**STATE’S MEMORANDUM ON ADMISSIBILITY OF OTHER ACTS EVIDENCE IN SEXUAL ABUSE CASE**

State of Wisconsin

The defendant is presently charged with three felony counts, alleging charges of Kidnapping, First Degree Sexual Assault, and Child Enticement, as well as one misdemeanor count of Obstructing a Police Officer. Those counts all involve allegations of conduct occurring on August 20, 1993 involving a minor child, G.T. whose date of birth is 10/16/84. The factual information in support of these charges is set forth in the criminal complaint, which is attached hereto, and on file with the Court. Summarized in brief, the allegations are that the defendant observed G.T. near a pathway in the park, picked up G.T. by the waist with his other hand cupped over her vaginal area. The defendant then carried G.T. down a wooded path until G.T. was able to struggle free and run for help. This entire incident lasted approximately one minute. The defendant did not say anything to G.T. when he grabbed her that would suggest his purpose in doing so. The defendant has given a statement in which he claimed he was carrying G.T. to help her, and denied any contact with her vaginal region.

The State is presently moving the Court pursuant to the provisions of Section 904.02, 904.03 and 904.04(2), for the admission of other allegations of sexual conduct involving the defendant, and D.M., a minor, date of birth 9/12/82 and K.C., a minor, date of birth 10/24/82 involving incidents which occurred on March 8, 1992. The factual allegations involving these other acts are set forth in part in the criminal complaint on file, as well as in the attached reports from the Police Department and the criminal complaint of the County District Attorney's Office.

In brief, those documents indicate that the defendant was observed by D.M. and K.C. standing in front of an apartment window exposing himself, and masturbating in their presence. The defendant was originally charged with Lewd and Lascivious conduct and pled to disorderly conduct. He was on probation for this charge at the time of the alleged offenses involving G.T. For the reasons set forth below, the State asserts that such evidence is relevant under Section 904.02, and admissible pursuant to a number of provisions contained in Section 904.04(2), and should not be excluded pursuant to Section 904.03.

The general rule in Wisconsin is that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. Wis. Stat. Section 904.04(2). As stated in *Hough v. State*, 235 N.W.2d 534 (Wis. 1977), other crimes evidence is not admissible merely to impugn the character of the defendant, or to show that as a result of such prior activities he is more apt to commit this particular type of crime.

In *Whitty v. State*, 149 N.W.2d 557 (Wis. 1967), cert denied, 390 U.S. 959 (1968), the seminal case on the admissibility of other crimes evidence, the Wisconsin Supreme Court set forth four reasons for excluding evidence of other crimes:

"The character rule excluding prior-crimes evidence as it relates to the guilt issue rests on four bases: (1) the over strong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence as fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes." *Whitty*, 149 N.W.2d at 292.

However, the Court in *Whitty* also noted several exceptions to the general rule prohibiting the admission of evidence of other crimes, wrongs or acts by the defendant. These exceptions are now codified in Wis. Stat. Section 904.04(2) which specifically provides that evidence of other crimes, wrongs or acts by the defendant is not excluded "when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident".

Admissibility of prior crimes evidence does not depend upon admission or conviction for prior criminal conduct, but upon its probative value, and depends in part upon its nearness in time, place, and circumstances to the alleged crime or elements sought to be proved. *Whitty*, 149 N.W.2d at 294. The State is not required to establish the reliability of prior act evidence to any requisite degree of certainty, i.e. beyond a reasonable doubt or by clear satisfactory and convincing evidence, before such evidence may be submitted to the jury. Prior acts evidence is to be submitted if there is sufficient evidence to support a finding by the jury that the defendant committed the prior acts. *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988).

Other crimes evidence is generally admissible when that evidence is particularly probative in showing elements of the specific crime charged including intent, identity, or a system of criminal activity. *Hough*, 235 N.W.2d at537. However, the Wisconsin Courts have explicitly held that the statutory exceptions cited in Wis. Stat. Section 904.04(2) are not exclusive, but are illustrative in nature. *See* *State v. Amos*, 450 N.W.2d 503, 509 (Wis. Ct. App. 1989); *State v. Kaster*, 436 N.W.2d 891 (Wis. Ct. App. 1989); *State v. Sonnenberg*, 344 N.W.2d 95, 101 (Wis. 1984); *State v. Shillcutt*, 341 N.W.2d 716 (Wis. Ct. App. 1983). In *State v. Grande*, 485 N.W.2d 282 (Wis. Ct. App. 1992), the Court stated:

"We have held that Section 904.04(2), Stats. is permissive and not restrictive, recognizing that the drafters were not as concerned with the potential prejudice of other acts, crimes or wrongs evidence, as they were with insuring that restrictions are not placed on the admission of such evidence. *Lievrouw v. Roth*, 459 N.W.2d 850, 856 (Wis. Ct. App. 1990). Consequently, Section 904.04 and 904.03 favor admissibility. *See* *Lievrouw*, 459 N.W.2d at 856."

The Courts have held that a two-prong test must be used to determine whether other crimes evidence is admissible. *State v. Fishnick*, 348 N.W.2d 272 (Wis. 1985); *Shillcutt* 341 N.W.2d 716; *State v. Alsteen*, 324 N.W.2d 426 (Wis. 1982); *State v. Spraggin*, 252 N.W.2d (Wis. 1977). The first prong requires the trial court to determine that the evidence sought to be admitted fits within one of the exceptions delineated in Wis. Stat. Section 904.04(2). The second prong requires the trial court to exercise its discretion to determine whether any prejudice resulting from the admission of such evidence outweighs the probative value from such admissions. Additionally, the Court in *Alsteen* noted that implicit within this two prong analysis was the requirement that evidence of other crimes, wrongs, or acts must be relevant to an issue in the pending case. *Alsteen*, 324 N.W.2d at 729.

Relevant evidence is defined as "evidence having 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. Section 904.01. Evidence that is not relevant is not admissible. Wis. Stat. Section 904.02. The Court in *Rogers v. State*, 287 N.W.2d 774,776 (Wis. 1980), interpreted the statutory definition of relevancy to mean "any act which tends to prove a material issue". In *Schapiro v. Klinker,* 44 N.W.2d 622, 623-24 (Wis. 1950), the Court stated that "in determining a dispute concerning the relevancy of proffered evidence, the question to be resolved is as to whether there is a logical or rationale connection between the fact which is sought to be proved, and a matter of fact which has been made an issue in the case". *See also* *Alsteen*, 324 N.W.2d at 429; *Hart v. State*, 249 N.W.2d 810, 816 (Wis. 1977).

The probative value of other crimes evidence is determined by its nearness in time, place and circumstances to the facts of the alleged crime. *Hough* 253 N.W.2d at 537; *Whitty*, 149 N.W.2d at 564. The rejection or admission of other crimes evidence because of remoteness to the alleged crime, rests in the trial court's discretion. *State v. Mink*, 429 N.W.2d 99, 105 (Wis. Ct. App. 1988); *Hough,* 253 N.W.2d at 537. No specific time limits control such discretion, and the element of remoteness in time between the prior act and the alleged crime, must be balanced against the uniqueness of the prior act to the current offense, *Mink*, 429 N.W.2d at 105, *Hough* 253 N.W.2d at 538, and by assessing the relevancy of the prior acts evidence to the facts and issues of the present offense.  *See* *Mink*, 429 N.W.2d at 105; *Sanford v. State*, 250 N.W.2d 348, 351 (Wis. 1977).

The Wisconsin Supreme Court has provided trial courts with greater latitude in performing the two-prong analysis in cases involving the sexual assault of children. *See* *Mink*, 429 N.W.2d at 105; *State v. Friederich*, 398 N.W.2d 763, 771, 776-78 (Wis. 1987); *Fishnick,* 348 N.W.2d at 277; *Hendrickson v. State*, 212 N.W.2d 481, 482 (Wis. 1973). Indeed, the Court in *Hendrickson* specifically stated "a greater latitude of proof as to other like occurrences is clearly evident in Wisconsin cases dealing with sex crimes, particularly those involving incest and indecent liberties with a minor child". *Id* at 482. The Court of Appeals reasoned that this "greater latitude" has less to do with "relaxing the rule that other acts evidence is not competent" and more to do with "placing the other acts evidence within one of the well-established exceptions of Wis. Stat. Section 904.04(2)". *Mink*, 429 N.W.2d at 103; *Fishnick,* 348 N.W.2d at 277.

Recently, the Wisconsin Supreme Court reviewed the issue of whether Section 904.04(2), creates a "presumptive" rule against admissibility of other crimes evidence, a position long argued by the defense throughout the State of Wisconsin. In *State v. Speer*, 501 N.W.2d 429 (Wis. 1993), the Wisconsin Supreme Court indicated:

"The admission of other crimes evidence is not controlled by presumptions or predispositions, but rather it is controlled by the Wisconsin Rules of Evidence. Our case law correctly notes that the first sentence of Section (Rule) 904.04(2), Stats., provides a rule of exclusion; other crimes evidence is excluded when it is offered to prove the criminal disposition of the defendant. The case law in no way indicates that a Circuit court should predispose itself against the admission of other crimes evidence. To the extent that Speer reads our statements to indicate such a presumption, he misinterprets our case law and reads a presumption into language that was intended merely to express the rule as provided under Section (Rule) 904.04(2).” *Speer*, 501 N.W.2d at 433.

The Supreme Court went on to note:

"The Court of Appeals' statement that the 'rules favor admissibility' is similarly an expression of what the rules themselves already point out; other crimes evidence is admissible for the relevant admissible purposes other than to show the defendant's disposition to commit a crime. In other words, Wis. Stat. Section 904.04(2) favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes.

Similarly, Wis. Stat. Section (Rule) 904.04(3) favors admissibility in that it mandates that other crimes evidence will be admitted unless the opponent of the evidence can show that the probative value of the evidence is substantially outweighed by unfair prejudice. The term 'substantially' indicates that if the probative value of the evidence is close or equal to its unfair prejudicial affect, the evidence must be admitted.” *Speer*, 501 N.W.2d at 433.

The evidence of other crimes sought to be admitted in the present case falls within a number of the specific exceptions articulated by the Court in *Whitty*, as well as other Wisconsin cases, and as set forth in the provisions of Wis. Stat. Section 904.04(2). Specifically, the evidence of prior acts involving the defendant with D.M. and K.C. is relevant to establish the defendant's motive and intent to engage in sexual relations with G.T., to establish a common scheme or plan to engage in sexual activities with preadolescent females, to rebut a general credibility attack on the alleged victim, to rebut the defendant's explanation for this offense and his behavior by establishing the absence of mistake or accident, to establish the defendant's consciousness of guilt, and to establish the elements of the offense of obstructing.

The evidence involving prior acts of sexual conduct between the defendant and D.M. and K.C. are admissible to establish the defendant's intent and motive to become sexually gratified and sexually aroused by initiating and acting out his sexual desires with preadolescent females. *Mink*, 429 N.W.2d 99; *State v. Conley*, 416 N.W.2d 69 (Wis. Ct. App. 1988); *Fishnick*, N.W.2d 272 (Wis. 1985). Although motive is not a specific element of the crime charged against the defendant, and consequently the State is not required to prove the defendant had a motive to commit the crime with which he is charged, motive is a relevant issue for the jury's consideration in the present case. This is especially true in cases involving allegations of sexual abuse against children, since lay persons in general, and jurors in particular, have a difficult time in understanding that adults are motivated to engage in sexual relations with children, or that such individuals can achieve sexual gratification through acts committed with minor children. (See generally, Summit,R. M.D., *Too Terrible to Hear - Barriers to Perceptions of Child Sexual Abuse* attached.) *See also* *Crabtree v. State*, 547 N.E.2d 286 (Ind. App. 1 Dist. 1989); *Friederich*, 398 N.W.2d at 772; *Greg v. State*, 404 N.E.2d 1348 (Ind. 1980).

With respect to the three felony counts contained in the present information, the State will be required to prove at the time of trial that the defendant had sexual contact with G.T. for purposes of sexual gratification, that he seized, confined, or restrained her with intent to commit an act of sexual assault against her, and that he took her from one place to a more secluded location for purposes of engaging in acts of sexual assault with her. The defendant's motive and intent with respect to the alleged acts of sexual contact, seizure of the victim, and asportation of her are critically relevant issues for the jury. Similarly, with respect to Count Four in the information, the State must disprove the defendant's proffered reasons for engaging in this behavior to establish that the defendant provided false information to the police officers with respect to his conduct.

Evidence of motive is admissible if otherwise relevant. *State v. Phillips*, 298 N.W.2d 239, 243 (Wis. Ct. App. 1980). A defendant's motive may show the reason why a defendant desired the result of the crime charged, *Friederich*, 398 N.W.2d at 772, or lead him to indulge in the alleged criminal act. *State v. Chartegena*, 97 Wis.2d 657 (1981). Evidence of the defendant's prior sexual conduct with D.W. and K.C. is therefore relevant in establishing the defendant's motive and intent to engage in sexual relations with G.T., on the three felony counts in the Information, as well as to rebut the defendant's explanations for his motives and intents under the fourth count of the information.

As the Court noted in *Grande*, 485 N.W.2d 716, evidence of a sexual assault is evidence of an element of the kidnapping charge, since it establishes the intent to hold the victim to "service against her will". To establish a sexual assault to G.T. in fact occurred, the State must establish that sexual contact took place, requiring the State to prove beyond a reasonable doubt that the defendant touched an intimate part of G.T., and did so for purposes of sexual arousal or sexual gratification. The prior acts involving D.W. and K.C. established this intent by demonstrating the defendant's prior sexual exploitation of preadolescent females of the same age, for purposes of sexual arousal and sexual gratification. The prior acts thus satisfy the relevancy criteria for admissibility under Section 904.02 and 904.04. *Grande*, 485 N.W.2d at 9-10.

Indeed, given the short time period in which the defendant was involved with G.T., and allegedly had contact with her intimate parts, since G.T. was able to fight the defendant off, there is very little to establish the defendant's motive or intent in grabbing and touching G.T., other than the prior acts evidence. If a jury were solely to consider this testimony of G.T., in a vacuum, without reference to the prior conduct of the defendant involving D.W. and K.C., the jury may well conclude that the State had not established, beyond a reasonable doubt, the element of contact for purposes of sexual arousal or sexual gratification. This is especially true in light of the defendant's neutral explanations for his behavior, the tender age of the child and her inability to articulate descriptive testimony of adult concepts of sexuality, and the difficulty generally, of establishing a state of mind by the defendant as a required element of proof at trial.

In *Grande*, the Court of Appeals noted this dilemma in ruling that the trial court had improperly excluded prior conduct evidence which established the element of the charged offense.

"Under Section 904.03, Stats., the probative value of the evidence is weighed against the danger of misleading the jury and unfair prejudice, not prejudice. Here, the sexual assault evidence is the only evidence that proves Grande intended to hold B.I. to service against her will. 'Other crimes evidence is admissible' to complete the story of the crime on trial... *State v. Pharr,* 340 N.W.2d 498, 504 (Wis. 1983) (quoting *Bailey v. State*, 222 N.W.2d 871, 879 (Wis. 1974)). The Supreme Court has recognized the State's right to a fair trial and the opportunity to convict. See *State v. Copening*, 303 N.W.2d 821, 833 (Wis. 1981). Withholding admissible evidence from the jury on the basis of unfair prejudice or misleading the jury, where that evidence is the only evidence of an element of an offense, precludes the conviction of the offense charged. Consequently, the State would be unfairly prevented from prosecuting a serious criminal allegation." *Grande*, 485 N.W.2d at 9.

Closely related to the defendant's motive and intent to engage in sexual relations with G.T. for the purposes of sexual gratification, and to seize and confine her, as well as to transport her from one location to another to achieve those objectives, is the defendant's common scheme or plan to engage in sexual conduct with preadolescent females. In the present case, the evidence will establish that the defendant sought out sexual gratification from both G.T., when she was approximately nine years of age, and with D.M. and K.C. when they were nine years of age. The prior incidents involving D.M. and K.C. demonstrate that the defendant achieved sexual arousal and sexual gratification from sexual conduct involving preadolescent females, thereby demonstrating the defendant's motive, intent, and common scheme or plan in terms of conduct involving G.T. as alleged in the complaint. The prior incidents demonstrate that the defendant's motive and intent with G.T., and the reasons he grabbed her, had contact with her private parts, and attempted to take her into a secluded location, were to satisfy his lust for sexual activities with preadolescent females.

In addition to those cases cited previously, several decisions from Wisconsin Courts, as well as Courts in other jurisdictions, support admissibility of this prior act evidence to establish the defendant's motive and intent on the charged offenses, and to establish the defendant's common scheme or plan to engage in such conduct.

In *Fishnick,* 348 N.W.2d 272 (Wis. 1985), the Court reviewed the trial court's admission of other-acts evidence showing that the defendant had previously attempted to entice a 13 year old to come to his trailer to show the defendant her vagina, by offering her $20.00, and also evidence indicating that the defendant had previously exposed himself to a 12 year old female from inside of his trailer, where the defendant was subsequently enticing a three year old to come to his trailer by offering her candy and then having oral sexual contact with her vagina. The trial court admitted the evidence as probative of motive, intent, preparation and plan. The Supreme Court determined that the admission of the testimony regarding the exposure incident was erroneous, although harmless error, but upheld the admission of the prior enticement incident as probative of the defendant's motive and identity, while holding such evidence inadmissible to show the defendant's plan, preparation or intent to do the act for which it was charged.

The Court determined that the defendant's motive for his prior interaction with the female youth was sexual gratification and consequently tended to show his motive for the subsequent sexual assault. Since the issue of whether the defendant acted with the purpose of becoming sexually aroused or gratified by the sexual contact, was an element of the crime charged, the prior other-acts evidence was admissible to show that his motive for committing the alleged crime was also sexual gratification.

Similarly, in *Hendrickson*, the Court examined the admissibility of other-acts evidence involving prior incestuous relations between the defendant and two of his other daughters, where the defendant was charged with incest and taking indecent liberties with the third daughter. The Court upheld the admission of the evidence of the prior incestuous relations under the "general scheme or plan" and "proof of motive or intent" exceptions to the general rule against admitting other-acts evidence.

In discussing the general principal that greater latitude is given to the admission of other-acts evidence in sex crimes, the Court in *Hendrickson*, discussed a number of decisions, both from Wisconsin and other jurisdictions, relating to the admission of other-acts evidence in sex cases, and the rationale therefore. In one such case, other-acts evidence involving incestuous acts with other daughters was admitted to show an unnatural sexual desire held by the defendant, thereby tending to show a motive for the defendant's commission of the alleged charged. *See* *State v. Jackson*, , 81 N.E.2d 546 (Ohio Ct. App. 1948). Similarly, in another incest case, the Court noted that evidence consisting of prior incestuous acts by the defendant with his other daughter was admitted "to show the defendant's intent, mental mind or general plan to use his daughters to gratify his lust, passion and sexual desires. *Staggers v. State*, 172 S.E.2d 462 (Ga. Ct. App. 1969).

In *Day v. State*, 284 N.W.2d 666 (Wis. 1979), the Supreme Court affirmed the trial court's decision to admit testimony from three additional victims at the defendant's trial for two counts of sexual assault. These victims relayed incidents of prior sexual abuse perpetrated by the defendant. The trial court had permitted the testimony, finding that it was admissible to establish the defendant's motive, intent, plan or design. The Supreme Court stated:

"Clearly, this evidence tended to establish that the acts of sexual intercourse were all part of a definite preconceived plan, design, or scheme by the defendant. The testimony also establishes that the defendant created the opportunity and circumstances whereby the plan could be carried out. Because the testimony in question tends to establish existence of a preconceived plan and the opportunity to carry it out, the testimony was highly relevant and therefor admissible." *Day*, 284 N.W.2d at 405.

In *Friederich*, the defendant was charged with sexual assaults involving his 14 year old niece. The trial court admitted testimony from three other female victims who alleged prior sexual assaults perpetrated by the defendant on various occasions between four and seven years prior to the charged offenses. The trial court admitted evidence of the prior incidents involving minor females on the basis that such evidence established that the

defendant had "a general scheme or motive" to obtain sexual gratification from young girls.

The Supreme Court upheld the admissibility of such evidence both to establish the defendant's motive, and to establish a "plan" to engage in such acts with minor females. The Court noted that while identity was not an issue in the case, the commission of the act, and the defendant's intent were at issue since the defendant denied performing the acts alleged, and intent was an element of the crime which must be established by the State. The prior acts evidence was "relevant since the 'plan' established by the facts of record relates to these contested issues of fact", and the evidence tended to establish the existence of such a plan. *Id*. at 23. The Court went on to note:

"The *Whitty* case explains that this type of other acts evidence 'is admissible when such evidence is particularly probative in showing elements of the specific crime charged, intent, identity, system of criminal activity, to impeach credibility, and to show character in cases where character is put in issue by the defendant'. *Whitty*, 149 N.W.2d at 559 (emphasis added). The facts of the instant case reveal that, at least with respect to the other acts testimony of M.A., and J.H., the defendant was involved in a system of criminal activity in seeking sexual gratification from young girls with whom he had a familial or quasi-familial relationship. The other-acts testimony was

highly probative in this regard and was properly admitted for the purpose of establishing this 'plan'." *Id* at 773.

The Court reemphasized the greater latitude principal for admitting such evidence in crimes involving sexual abuse of children.

"To a person of normal, social and moral sensibility, the idea of the sexual exploitation of the young is so repulsive that it's almost impossible to believe that none but the most depraved and degenerate would commit such an act. The average juror could well find it incomprehensible that one who stands before the court on trial could commit such an act." *Id.*at 776.

Consequently, the Court concluded that it was important that juries be presented with a full range of relevant facts to assist the jury in making their determinations of the defendant's guilt, noting this as a "compelling reason" for the "greater latitude" doctrine for admitting other crimes evidence. The Court went on to note:

"It's true as the dissent states that past acts of sexual abuse do show a 'propensity' on the part of the defendant, because without such 'propensity' or 'leaning' the plan, scheme or motivation for it would never take place. But the plan, scheme and motive behind the act to molest children is there as a fact and is in the exercise of judicial discretion clearly admissible, under Section 904.04(2), Stats. The fact that the evidence also most certainly shows a propensity to commit such a crime should not deny its admission into evidence." *Id.* at 776.

Additionally, the Court noted:

"But our statutes make admissible evidence of those past acts of sexual exploitation of children which demonstrate a scheme or plan. That scheme is to take advantage of the trust children show toward adults. Child exploiters take advantage of a child's physical and emotional vulnerability in order to give gratification to their warped and perverted 'propensities' and 'leanings'. It is this scheme or plan to achieve sexual stimulation or gratification from the young, the most sexually vulnerable in our society, that allows trial courts in the exercise of discretion to admit evidence of past similar acts to show scheme or plan to exploit children. The actions of child molesters and abusers may have a sameness because they are the plans and schemes that have proven most workable in achieving the result the molester or abuser seeks to obtain." *Id.* at 777.

Finally, in *Mink*, evidence of prior sexual acts involving other family members was held to be relevant on the issue of the defendant's motive for seeking sexual gratification from young boys.

Several decisions from other jurisdictions similarly uphold the admission of prior acts evidence to establish the defendant's common scheme or plan of committing sexual assaults or to establish his motive and intent. In *People v. Garland,* 393 N.W.2d 896 (Mich. App. 1986), the defendant was convicted of second-degree sexual assault of his stepdaughter. Testimony from the defendant's daughter regarding prior incidents of abuse was admitted and affirmed by the appellate court which found the prior acts so similar that they established the defendant's scheme, plan or system of engaging in sexual misuse.

In *Pendleton v. Commonwealth*, 685 S.W.2d 549 (Ky. 1985), the elder sister of the victim was allowed to testify about prior sexual abuse inflicted on her by the defendant within a period of six or seven years prior to the charged offense. The admission of this evidence was upheld by the appellate court which noted that the prior acts showed a common and continuing pattern of conduct by the defendant to engage in sexual acts with family members who are young adolescents, establishing a plan to exploit and abuse an identifiable group of young females living within the defendant's household.

In *Brewington v. State*, 702 S.W.2d 312 (Tex. Ct. App. 1986), the appellate court upheld admission of evidence from two other family members documenting a sequence of sexual touching by the defendant over a period of 20 years, in addition to those involving the alleged victim in the charged offense. The appellate court noted that the prior offenses were admitted to prove the intent of the defendant, noting that the similarities between the victims included age, the setting in which the acts took place, the nature of the contact, and the same general child to parent relationship, providing a significant probative element in establishing the defendant's intent, and overriding any prejudicial effect to the admission of such evidence.

In *McNeely v. State*, 529 N.E.2d 1317 (Ind. Ct. App. 1988), evidence of the defendant's prior sexual crimes was admitted to show the defendant's intent and depraved sexual instinct. Similarly, in *Crabtree v. State*, 547 N.E.2d 286 (Ind. Ct. App. 1989), the Court upheld evidence of prior uncharged sexual offenses to show that the defendant possessed a depraved sexual inclination. This evidence was admitted despite the fact that the uncharged prior acts were more than 30 years old, the Court finding such evidence not too remote in time to diminish its probative value. And in *Grey v. State*, 404 N.E.2d 1348 (Ind. 1980), the defendant was convicted of raping a child under the age of 12. The appellate court upheld admission of evidence that the defendant had previously molested his girlfriend's daughter to establish the defendant's depraved sexual instinct, and to corroborate the testimony of the alleged victim. Finally, in *State v. Edward Charles L. Sr.,* 398 S.E.2d 123 (W.Va. 1990), the West Virginia Supreme Court upheld admission of unrelated sexual acts and tendencies by the defendant to establish the defendant's lustful disposition toward children.

These decisions all support admissibility in the present case of the testimony of D.M. and K.C., to establish the defendant's motive and intent on the charged offenses, and to establish a general scheme or plan by the defendant to engage in sexual conduct with preadolescent females.

Evidence of the defendant's prior sexual conduct involving D.M. and K.C., is also admissible to corroborate the testimony of G.T. against a credibility challenge by the defense. *See* *Mink*, 429 N.W.2d at 103; *Conley*, 416 N.W.2d at 76; *Friederich*, 398 N.W.2d at 776; *Fishnick*, 348 N.W.2d at 277; *Hendrickson,* 212 N.W.2d at 483. The Court in *Fishnick* stated:

"One reason for a 'greater latitude' standard in child sex crimes cases is to corroborate the victim's testimony against a credibility challenge by the defense. In the child molestation cases the defense may raise the possibility of fantasy, unreliability or vindictiveness on the part of the child-victim. *See* *State v. McFarlin*, 517 P.2d 98 (Ariz. 1987). Allowing other acts evidence buttresses the victims credibility against such a defense challenge. *People v. Kazee*, 121 Cal. Rptr. 221 (Cal. Ct. App. 1975)." *Fishnick*, 348 N.W.2d at 277 Note 4.

Similarly, in *Hendrickson*, the Court noted that in cases involving sexual assaults, the offense almost always occurs in private, with the only direct witnesses being the defendant and the alleged victim. In such cases, circumstantial evidence occasionally supplies corroboration, but the evidence generally rests upon the credibility of the victim. "In this kind of case, beyond any other, the defendant's plea of innocence challenges the credibility of the alleged victim...standing alone, the implicit challenge to the credibility of the prosecuting witness creates relevance for evidence of similar sex offenses upon other persons." *Hendrickson* 212 N.W.2d at 483, note 13, citing *People v. Covert*, 51 Cal. Rptr. 220 (Cal. Ct. App. 1967). In *Mink*, the Court reaffirmed the rationale of the decision in *Fishnick* by noting "one reason for allowing greater latitude (of other acts evidence) is to corroborate the victim's testimony against the credibility challenge by the defense." Mink, 429 N.W. at 103, parenthesis added. And in *Friederich*, the Court noted the need for presenting prior acts evidence to provide a complete presentation of all of the relevant facts in order for the jury fairly to assess the credibility of the child's allegations. *Friederich*, 398 N.W.2d at776-7.

In *Crabtree,* theIndiana Court of Appeals expressly noted that prior acts evidence had been admitted to bolster the credibility of the victim in situations where the accusations or acts seemed unnatural or improbable standing alone, and the victim was less likely to be believed. The Court referred to a prior decision in *Borolos v. State*, 143 N.E. 360 (Ind. 1924) which upheld the admission of prior acts evidence to explain the victim's passive participation and silence during and after the assaults, and to rebut the inference that the victim's story was too improbable to be true.

Similarly, in *Greg v. State*, 404 N.E.2d 1348, the Indiana Supreme Court stated that the reason for admitting prior sexual acts to establish the defendant's depraved sexual instinct was to bolster the victim's credibility. "The prosecuting witness is not likely to be believed, since the evidence standing alone and entirely unconnected with anything which led to or brought it about, would appear...unnatural or improbable in itself... Thus the evidence lends credence to the testimony of the prosecution that might otherwise be disbelieved." *Id.* at 1352.

In the present case, admissibility of the prior acts evidence under the "credibility" exception is closely related to another recognized exception for 904.04(2) evidence. Wisconsin courts and courts in other jurisdictions, have recognized that "other crimes" evidence is also admissible to complete the story of the crime charged by offering evidence of "its immediate context of happenings near in time and place". *See* *State v. Pharr*, 340 N.W.2d 498 (Wis. 1983); *Shillcut,* 341 N.W.2d. 716 (Wis. Ct. App. 1983). In *Shillcut*, the Court noted that "other crimes" evidence was admissible to establish the background information, set the context of the crime, and to insure a full presentation of the case.

In the present case, the prior acts evidence is both necessary to a full presentation of the case, and especially probative on the issues of credibility, since the defendant has proffered a version of this incident, as well as the prior acts, which is totally inconsistent with the alleged victim's claims. Consequently, the prior acts evidence is relevant and admissible under Section 904.04(2), to establish not only the credibility of G.T., but also to rebut the defendant's claims of accident or mistake, and to show the defendant's consciousness of guilt by establishing his use of neutral or non-criminal explanations for his behavior when confronted by investigating law enforcement personnel. In the prior incident, the defendant claimed that his curtain fell down accidentally while getting undressed for a shower, and denied exposing himself to two children, or hiding from police. This "innocent" explanation was in contradiction to the statements by the two minor children, who not only claimed the defendant exposed his penis to them, but that he also masturbated. The mother of one of the children also claimed the defendant was hiding from the police who tried to contact the defendant inside his residence.

In the present case, the defendant claimed that he was merely attempting to help the alleged victim, denied touching the victim in an inappropriate or sexual fashion, and denied grabbing the victim or trying to abduct her. In the midst of these denials the defendant also denied his past conviction, and being on probation. He further characterized the nature of this prior offense as "urinating in public".

The defendant's claims and explanations for his behavior with G.T. cannot be properly assessed and understood without consideration of the defendant's prior conduct with D.M. and K.C., and his explanation for such behavior to the police. These explanations also deal directly with the elements of the defendant's obstructing charge, since the State is alleging the defendant provided false information regarding the prior incident in Burlington during questioning by the Kenosha Sheriff's Department. In *State v. Amos*, 450 N.W.2d 503 (Wis. Ct. App. 1989), the Court of Appeals upheld admissibility of prior acts evidence, which demonstrated a consciousness of guilt for the charged offense.

The "Doctrine of Chances", (hereinafter referenced as DOC), also supports admissibility of the prior acts evidence. "The reasoning of this argument is that the recurrence of a like act lessens by each instance the possibility that a given instance could be the result of inadvertence, accident, or other innocent intent." *State v. Robertson*, 459 N.W.2d 611 (Wis. Ct. App. 1990), quoting 2 J. Wigmore, *Evidence* § 325 at 287 (Chadbourn rev. 1979). Stated another way, the recurrence of separate incidents involving sexually improper conduct with D.M. and K.C. and with G.T. makes it less likely that the defendant's explanation of ‘innocent’ behavior is true, and makes the version offered by G.T. more probable, as well as helping to establish the "state of mind" which the defendant possessed when he engaged in this behavior.

Under the DOC, the relevancy of the prior conduct evidence does not depend upon the impermissible inference of bad character:

Wigmore's theory of logical relevance does not depend upon a character inference because the proponent is not asking the trier of fact to infer the defendant's conduct (entertaining a particular *mens rea*) from the defendant's subjective character. The intermediate inference is an objective likelihood under the doctrine of chances rather than a subjective probability based on the defendant's character. *State v. Johns*, 725 P.2d 312, 323, 324, (Or. 1986), citing E. Imwinkelreid, *Uncharged Misconduct Evidence*, § 5.05 at 10 (1984).

Current academic literature also supports the admissibility of prior conduct evidence in sexual abuse cases under the DOC. See generally, Thomas J. Hickey, *Expanding the Use of Prior Act Evidence in Rape and Sexual Assault Cases*, 29 Crim. L. Bull. 195, 217 (1993) advocating broader admissibility of prior similar acts in rape and sexual assault cases because "an accused's prior actions are compelling and highly probative evidence of whether he committed a later similar act;” Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reas in Child Abuse and Acquaintance Rape: People v. Ewoldt Reconsidered*, 29 U.C. Davis L. Rev. 355 (1996), arguing that similar conduct evidence tends to eliminate the possibility of an explanation based on coincidence and disproves the defendant's claim of innocence; Edward Imwinkelreid, *Unchanged Misconduct Evidence*, sec. 4.04 (1984), arguing that litmus test for admissibility of prior conduct evidence should be logical relevance rather than similarity, and Imwinkelreid, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575 (1990), outlining use of DOC to prove *mens rea*; Sara S. Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, Crim. L.F. 307, 321-22 (1993), discussing application of DOC in child molestation cases.

The principle behind similar accusations evidence is the common sense notion of corroboration. The principle behind admission of such evidence under the DOC is to place focus on the accuser's stories, rather than on the defendant's character. The "logical force of the evidence to verify the victim's testimony should be . . . obvious . . . to jurors." *Cammack, supra* at 408. As Lord Cross of the English House of Lords put it, "if two [or more accusers] make [similar] accusations . . . at about the same time independently of one another then no doubt the ordinary person would tend to think there was ‘probably’ something to it." *Boardman v. Director of Public Prosecutions*, App. Co s. 421, 460 (1974).

For these reasons, as well as those stated above, the prior acts evidence of the Burlington incidents qualify for admission under the provisions of Section 904.04(2), and are relevant under the provisions of Section 904.02, since they establish the defendant's motive and intent, establish a general scheme or plan, refute the defendant's claims of accident or mistake, establish the defendant's consciousness of guilt, and establish the relative credibility of the parties. Where such a strong basis for admissibility of prior acts evidence exists under multiple provisions of Section 904.04, the Court need not resort to the well stated rule of greater latitude for admitting prior acts evidence in cases involving child sexual abuse. *See* *Friederich*, 398 N.W.2d 763 (Wis. 1987) and cases cited previously.

If the Court determines that such evidence is admissible under one or more of the established exceptions under 904.04(2), the Court must also determine whether any prejudice resulting from the admission of such evidence outweighs the probative value of the evidence. Courts have repeatedly noted that any prejudice resulting to the defendant from the admission of such evidence may be cured by cautionary instructions to the jury as to the appropriate use of such evidence. In *Mink*, 429 N.W.2d at 105, the Court noted that cautionary instructions "went far to cure any adverse affect attendant with the admission of the (other acts) evidence" citing *Fishnick.*. Similarly in *State v. Jones*, 444 N.W.2d 760,761 (Wis. Ct. App. 1989), the Court ruled that "any possible prejudicial effect of the 'other acts' evidence was offset by the trial court's instructions, which explained to the jury that such evidence was 'admitted solely on the issue of...’”

The prejudice to be avoided is the conclusion that because the defendant committed the prior acts alleged by D.W. and K.C., that he necessarily committed the current offenses involving G.T. *See* *Jones*, 444 N.W.2d 760. In the present case, such a conclusion may be cured by appropriate cautionary instructions directed to the jury. The mere fact that such evidence is damaging to the defense, however, is not the type of "prejudice" warranting exclusion of such evidence under the provisions of Section 904.03. Prejudice resulting to the defense case by the admission of otherwise damaging or highly probative evidence is not precluded by the provisions of Section 904.04(2), or the cases interpreting this statute. Indeed, the Court of Appeals in *Grande* noted:

"All evidence of an element of an offense 'is prejudicial' to a defendant. Yet, a defendant has no right to claim that such evidence is unfair and excludible under Section 904.03, where it is admissible and the only evidence of an element of the charged offense. Here, the sexual assault evidence, while incriminating to Grande, is the only evidence of an element of the kidnapping charge, but not unfairly so. Thus, even if the sexual assault evidence could be considered 'prejudicial' as a matter of law, it is not 'unfair' to Grande. ...Under these circumstances, the sexual assault evidence cannot be excluded under Section 904.03, because there is not unfair prejudice or danger of misleading the jury to substantially outweigh the evidence's extremely high probative value. *Grande*, 485 N.W.2d at 11-12 (emphasis added)."

As stated by the Wisconsin Supreme Court in an earlier "other acts" case, "no man can by multiplying his crimes diminish the volume of testimony against himself. The State discovers it and the jury acts upon it." *Hearde v. State*, 295 N.W.2d 684 (Wis. 1941). The defendant in this case is the only person who can claim the responsibility for multiplying the crimes charged against him. The admission of the State's other acts evidence will not unfairly prejudice the defendant because, by his own actions, the defendant has given the State the proof needed to prove to the fact finder that he committed the charged offenses.

**CONCLUSION**

For the reasons set forth above, the State respectfully requests that the Court grant its motion in limine and rule that it may introduce evidence concerning the defendant's prior conduct in involving D.W. and K.C., as well as the defendant's prior statements to the Police Officers regarding his conduct, during the course of the State's case-in-chief involving the allegations with G.T. and the charge of obstructing.

Dated at Kenosha, Wisconsin this day of , 20\_\_.

Respectfully submitted,

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Assistant District Attorney