STATE OF WISCONSIN
CIRCUIT COURT
TREMPEALEAU COUNTY

STATE OF WISCONSIN,
Plaintiff,

Vs.

JAMES KILLIAN,
Defendant.

ORDER

Case No: 15CF47

ISSUE

A jury trial in this case was commenced June 19, 2017. The defendant moved for mistrial during the child victim's testimony and the motion was ultimately granted. The defendant subsequently filed a motion to dismiss. A formal motion hearing was heard December 21, 2017. The parties requested additional time to review transcripts and to submit briefs; the final briefs were submitted on or about February 6, 2018. The issue before the Court is whether the Fifth Amendment's protection against double jeopardy bars the retrial of James Killian because of prosecutorial overreaching in this case.

RULE

The double jeopardy clause of both the Federal and State Constitutions protects a defendant's right to have his trial completed by a particular tribunal and protects a defendant from repeated attempts by the State to convict the defendant for an alleged offense. *State v. Hill*, 2000 WI App 259 ¶ 10, 240 Wis. 2d 1, 622 N.W.2d 34. When a defendant successfully requests a mistrial, the general rule is that the double jeopardy clause does not bar a retrial because the defendant is exercising control over the mistrial decision or in effect choosing to be tried by another tribunal. *Id.*, ¶ 11, 622 N.W.2d 34. An exception to this rule is that retrial is barred when a defendant moves for and obtains a mistrial due to prosecutorial overreaching where two conjunctive elements must be shown:

(1.) The prosecutor's action must be intentional in the sense of a culpable state of mind in the nature of an awareness that his activity would be prejudicial to the defendant; and

(2.) The prosecutor's action was designed either to create another chance to convict, that is, to provoke a mistrial in order to get another "kick at the cat" because the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, *i.e.*, to harass him by successive prosecutions.

State v. Jaimes, 2006 WI App 93, ¶8, 292 Wis. 2d 656, 715 N.W.2d 669, *citing State v. Quinn*, 169 Wis. 2d 620, 624, 486 N.W.2d 542 (Ct. App. 1992).

The Supreme Court described what the Court must consider in its analysis noting that "…a standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." *Oregon v. Kennedy,* 456 US 667, 675 (1982). Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. *Id.* at 676. Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *United States* v. *Dinitz, supra,* at 609. Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion."

The Court did not "lay down a flat rule that where a defendant in a criminal trial successfully moves for a mistrial, he may not thereafter invoke the bar of double jeopardy against a second trial. But we do hold that the circumstances under which such a defendant

may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. *Oregon v. Kennedy*, *supra,* at 679.

RELEVANT FACTS

1. CASE 1 CHARGED: JURY TRIAL SCHEDULED AND ADJOURNED

Charges were filed on this case on or about March 17, 2015. The defendant waived his preliminary hearing on or about May 21, 2015 and he was bound over for trial. An information was filed alleging 1st Degree Sexual Assault of a Child Under Age 12 contrary to §948.02(1)(b), Wis. Stats., occurring on or about August 18, 2014. The defendant pled not guilty. The Information informed the defendant that this was a Class B Felony subject to imprisonment of up to 60 years with a mandatory minimum of 25 years imprisonment required as part of a bifurcated sentence.

A substitution was filed and the matter was reassigned to Judge Becker. On or about September 9, 2015, the parties advised the court it should be scheduled for trial. A three day jury trial was scheduled to commence February 3, 2016, with a Final Pretrial Conference set for January 8, 2016. The defendant's motion requesting inspection of psychological records was heard January 14, 2016. The trial was adjourned to allow discovery and inspection and the matter was reset to February 3, 2016 for a status conference.

2. CASE 2 CHARGED

A second case was filed against the defendant (16CF38) on or about March 15, 2016 (hereinafter referred to as "Case 2"). Case 2 alleged the defendant had committed repeated acts of sexual assault against a different child (hereinafter referred to as "child 2") in 1994. The defendant waived his Preliminary Hearing, was bound over for trial and an Information was filed on or about April 27, 2016. This Information alleged that the defendant had committed 3 or more violations of §948.02(1) or (2), Wis. Stats., involving child 2 who had not yet attained the age of sixteen, between

April 1994 and December 1999, contrary to §948.025(1), Wis. Stats. The Information recited the charge as a Class B felony subject to up to 60 years of imprisonment.

3. CASE 1 MOTIONS; RESCHEDULING OF CASE 1 JURY TRIAL

Another set of motions was heard in Case 1 on or about April 27, 2016. The court issued a Criminal Case Scheduling Order on or about May 26, 2016 which required that certain items be filed before the October 5, 2016, Final Pretrial Conference. The Jury trial was rescheduled to October 26, 2016. On or about September 22, 2016 the State filed an Amended Information which amended the charge to sexual assault of a child who had not attained the age of 13, alleging that the child was born in 2004, and changed the offense to a violation of §948.02(1)(e), Wis. Stats. The penalty was reflected as a 60 year (Class B) Felony. Additional motions were filed by both sides. The motions concerned several Other Acts Evidence (OAE) motions, other motions in limine, motions for expert testimony, a motion to inspect psychiatric records and a motion allowing use of recorded forensic interview at trial. The trial was adjourned at the request of both parties..

The numerous motions were heard October 5, 2016. The State's OAE motion concerned the State's intention to introduce the other alleged acts of sexual assault on child 2 which were contained in case 2. It was alleged these other acts occurred between January 1988 and December 1999. The Court used the standard Sullivan analysis, finding that the acts were offered for an acceptable purpose, namely to show it was not accidental (motive) and to prove the absence of mistake. It further considered the greater latitude rule and found that these other alleged acts would not confuse or mislead the jury and were thus admissible.

The defendant's Motion in Limine requested "notwithstanding the State's other act motion which will be addressed separately from this motion in limine, that the state be prohibited from any mention or use of evidence or allegations pertaining to other crimes, wrongs or acts committed by the defendant either prior to or following the date of the alleged offenses charged in the complaint. …More specifically, the defendant asserts: that the State has failed to identify any other crime,

wrong or act allegedly committed by the defendant; that the State has not articulated an acceptable purpose for the any "other acts" evidence, whether or not identified; that the State has not shown relevance; and that the State has not weighed the probative value of the alleged other act against the resulting unfair prejudice (the Sullivan analysis)." The defense also requested that the State be prohibited from any mention or use of evidence not previously disclosed to defense counsel. The state asserted that the defendant had engaged in "behaviors" over 2 years prior with child 1. The defense demanded that any other acts of assault be addressed separately (ie…. including sexual contact) for purposes of the motion. There was discussion as to grooming behaviors such as special gifts and preferable treatment. The defense conceded that behaviors like that were "grooming" and were not considered an "other act." The State did not further discuss any "other acts" that it intended to introduce that might be considered sexual assault and indicated that the only act it was intending to discuss was the one(s) that took place on the charged date. The state then indicated that it did not object to the defense's motion for OAE and the court therefor granted the motion.

The Court was unable to rule on the State's proposed expert (Ms. Bryhn) because the State had failed to provide a report or summary regarding her proffered testimony. The court was likewise unable to rule on the admissibility of the recorded forensic interview because it had not been provided a copy by the State to review and therefore could not properly analyze it under the required Sec. 908.08, Wis. Stats. rubric.

4. JOINDER OF CASES; RESCHEDULING OF JURY TRIAL

On or about October 27, 2016, the parties stipulated that the two pending cases should be joined and tried together. The now joined cases were again set for a 5 day jury trial to commence on June 19, 2017, with the notice sent out on or about November 7, 2016.

5. ADDITIONAL PRETRIAL MOTIONS

On or about March 24, 2017, the State filed another Motion to Admit OAE relating to the charge in joined case 2. The State listed two other individuals who would testify regarding other

acts committed by the defendant. One would testify that the defendant would put his hands down her pants while they rode the tractor together. The other witness would testify that the household was violent, with the children subjected to physical abuse, and that he watched pornography with the defendant. The motions were set to be heard on April 20, 2017, but were reset to May 31, 2016 with written notice that "all motions need to be filed with the court no later than May 10, 2017." The court disallowed one of the OAE motions because the witness was not able to give sufficient factual specificity or context as to how she was sexually assaulted or touched and whether in fact she was touched by this defendant or another, as she had been the victim of another perpetrator. The court did allow testimony of the other witness after reviewing it subject to the Sullivan criteria.

The State finally filed the report of its proposed expert, Ms. Bryhn, regarding grooming and late reporting on or about May 25, 2017. The motions were heard May 31, 2017. The court questioned why the report was not filed until within weeks before trial when the concern regarding the substance of her proposed testimony had been raised by the defense in early October. For the various reasons stated in the record, the court denied the State's motion to have Ms. Bryhn provide expert testimony regarding late reporting and grooming. The court was only able to issue a partial ruling regarding the defense expert (Dr. Thompson) because his testimony was largely dependent upon what would be introduced factually at trial. The court had reviewed the recorded forensic interview which was provided to it by the State and placed its Sec. 908.08 findings on the record, noting that the only evidence the state provided in support of its claim that the child was unable to testify was essentially that her mother could vouch for her being traumatized. The court found that the recording did not satisfy the requirements of the statute and therefore was not admissible, however it authorized the child to have a support person present while she testified as well as a comfort item of her choosing with her on the witness stand.

The Court questioned whether there were additional motions that needed to be heard or re-addressed in light of the joinder of the two cases which took place after the original motions were

decided. Neither party believed it was necessary. During the Motion hearing, both parties discovered that child 1 had been participating in ongoing therapy and the Court therefore ordered the State to disclose the contents of the updated records to the defense forthwith.

Another motion hearing was heard June 13, 2017, when the Court was advised that the attorney for Gundersen Lutheran Medical Center (GLMC) was objecting to the late subpoenas presented by the parties regarding its medical personnel. The subpoenas were allegedly not properly served and the GLMC attorney refused to admit service because his client was not notified until late Friday, that its presence was being demanded for the following Monday morning at trial. The GLMC attorney noted that the trial had been scheduled for many months and at this late date they were unable to adequately cover prescheduled patient appointments with such late notice. In fact the doctor in question had just gotten out of surgery herself and was likely physically unable to appear in person. The court denied the request to reschedule the trial. The defendant noted it had subpoenaed the medical personnel as rebuttal witnesses for impeachment purposes only and the State asserted that it had subpoenaed the same witnesses because the defendant had issued them subpoenas. The court did not authorize the witnesses to appear by VTC and refused to adjourn the trial one more time.

During that same hearing the Court requested that the State review the Information and advise how it wished to have the jury instructions read. It was unclear under which subsection of Section 948.02(5), Wis. Stats., the State was proceeding.

At the conclusion of the motion hearing the parties noted that the State had made an offer to settle the case with a plea to the charge originating from case 2 (Count 2). The offer capped the State's recommendation at 15 years bifurcated as 8 years confinement followed by 7 years of extended supervision, along with a request for a PSI. The court inquired whether that charge predated truth in sentencing and whether a recommendation for a bifurcated sentence would

apply. The parties were requested to research the issue so there was a clear record as to the offer and whether the defendant was knowingly rejecting the offer prior to trial.

6. ISSUES IMMEDIATELY PRIOR TO TRIAL

On Thursday, June 15, 2017, the State sent a letter to the Court enclosing a motion and supporting affidavit to request leave of court to again amend the Information. The letter provided in part "the Amended Information further corrects the charged time frame in Count 1 and includes the transactionally-related charge of incest as Count 3. If Attorney Schroeder has an objection based upon prejudice as defined in the relevant case law, I would suggest that he articulate that objection prior to the close of business on Friday." The Affidavit provided in pertinent part "*on June 13, 2017*, in the course of witness preparation I met with [child 1]. In discussing with [her] when the *sexual assault* occurred, [she] disclosed *they happened over a course of time* starting in January 2014 and ending on August 18, 2014. The State's proposed amendment conforms to the proof and reflects the accurate time frame of the charged offense" (emphasis added). This reinforced the court's belief that the lack of preparation for trial on the part of the prosecutor was significant until very late in the case and that only days before trial, he had decided to pursue prosecution for sexual assault(s) on a range of other acts that occurred over a significantly larger time span. It should be noted that Count 2 as proposed was cited as a Class B felony with a penalty of up to 40 years imprisonment.

On June 19, 2017, the State filed a Motion to reconsider the admissibility of the forensic interview video which had already been ruled on by the Court, asserting that Child 1 would not be able to testify and the tape would be the best evidence of completeness. The motion failed to present any new information to the Court in support thereof. The Court again denied the request. Interestingly, when the child did testify she did so with great composure and very clear testimony.

On the morning of trial the Court again addressed the offer to settle the case on the record. Again, the State recited its offer as a plea to Count 2 with a specified recommendation for bifurcated

sentencing. The Court opined that the law existing at the time of the offense applied and in fact the offer to settle exceeded the statutory penalty at the time the offense was alleged to have occurred. The State responded that it did not have access to the statutes from that long ago (which the Court found online that morning in a matter of moments). The maximum period of imprisonment was 10 years under the statute existing at the time of the offense. After a recess, the State then returned with a different offer, stating that it was then looking at the maximum allowable under the law at the time the offense was committed (10 years in prison, with parole after 2/3 of the sentence was served on Count 2). The State demanded that it be a joint recommendation for probation with an imposed and stayed prison sentence. The duration of the imposed and stayed sentence was not specified, nor were the terms upon which it was stayed. Likewise the term of probation was not defined. The defendant rejected the offer.

The Court then addressed the proposed change of the date range in the latest Amended Information noting that the math did not work to have the victim the correct age for the charge as it was written. The Court further questioned the State as to why it added the new incest charge on the morning of trial when the case had been pending for years. The response was effectively "the State is not perfect in this case." More inquiry was made as to why the last minute change in the charges and the charging date was made and how it could affect the case as it was planned to be tried. The defense noted that the original charges corresponded with the information they received in discovery. The discovery also had contained information regarding sexual contact outside that original time frame charged (which was why a motion in limine was filed by the defendant) and thus the defendant alleged the State was expanding the dates to make it possible to add these additional allegations as other uncharged acts without addressing them properly under the OAE Motion. It asserted undue surprise and complained that other discovery would clearly have been done had the defendant been placed on notice that arguably other criminal sexual contact acts were now planning to be introduced.

The Court allowed the State to expand the date to a range for the offense due to the nature of the victim being a child but clearly informed the parties that if there were other acts of the defendant that the State intended to introduce which were not addressed at the previous motions and which could be criminal acts, they were not admissible at this point.

The State eventually filed a signed Amended Information containing two counts on June 20, 2017. The first count alleged sexual contact with a child under age 13, on or between January, 2014 to August 18, 2014. The second count alleged repeated sexual assault of a child less than 16 years of age (relating to Case 2) on or about April 1994 through November 30, 1998. Said count 2 correctly recited the charge (under the law at the time the offense was allegedly committed) to be a Class C felony punishable by up to 10 years of imprisonment or up to $10,000 in fines.

7. JURY TRIAL: DAY ONE

Child' s Mother Testifies

The trial commenced June 19, 2017 after a morning of motions and jury selection. The opening statements were heard at approximately 2:49 pm. At nearly 3:45 PM the first witness (the mother of child 1) was called to testify. Her demeanor was odd and she appeared to be slurring her words at times. There was an objection from the defense at virtually the beginning of her testimony when the State attempted to introduce photographs of child 1 that had never been seen by the defense. The court adjourned for the day at approximately 4:30 pm.

8. JURY TRIAL: DAY TWO

Child's Mother Continues Testimony

The trial resumed the next day at approximately 8:30 am with the State recalling the child's mother. The State posed certain questions to the witness regarding how she was feeling. She replied she felt better. When the State asked what she was referring to she replied "clarity of mind. I want to apologize about yesterday. I had taken a prescribed Xanax for anxiety. And I had taken some yesterday, but clearly affected me in a way that is not typical. And I was not – I didn't have the

clearest mind yesterday. So that kind of threw everyone off." (Trial Tr. 136: 20-25, June 19-20, 2017). Presumbaly the prosecutor offered this testimony to explain her previously strange demeanor by disclosing to the jury that she had medicated herself the day before and was under the influence of xanax during her testimony the preceding day. The record indicates that during cross exam the mother admitted that she had contacted child 2 (now an adult) to inquire about the defendant. The mother had been warned by child 2 that the defendant had molested her repeatedly as a child and to be wary of leaving her child alone with the defendant. Nevertheless the mother proceeded to take child 1 to the home where the defendant resided with the child's grandmother knowing that the grandmother would be at work during the nighttime hours and the child would be in the care of the defendant. She further acknowledged that she had recorded a conversation with the child on her cell phone about the alleged misconduct of the defendant but it was no longer existed. These things all could be viewed as quite damaging to the State's case.

Child's Grandmother Testifies

The State then called the child's maternal grandmother who testified for approximately 30 minutes. She testified that in August of 2014 she returned from work at 7:00 am and she walked into her bedroom. There she saw the defendant and child 1 sleeping in the same bed "extremely close. Real close. Like that's too close. It was total body contact from shoulder to ankle. I didn't feel comfortable with that." (Trial Tr. 205: 12-20, June 19-20, 2017) She was asked whether she would describe it as an "embrace" to which she responded "very much so. I thought it was very inappropriate….it sickened me." (Trial Tr. 218: 12-16, June 19-20, 2017) In response to the sight she described as inappropriate and sickening, the grandmother testified she crawled into bed and went to sleep because she was tired and it was never brought up or discussed the next day. The State then called Jeanne Meyer to briefly testify that she conducted a forensic interview with the child. This testimony offered little since the recorded interview had been ruled inadmissible for the case in chief.

Argument Before Lunch Recess

The State again sought introduction of the recorded forensic interview with the child despite the Court having ruled on this issue twice before. In supporting its prior rulings the Court noted that the State had never presented the child herself to the Court (which could have shed light on her ability to recall or function, shown the level of stress she was experiencing or the traumatic effect it could have on her to testify before the jury, etc…). The State never brought in her therapist to address these issues either. The State had not met its burden under the statutory guidelines in order for the court to find the recording admissible, yet continued to reargue the point with no new evidence. The State again requested to introduce pictures of the child on her birthday which had not been previously been disclosed to the defense prior to trial, claiming they were necessary to help her identify the year. The year had never been an issue prior to this time and the Court had already emphasized the wide latitude it would allow the prosecutor in questioning child 1 due to her age. The Court therefore again denied the request.

The defense noted that it would object if the State addressed the forensic interview itself rather than the issue of what the child said occurred. The State responded that she would be talking about other things that happened to her. The Court questioned whether these "other things" were addressed in the OAE motion. The State went on to identify that she would be speaking about dating, sex, a breast rub, alleged humping, penis rubbing on her leg, and a vagina rub and stated that he considered these to be grooming behavior, not other acts. The defense argued that those were clearly other instances of sexual assault and that grooming behavior did not equate to sexual assault – that other claims of assault need to be separately addressed. The Court noted that the listed conduct were all acts apparently now falling within the expanded date range of the offense in the latest Amended Information. The Court reiterated that these were other acts prohibited by the Court's prior ruling on the motion in limine to which the State did not object. It was clear that the if the State introduced the other acts the defendant would move for mistrial

because the State previously did not object and had indicated it did not intend to introduce other acts at trial. A lunch recess was called and the parties were instructed to return at 12:45.

Argument After Lunch Recess

At approximately 12:54pm the parties returned to the courtroom and the State announced that it had done some research over the break and it again wished to address the other acts issue. After much argument the Court indicated that it did not generally disagree with the State's argument but that these issues could have and should have been addressed well before trial. It noted that the State was changing the game and the defense was blindsided by this new strategy which the State initially had indicated it was not pursuing when it failed to object to the defense's OAE motion in limine. The prosecutor claimed he was trying to avoid a mistrial and that the defense would have to show prosecutorial overreaching, otherwise the State would refile charges. The prosecutor continued to argue that this evidence needed to come in to demonstrate the second element of the crime to demonstrate this was intended to show sexual gratification. Again, the Court responded that it did not disagree that these things might be relevant but they were still other acts to which the State did not object when the motions were decided. The State again demanded the Court reconsider the ruling. The defense argued that other acts introduced to prove motive are still "other acts." The Court again reiterated its position and noted that there were other pieces of evidence upon which the State could rely to demonstrate intent (ie., the OAE that were found admissible in case 2 which preceded the assaults alleged in case 1). The State persisted in its argument that these listed items were not other acts. The court questioned why the State did not address these concerns well before trial. The state responded that these were not other acts, they were just relevant to the elements. The fact that an act is relevant does not change whether something is OAE. Clearly if there was concern of if the prosecutor needed clarification he could have requested a ruling on these issues months prior as the case had been set for trial two times already. The Court believed that in the court of the trial preparation the prosecutor only then

understood the facts of his case and therefore decided to change his strategy at the last moment. The Court continued to express concerns about the potential for a mistrial and stated that it would allow in other grooming acts but not conduct that could be an assault. To have done otherwise would have been confusing to the jury and unfairly prejudicial to the defense. The arguments continued for approximately 25 minutes before the jury was recalled.

Child Testifies; Motion for Mistrial

The child victim in case 1 was finally called to the stand at approximately 1:20. The State questioned her regarding a course of events she described as happening in the spring on the four wheeler. The child described a four wheeler ride where it was muddy from the rain. The child was focused on the ride occurring in the spring when it was muddy. There was testimony about what the defendant had said to her on the ride of a sexual nature and that the child had then told her mother what he had said to her. The State then asked "so far we've talked about mostly conversations about sex, right?" To which the child responded "yes." The DA then asked "did you tell her something else relating to a private part of your body?" He did not make any effort to refocus the child's attention to any other time frame or to any other setting. The child then responded "when I told her that one day when we were in bed he was rubbing my back and he rubbed – he was rubbing my stomach. So he rubbed up and he rubbed on my breasts. And then when he was done, he rubbed on my private spot. It was just a swift rub." Within approximately 40 minutes of the child taking the stand, the motion for mistrial was made by the defendant.

The Court initially responded by saying it did not believe there was a misunderstanding by the State and went on to address what it perceived as the State's lack of preparation for trial. It noted that after the cases were joined the court had asked counsel to reevaluate the motions and whether they needed to be readdressed. Since the joinder there had been new charges added, new informations filed, dates changed, etc….The Court suspected that there had been a "flurry of

preparation" going on by the State in the last week before trial and had these issues been addressed well in advance rather than mid trial, the same problems would not exist.

ANALYSIS

Firstly, addressing the child testimony itself, it was clear from the discovery, the date of reporting, and the original charging documents that the incident being prosecuted had occurred in the warm late summer months of August. The child was clear about the timeframe she was describing in her live testimony as NOT being in August or any time in summer. Nonetheless, the prosecutor did nothing to redirect his line of questioning to the point in time he wanted to cover. He had been intent on having her "tell her story" as he stated clearly. The State knew or should have known as the child began to speak that this was headed in the very direction of the forbidden territory that had immediately been discussed prior to her testimony. He did not interrupt or otherwise make any effort to avoid crossing that line. The child did not give an unexpected answer nor was she unresponsive to the question he intentionally posed to her. After the motion for mistrial was made, the prosecutor responded "I can redirect [child 1] to redefine what special spot meant. I misspoke. I should not have asked that question. I agree. We've talked about two different special spots. I now need to get her to talk about her buttocks which would be the, I think, the court's ruling." (Trial Tr. 184: 4-9, June 19-20, 2017). This again demonstrates that the prosecutor (despite disagreeing with the court's rulings) did in fact understand and know what the ruling was. Even if there might have existed any confusion in the prosecutor's mind on the morning of trial, by the time the child testified, there was not and could not have been any reasonable confusion about what the court's ruling was or what the ruling prohibited. The issue had been argued repeatedly and again even argued only moments before the testimony began.

The court cannot find that this was a mistake or a matter of confusion. This conclusion is supported by the history of the case and most importantly in the affidavit filed days before trial wherein the State placed its reasons for again amending the Information. The affidavit asserts "the

law permits amendments to charges…not only before the trial but at trial, to conform to the proof." This again, reinforces the Court's belief that this testimony was planned and in fact alleged to be part of the sexual assaults that were charged. It is only after the fact that the State characterized this course of conduct as grooming, not OAE. The affidavit itself in fact refers to the conduct described at issue as sexual assault, not grooming, The affidavit reads "in the course of witness preparation I met with [child 1]. In discussing with [her] when the *sexual assault* occurred, [she] disclosed *they happened over a course of time* starting in January 2014 and ending on August 18, 2014." This clearly indicates the prosecutor considered these acts as sexual assault that occurred over a course of time and contradicts his later argument that these were not other acts and were instead merely acts of grooming. This affidavit also reinforces the Court's belief that the lack of trial preparation on the part of the prosecutor was significant until very late in the case and that only days before trial, he had decided to pursue prosecution for sexual assault on a range of other acts that occurred over a significantly larger time span. Had preparation taken place earlier and he had changed his mind about what he was planning to introduce the issue could have been addressed well in advance of trial so that the defense was not blindsided by an introduction of additional evidence that they had been told would not be sought to be introduced by the State. Again, it is noteworthy that had the State, in a timely fashion prior to trial, expressly discussed these specific acts it is likely they would have been deemed admissible. The issue came about because the State did not bring the matter up until the morning of trial.

The State argues that any error made at trial was because of a misunderstanding. It alleges that the court's initial ruling was unclear and incorrect. The fact of the matter is that even if this was thought to be grooming behavior the Court and defense counsel made it very clear that this was not the case for purposes of trial yet the prosecutor kept pushing to change prior rulings, to reargue the issues and attempt to have the Court change its mind on the very morning of and during the course of the trial. It was a product of lack of preparation until very late in the process

that easily could have been addressed months prior and which likely would have been admissible. Had the prosecutor been prepared he would have objected to the defense's motion in limine and clearly spelled out exactly what he did intend to introduce and for what purpose he was intending to introduce it. Even if there was confusion by the State as to the ruling and its significance initially, the issue had been discussed at least 3 separate times or more since the morning that the trial commenced. The State disagreed with the ruling that the court made (i.e., that it is too late to address the error and we will proceed with the prior ruling on the motion) but it is clear from the record that the State understood the ruling. Nevertheless, it continued to push the issue. It readdressed the argument after it returned from lunch, again, a clear indication that it disagreed with AND understood the Court's ruling. The Court reinforced its ruling over and over again much to the State's displeasure and also indicated that it would give the State latitude with the child witness to ensure that the line was not crossed. The State plowed ahead with its original plan and that has become ever more clear with the additional testimony provided at the motion hearing and the availability of transcripts. It is clear to this Court that even if there was initial confusion about the order, by the time the child testified, the prosecutor was clear (and in disagreement) with the Court's ruling yet intentionally forged ahead. The discussion with the defense attorneys over the noon break and immediately preceding MR's call to the witness stand further supports the prosecutor's utter frustration with the Court's rulings and his intent to find a way around them.

This case was not going well for the prosecutor either. The mother of the child victim testified under the influence and the prosecutor made sure the jury knew that for some reason by having her tell them what she had done when she retook the stand on day 2. In addition, his expert on grooming had not been approved for testimony. The subpoenas for the medical providers had become an issue and he was facing the possibility of lacking medical testimony. He had not taken the time to properly prepare the child in light of the Court's rulings. He had started the trial that morning not even realizing that his offer to settle exceeded the maximum penalty under the law at

the time. The maximum penalty for the charge he offered to settle for was a 10 year, non-bifurcated sentence. He was still scrambling on the morning of trial in a desperate effort to get in this extra information regarding other acts by rearguing that the tape of the forensic interview of the child should be admitted despite the Court having ruled on a prior date that it did not meet the statutory criteria. He offered no additional information to change the Court's prior ruling. All of these factors further support the Court's belief that the prosecutor knew that the case was not going the direction he had hoped and that he was going to get in additional acts in some fashion or another.

The defense points out several factors that courts have used to examine objective facts and circumstances of the record as noted in *State v. Quinn*, 169 Wis. 2d 620, 624, 486 N.W.2d 542 (Ct. App. 1992). The court notes numerous factors are present in this case and points to the following:.

1. The prosecutor had multiple reasons to believe the trial was going poorly even before the trial started (medical subpoenas, excluded expert, excluded forensic interview, improperly crafted proposal to settle);

2. The court had made significant evidentiary rulings against the State;

3. The prosecutor's question to the child invited the improper testimony.

4. While claiming inadvertent error, the comments by the prosecutor on the record point otherwise. Prior to the child's testimony the prosecutor stated "anything could happen when she testifies. I don't know. But if she starts to speak about a vagina rub or him rubbing his penis on her leg, I can't control that. And if she does that, then I guess Mr. Shroeder's going to move for a mistrial."

5. The prosecutor started preparing for trial too late and did not discover the errors it had made until too late.
6. The Court reinforced and clarified the intent of its prior rulings as to OAE and clearly informed the prosecutor that if he continued to attempt to introduce the disputed OAE "it will be a mistrial because you didn't, again, prepare for trial adequately until the last moment."

7. The prosecutor claimed the error was an unintentional mishap yet the prosecutor had clearly educated himself that the only way he would be barred from retrial if a mistrial was declared was if there was prosecutorial overreaching and he discussed this research with the defense team moments before the child was called to testify. There would be no other purpose to call in the defense counsel over lunch other than to lay out what he intended to do if they objected to the introduction and a mistrial was declared.

8. The prosecutor knew that if he retried the case, he might fare better and the defendant could face more ominous charges "because if she were to testify and she goes and tells her story, Mr. Killian is facing more charges."

9. The prosecutor on the day of trial, despite a prior ruling that the forensic interview recording was not admissible, again requested the court allow it to be played. This was an attempt to back door the prior ruling to which he failed object and to get in this additional information. He stated "and I think that if the jury watches the forensic interview, it is possible that there will be other facts before them that could in fact lead to further counts which is, I think, allowed under the law. If more facts are introduced at trial, the Court can amend the Information and give that instruction to the jury."

10. At the mistrial motion hearing, the prosecutor acknowledged that he had not spent time with child MR to discuss the limitations of her testimony, stating "I didn't have time. I was doing legal research and attempting to get the court to change its ruling." Months later at the hearing regarding the retrial, the prosecutor then claimed he had met with the child and discussed it as they walked down the hallway to the courtroom. This is not borne out by the testimony taken as a whole in the context of the timeframes of attorney discussions over lunch and return to the courtroom.

11. The prosecutor, within days of trial, filed an affidavit in support of his motion to amend the Information to expand the date range and add an additional charge, alleging that after he had met with child 1 to prepare for trial he discovered there were a series of sexual assaults over a span of time. The fact that the affidavit refers to when the sexual assault occurs as needing to be corrected to show THEY (the sexual assaults) happened over a course of time, again reinforces the Court's belief that the State intended to introduce other acts outside the date alleged in the complaint, not to show "grooming" as it now contends, but to demonstrate clear other acts of sexual assault which should have been the subject of the other acts motion addressed over a year prior. Had the state addressed these other acts properly, identified what it was intending to introduce with specificity, the court would likely have found them admissible at trial as it had with the other adult victim. Now the State wishes to craft this as a matter of "confusion," claiming it was only wanting to bring in this course of conduct to establish grooming, a topic on which its expert had been excluded.

12. The State's expert on late reporting and grooming was not allowed to testify and the State was looking for a way to get this other acts information admitted without having the context of expert testimony.

13. The prosecutor's case started out poorly when his first witness, the mother of child 1, testified under the influence. He then chose to have her tell the jury why her testimony and demeanor was strange the first day and she indicated she took pills to self-medicate.

14. The State was not prepared for trial and realized only the week prior to trial that there were a series of sexual assaults alleged by the child. It then requested leave to amend to include a date range, hoping to get the entire set of acts included, by sidestepping the prior ruling on OAE to which it had previously failed to object.

15. This case was scheduled for jury trial three times and the prosecutor should have known his case and his evidence well before the days preceding the June 29, 2017 jury trial.

16. There were numerous Informations filed, with various charges, changing dates, and changing penalties up to and during the trial itself.

17. The prosecutor did not make any request for motions to be reheard based on any new evidence. It was only immediately preceding and during the trial itself that the prosecutor interjected continual arguments to change the prior court rulings because he didn't agree with the rulings or didn't understand the implications of his failure to object to the motions in limine at the time they were made and ruled upon previously.

18. The record is replete with the prosecutor commenting that he could not control what the child would testify and complaining that she was being denied an opportunity to tell her story.

19. Despite having been granted liberal questioning latitude by the court with the child, the prosecutor posed an open ended question in a context where it was clear that she was not focused on the proper timeframe relevant to the charged conduct.

20. Up to the point where the State called Child 1 to testify, the testimony that had been elicited on both direct and cross exam had not been particularly favorable to the State. The mother had testified initially under the influence of medication. She acknowledged that she was made aware by Child 2 (who was an adult child of the defendant at the time) that the defendant had molested her as a child and nevertheless delivered her child to his residence knowing that the child's grandmother would be gone during the nighttime hours working and child 1 would be left in his care. The grandmother testified that she observed the defendant and Child 1 sleeping together in an inappropriate embrace yet did nothing but crawl into bed beside them and go to sleep.

21. There were a myriad of excuses as to why the prosecutor was not prepared throughout the course of the trial and leading up to it (the State isn't perfect, PROTECT wouldn't let us change the information, the State didn't have access to the old statutes) as well as no explanation at other times (no explanation why there was not a timely summary from the expert filed, why the charges and dates kept changing, why the offers were not made under the correct law and in fact at one point exceeded the maximum penalty, why the recorded interview sought to be introduced was not provided to the court for review prior to asking for a ruling on its admissibility).

CONCLUSION

The Court must look at the facts and the record of the case as a whole. Based upon the multitude of objective facts and analyzed thusly, the Court must infer the existence of the prosecutor's intent despite his statements to the contrary. The case reviewed as a whole meets the *Jaimes* test. The Court concludes that these factors viewed objectively point clearly towards the

prosecutors' intent on disobeying a Court order that he disagreed with and which by the time the child testified, he clearly understood. Looking at the case as a whole, it is the Court's opinion that the State started trial preparation too late and when it did so in earnest, it realized that it should have take a different strategy, yet it was too late to do so in light of the rulings that stood on the morning of trial with the jury waiting. The facts viewed as a whole, and viewed objectively, point point to the prosecutor taking direct and intentional action believing that one of two things would happen if he proceeded in his quest to introduce the other acts. One, if he introduced the prohibited testimony the defense would not object and he had gotten it before the jury; or, two, if the defendant objected and a mistrial was declared, the State could retry the case and add additional charges, thereby increasing its chance of conviction. Given a chance at a new trial, the State would likely have a better outcome because their strategy would change, and thus the motions would be posed and ruled upon differently and more favorably to the State. His witnesses would be better prepared as well. The State denies any wrongful intent but the history of the case, and the record viewed objectively cannot support the claim that there was no prosecutorial overreaching.

The Court finds that the prosecutor's actions were intentional and the record shows that he knew his actions would be prejudicial to the defendant. The Court finds also that the prosecutor's conduct was designed to create another chance to convict, and was an act done so as to allow the State another "kick at the cat" – a chance to prepare more thoroughly and with a better understanding of the issues, a chance to file different motions and obtain more favorable pretrial rulings, and a chance to add more charges and incriminating evidence into the record in the hopes of solidifying the State's chances of conviction.

For the foregoing reasons, the Court finds that the State is barred from retrial in this matter due to prosecutorial overreaching.

BY THE COURT:

Electronically signed by Anna L. Becker

Circuit Court Judge

03/15/2018