noted the objection. The jury found Badzinski guilty.

¶8 Badzinski filed a postconviction motion, raising five issues: (1) that the "non-precise nature of the allegations[,] coupled with the massive delay in reporting[,] prevented [him] from being able to properly plead and prepare a defense"; (2) that "no rational trier of fact would have believed [A.R.B.] and the conviction must be reversed"; (3) that "the real controversy was not fully tried"; (4) that "the [trial] court's answer to the jury question resulted in denial of [his] right to a unanimous verdict"; and (5) that "the trial court erred by allowing [a State witness] to testify despite the fact that [the witness] was not listed on the State's witness list." (Formatting and some capitalization omitted.) The trial court denied Badzinski's motion for postconviction relief, adopting the State's response brief *in toto*. Badzinski appeals.

DISCUSSION

¶9 Badzinski raises four issues on appeal: (1) that the criminal complaint failed to pass constitutional muster because it was impermissibly vague; (2) that there was insufficient evidence to support the jury's verdict; (3) that the trial court prevented the real issue in controversy from being tried when it told the jurors that they did not need to agree on whether the sexual assault occurred in the laundry room; and (4) that he was denied his right to an unanimous verdict when the trial court told the jurors that they did not need to agree on whether the sexual assault occurred in the laundry room.[3]

[3] Badzinski has abandoned his claim that the trial court erred in allowing the State's witness to testify. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (An issue raised in the trial court, but not raised on appeal, is deemed abandoned.).

¶10 We conclude that Badzinski waived his right to raise on appeal whether the complaint was unconstitutionally vague when his attorney conceded the issue before the trial court. However, even if he did not waive it, the complaint is not impermissibly vague. I also conclude that the evidence was sufficient to support the conviction, and that the trial court's instruction to the jurors—that they did not need to agree upon the room in which the sexual assault occurred—did not prevent the real controversy from being tried and did not deny Badzinski his right to a unanimous verdict. However, a majority of the court concludes that the trial court erred in telling the jurors that they need not agree on whether the sexual assault occurred in the laundry room and, therefore, we remand for a new trial.

I. The complaint is not unconstitutionally vague.

¶11 Badzinski first complains that the allegations in the complaint are vague, and that the vague allegations, coupled with A.R.B.'s delay in reporting the incident, prevented him from properly pleading and from properly preparing a defense, in violation of his constitutional right to due process.[4] We disagree.

¶12 Due process includes the right to be informed of the nature and cause of the accusation against the defendant. *See* ***State v. Fawcett***, 145 Wis. 2d 244, 250-51, 426 N.W.2d 91 (Ct. App. 1988). In order to uphold that due process

[4] In basing his argument on the complaint, Badzinski ignores the fact that after the complaint was filed, the State filed an amended information, which is the operative trial document in this case. Although Badzinski couches his claim in terms of the complaint, we believe he challenges the sufficiency of both documents in this appeal and conclude he has waived both and even if he has not waived them, they are legally sufficient for the reasons set forth above. Nonetheless, we address the changes in the amended information for purposes of completeness.

right, the criminal complaint "must set forth facts that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable." ***Id.*** at 250. Whether the allegations in a complaint are sufficient and whether a deprivation of a constitutional right has occurred are questions of law we review *de novo*. ***Id.***

¶13 The State contends that Badzinski failed to preserve this argument for appellate review when his counsel conceded at a hearing that the complaint was constitutional if the trial court interpreted the complaint to allege that the sexual assault occurred on only one of six specific dates, as opposed to more generally alleging that the assault occurred at some time between Christmas 1995 and Easter 1998. Upon review of the record, we agree with the State that the issue has been waived.

¶14 "It is a fundamental principle of appellate review that issues must be preserved at the [trial] court." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Badzinski's trial counsel failed to preserve the issue by agreeing to, in effect, withdraw his motion.

¶15 At the hearing on Badzinski's motion to dismiss the complaint, the trial court said that it interpreted the complaint to refer to just the six holidays in question, stating: "I read that sentence as Christmas or Easter between that time period when she was five or six years old, which gets you in between those dates. Christmas or Easter." Badzinski's attorney replied that he was satisfied with the court's interpretation and asked the court to assure him that the State would be limited to those six dates at jury trial. Defense counsel said:

> I mean, as long as the court is giving me assurance that -- because it's impossible for me to prepare a defense through -- April 2nd, '95 through April 30th, '98. It is not impossible by any stretch of the imagination for me to prepare a defense for those [six] specific dates throughout those years. If the court is giving me an assurance that at the jury trial, you know -- and I will prepare a motion in limine -- that we're not gonna go into any other dates, I am fine with that.

The court then instructed the State to amend the information accordingly, which the State subsequently did. The amended information stated that Badzinski had sexual contact with A.R.B. "on or about December 25, 1995[] or Easter (April 7) 1996 or December 25, 1996 or Easter (March 30) 1997 or December 25, 1997 or Easter (April 12) 1998." Badzinski did not object to the amended information. As such, while Badzinski's attorney initially challenged the constitutionality of the complaint, he later accepted the trial court's interpretation of the complaint as constitutional, and he failed to mount a challenge against the amended information. In doing so, he waived Badzinski's right to raise the issue on appeal. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("'waiver is the intentional relinquishment or abandonment of a known right'") (citation omitted).

¶16 However, even if Badzinski had not waived his right to raise the argument, we conclude that the complaint was sufficiently specific to withstand constitutional scrutiny. "A criminal charge must be sufficiently stated to allow the defendant to plead and prepare a defense." *See* ***Fawcett***, 145 Wis. 2d at 250. The supreme court has identified seven factors to assist courts in determining whether a criminal complaint is sufficient in that regard.

> These factors include: (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 252.

¶17 Badzinski concedes that the first three factors are not applicable to his case, and instead relies on the final four factors to support his conclusion that the complaint was constitutionally insufficient. In doing so, Badzinski asserts that the period of time alleged in the complaint is too expansive, spanning six different dates over three years, and that too much time had passed, at least twelve years from the latest potential date, to allow him to properly plead and prepare a defense. He is mistaken.

¶18 "In a case involving a child victim, … a more flexible application of notice requirements is required and permitted." ***Id.*** at 254. Keeping that in mind, the supreme court held in ***Fawcett*** that a complaint alleging two sexual assaults of a child that occurred at some undefined day over a six-month period adequately notified the defendant of the charges against him. ***Id.*** Here, the complaint alleged that Badzinski sexually assaulted the victim on a single occasion on *one of six specific dates* over a three-year period during a family gathering at a specific location. As such, the complaint here was *more* specific than the one found constitutional in ***Fawcett*** because, here, the complaint named six specific days, easily identified by the holiday corresponding to each date. *See* ***id.***

¶19 Furthermore, while the twelve-year period that elapsed between the last potential assault date and the time Badzinski was arrested and the complaint

was filed is certainly significant, that long delay "do[es] not alone render the charges insufficiently definite," *see* ***State v. R.A.R.***, 148 Wis. 2d 408, 412, 435 N.W.2d 315 (Ct. App. 1988), particularly because child sexual assault "is not an offense which lends itself to immediate discovery," *see* ***Fawcett***, 145 Wis. 2d at 254. Despite the delay in arrest and in filing the complaint, the complaint itself sufficiently specifies the charges against Badzinski, setting forth the who, what, when, where, and how of the allegations. The complaint informed him that he was being charged with sexually assaulting A.R.B., in a laundry room at his parent's home, on one of six different holidays. That specificity allowed Badzinski to name over twenty-four witnesses, many of whom testified that they attended family gatherings during that time period, that the laundry room door was never closed, and that the laundry room is in an area that is heavily trafficked during family gatherings. While the fact that Badzinski had a defense does not in and of itself demonstrate that the complaint was constitutional, the strength of his defense is evidence that the complaint was sufficiently specific to enable him to plead and put on a defense. As such, we conclude that the complaint was constitutional.

II. The evidence was sufficient to support the conviction.

¶20 When reviewing the sufficiency of the evidence to support a conviction, we "may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). We must accept and follow any inference from the evidence drawn by the trier of fact, even if the record shows that more than one inference could be made, "unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 507.

¶21 Badzinski attacks the sufficiency of the evidence, arguing that because so many witnesses' accounts rebutted A.R.B's account, her testimony was incredible as a matter of law and the jury was not reasonable to believe her. Thus, Badzinski would have us replace his credibility determination for the jury's. He cites no authority for his assertion that we must reject the jury's reasonable credibility determination on the facts here, nor could he, as there is none.

¶22 Credibility determinations are entirely the province of the jury. "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***Id.*** at 506. The supreme court in ***Poellinger*** went on to say that it is up to the trier of fact, when faced with conflicting facts or inferences, to choose the one that it believes, subject to the bounds of reason. ***Id.*** The reviewing court's role is different however. "[A]n appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 507. In ***Jackson v. Virginia***, 443 U.S. 307 (1979), the United States Supreme Court articulated the sufficiency test this way: "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Id.*** at 319.

¶23 Applying these tests, that is, viewing the evidence in the light most favorable to the State and deferring to the factual findings and credibility judgments of the trier of fact that are based on the record and reason, I conclude that the evidence is sufficient to support conviction. The jury heard from both A.R.B. and the defense's many witnesses (all of whom were family members and all of whom supported Badzinski's version of the facts). Badzinski was able to

present his defense and attempt to impeach the credibility of A.R.B. Yet, the jurors, as they were entitled to do, believed her. Nothing in the record shows that her testimony was incredible as a matter of law. Just because testimony is disputed, as A.R.B.'s was here, does not make it incredible. Accordingly, I conclude that Badzinski has failed to show that the evidence was insufficient to support his conviction.

III. The real controversy has been fully tried.

¶24 Next, Badzinski asks us to remand this case for a new trial, pursuant to WIS. STAT. § 752.35, because the trial court prevented the real controversy from being tried when it told the jurors that they did not need to agree on the room in which the sexual assault occurred.[5] He argues that whether the assault occurred in the laundry room was crucial to the case because the State did not present any evidence that the assault occurred anywhere else and his defense hinged on demonstrating that A.R.B.'s testimony that the assault occurred in the laundry room was not credible.

¶25 The State argues that the real controversy was whether Badzinski sexually assaulted A.R.B. on any of the six dates and that the real controversy was fully tried. The location of the assault was not an element of the offense. Additionally, the State contends that Badzinski's entire argument is baseless in that it rests on speculation as to why the jury asked a question during deliberations. I agree with the State.

[5] Badzinski does not argue that we should remand this case under WIS. STAT. § 752.35 because there has been a miscarriage of justice. *See* ***id.***; *see also* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶26 As relevant to this case, WIS. STAT. § 752.35 permits us the discretion to remit a case back to the trial court for a new trial "if it appears from the record that the real controversy has not been fully tried." In order to convince us that the real controversy has not been fully tried, Badzinski must show that the jury was precluded from considering "important testimony that bore on an important issue" or that certain evidence which was improperly received "clouded a crucial issue" in the case. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). This court uses its power to reverse under § 752.35 "only in exceptional cases." *See* ***State v. Betterley***, 183 Wis. 2d 165, 178, 515 N.W.2d 911 (Ct. App. 1994). I conclude that the real controversy was tried and that this is not an exceptional case that requires reversal.

¶27 Here, Badzinski does not claim that important evidence was improperly kept out or that improper evidence was let in, so he fails to meet the ***Hicks*** test. *See* ***id.*** at 160. He was able to present a full defense. Badzinski does not claim that the jury was misadvised on the elements or otherwise improperly instructed. He does not contend that the room location was an essential element of the offense. Finally, it is undisputed that there was no evidence of a sexual assault in any other room but the laundry room. The real controversy was tried.

¶28 Yet, Badzinski argues that it was not. Badzinski bases his claim on speculation regarding the jurors' motive for asking whether they must agree on the room in which the assault occurred. His speculation is improper. The jury is instructed not to speculate. On review, we cannot speculate. We do not know why the jury asked the question and we cannot know. The jury's deliberation

process is protected by law. *See* WIS. STAT. § 906.06(2)[6] (prohibiting inquiry into a juror's mind or emotional processes during deliberations with the exception of claims of outside influences being brought to bear upon a juror, which is not the claim here).

¶29 Badzinski argues that by telling the jurors that they did not need to agree upon the room in which the assault occurred, the trial court permitted the jurors to ignore the State's evidence that the assault occurred in the laundry room, and Badzinski's evidence that there was no assault in the laundry room. The trial court properly stated that the room location was not an essential element of the crime. The court did not explicitly or implicitly tell the jurors to ignore the evidence. Presumably the jurors were given the standard jury instruction telling them not to speculate and to base their decision on the evidence. The parties do not tell us otherwise. We presume jurors follow the jury instructions. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶30 For all of the foregoing reasons, I conclude that the real controversy was fully tried.

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[6] WISCONSIN STAT. § 906.06(2) states:

> INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

IV. The trial court did not deny Badzinski his right to a unanimous verdict.

¶31 Badzinski also argues that the trial court, in telling the jurors that they did not need to agree on the room in which the assault occurred, denied him his constitutional right to a unanimous verdict. The Wisconsin Supreme Court has previously held that the right to trial by jury guaranteed by the state constitution includes the right to a unanimous verdict in criminal trials. ***State v. Cartagena***, 140 Wis. 2d 59, 61, 409 N.W.2d 386 (Ct. App. 1987). Due process requires that the State prove each essential element of the offense beyond a reasonable doubt. ***Holland v. State***, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979). There is no claim that the jury was not properly instructed as to the elements of the crime charged. Nor is there a claim that the room location is an essential element. Thus, I conclude that Badzinski fails to show that he was deprived of his right to a unanimous verdict. *See* ***id.***

By the Court.—Judgment and order affirmed in part, reversed in part and cause remanded.

Not recommended for publication in the official reports.

¶32 FINE, J. (*concurring in part*). Judge Curley and I agree with the Lead Opinion's resolution of the issue discussed in its Section I. Judge Curley and I, however, believe that the trial court erred in answering the jury's question whether the jurors must agree on the "place" that the sexual assault occurred. Accordingly, this opinion is the opinion of the court on that issue. *See* ***State v. Dowe***, 120 Wis. 2d 192, 194, 352 N.W.2d 660, 662 (1984) (opinion upon which a majority of the court agrees is the court's opinion). For the reasons set out below, we reverse and remand for a new trial.

¶33 As the Lead Opinion recounts, the only evidence that Darryl J. Badzinski sexually assaulted his then four-to-six-year-old niece during Christmas of 1995 or Christmas of 1996 or Christmas of 1997 or Easter of 1996 or Easter of 1997 or Easter of 1998 was that it happened on one of these holidays "in a basement laundry room at her grandparents' house." Lead Opinion, ¶¶3–4. There was no evidence that it happened anywhere else.

¶34 Further, as the Lead Opinion also recounts:

> Multiple family members testified at trial on Badzinski's behalf. It is undisputed that between twenty and twenty-five people were usually present for family gatherings at Badzinski's parents' home. These events would generally occur in the basement, where the adults would congregate and play cards. During the events, family members would regularly enter the laundry room to fill up the ice bucket and to get frosted mugs. The bathroom, which is located right next to the laundry room, was the primary bathroom used at these events. None of the family members who testified had ever seen Badzinski sexually assault [Badzinski's niece].

Lead Opinion, ¶5. At least one or more of the jurors believed the family members because the jury asked the trial court if they had to "agree on the 'place' that the

sexual assault occurred." Lead Opinion, ¶6. The trial court said that they did not. ***Ibid.*** This was error.

¶35 The *only* evidence that Badzinski assaulted his niece, more than a decade before the 2009 trial, was that the assault happened in a room where, if jurors believed Badzinski's witnesses, that was not possible. Of course, the jurors did not have to believe Badzinski's witnesses, and could have wholly credited his niece's contrary testimony. But *if* the jurors believed Badzinski's niece, the assault *did not happen anywhere other than in the basement laundry room*. The trial court, in effect, told the jury to ignore this, and let the jurors pick any room or rooms in the house.

¶36 Two of the main and irreducibly valuable protections of our criminal-justice system are that no person may be convicted of a crime unless a jury (1) unanimously finds that the government has proven the person guilty (2) beyond a reasonable doubt. Even in civil cases, jury verdicts must be based on *evidence*, not "conjecture and speculation." ***Herbst v. Wuennenberg***, 83 Wis. 2d 768, 774, 266 N.W.2d 391, 394 (1978). *A fortiori*, we may not permit a guilty verdict to rest on matters beyond the evidence. *See* ***United States v. Groves***, 470 F.3d 311, 324 (7th Cir. 2006) ("Speculation cannot be the basis for proof in the civil context much less the basis for proof beyond a reasonable doubt."); *see also* ***State v. Serebin***, 119 Wis. 2d 837, 851, 350 N.W.2d 65, 72 (1984); ***State v. Watkins***, 2001 WI App 103, ¶26, 244 Wis. 2d 205, 223, 628 N.W.2d 419, 428.

¶37 Accordingly, Badzinski is entitled to a new trial.[7]

[7] In light of our conclusion that the trial court erred in telling the jurors that they did not have to agree where Badzinski assaulted his niece, and our agreement with the Lead Opinion's resolution of the issue it discusses in its Section I, we need not address the other issues Badzinski raises on this appeal. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).