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

##### State of Wisconsin

**FACTS**

Defendant and J.W. met in December 1993 in the State of California and were subsequently married in April 1994. The couple has a natural daughter between them, M.D.W., a minor, DOB: 11-28-94, hereinafter referred to as M. who was born in Wisconsin after the parties moved from California in November 1994. J.W. has a daughter from a previous marriage, H.C., a minor, DOB: 9-26-92, hereinafter referred to as H. H.’s natural father is T.C.

On October 11, 1994, a court hearing was held in \_\_\_\_\_ County, California Superior Court on a juvenile petition involving H. This hearing is the equivalent of a CHIPS hearing in the State of Wisconsin. Dr. G., Ph.D., and director of the Social Services Agency filed a jurisdictional report with the court for \_\_\_\_\_ County, and by L.S., a child welfare worker for that department. That report is attached hereto and incorporated herein by specific reference. L.S.’s report documented numerous instances in which H. had suffered significant physical injury while under the care, custody and control of the defendant and J.W.

On September 5, 1994, \_\_\_\_\_ County’s Department of Social Services received a referral from the N. Medical Center in \_\_\_\_\_, California as a result of suspicious injuries found on H., consisting of an old fracture/dislocation of her shoulder. H. was subsequently referred to B. Hospital where she was examined on September 6, 1994 and x-rays were obtained. J.W. provided historical information to medical personnel and the Department of Social Services suggesting initially that the injury had occurred several days earlier as a result of H. falling. However, the medical evidence suggested that the injury had occurred more than two weeks prior to September 5, 1994 due to the healing nature of the bone injury. Subsequently, J.W. suggested that this injury might have occurred between August 10, 1994 and August 15, 1994 when H. had been picked up by her wrists by an aunt. J.W. claimed that she did not notice any swelling on H.’s shoulder until September 3, following this fall. J.W. was given several medical appointments for treatment of the shoulder injury that she failed to keep, resulting in the Department of Social Services, as well as the Police Department responding to their residence on September 21, 1994. Doctors who examined H.’s shoulder injury indicated that the injury was suspicious for child abuse, with a mechanism of trauma being a sharp pulling or yanking, causing the shoulder to separate.

On September 21, 1994, the Police Department and Social Services Department responded to the family’s residence as a result of J.W. not sufficiently following through with the recommended medical treatment for H.’s shoulder injury. At that time, they learned that H. had recently sustained a laceration in her perineal region, alleged to have occurred on September 17, 1994. J.W. provided a history at that time indicating that she did not observe this incident resulting in injury to H. because she was at home and in the shower at the time. The defendant, however, claimed to have personally witnessed the incident. He told J.W. that he was watching television and that H. attempted to climb into her high chair when she fell. J.W. indicated that H. was bleeding from this injury but J.W. did not seek out medical treatment for her, believing she could take care of the injury herself. Police officers who responded to the residence and examined the high chair indicated that they did not believe this history was consistent with the physical configuration of the high chair. However, medical personnel who examined H.’s vaginal injury concluded that the injury was consistent with a straddle-type injury and not consistent with sexual misuse. The defendant was not available for questioning by social service workers or police officials at that time due to the fact that the defendant had shipped out to sea as part of his naval training on September 19, 1994.

On September 22, 1994, H. was given an x-ray at Children's Hospital in \_\_\_\_\_, and found to have a fracture to the upper inside portion of her femur. Medical personnel note the injury to be at least three weeks old due to the healing nature of the bone injury. J.W. was unable to provide any historical information regarding the cause or mechanism of this injury, and claimed that H. displayed no discomfort as a result of this condition.

During the home visit on September 21, 1994, H. was also observed to have patches of hair missing. Subsequent questioning of J.W. regarding these findings resulted in J.W. explaining that H. had pulled her own hair out as a result of getting a hair brush tangled in her hair. However, J.W. could not produce the hairbrush that allegedly caused this injury. H. was also observed to be dirty and unkempt, and the residence was observed to be dirty. Additionally, when H. was admitted to the hospital, she was found to be in the tenth percentile for her height and weight.

Dr. S.H., H.’s pediatrician, advised the Department of Social Services that H. had previously been between the tenth and twenty-fifth percentile in height and weight. Dr. S.H. provided information indicating that J.W. had previously failed to keep pediatric appointments and Dr. S.H. further indicated that she had not been contacted as a result of any of the injuries noted by medical personnel in September, 1994. Additionally, Dr. S.H. had previously made a referral to the Department in February 1994 for suspected abuse following an incident in which H. had burns and marks to her face following a visit to her father, T.C. This matter was investigated and closed by the Department without substantiation.

R.G., a friend of T.C., provided information to the Department indicating that in May 1994, he observed H. during a visit to her father. At that time he observed nickel-size bruises to both inner thighs as if “someone had forced her legs apart,” as well as a yellowish bruise of a similar size one half inch from her right ear. At that period of time, H. was residing with the defendant and J.W. T.C. corroborated this information for the Department, but suggested the time period in which this occurred was in June or July 1994, rather than in May as R.G. indicated.

H. was placed into foster care following the investigation in September 1994. She was noted during visitations with J.W. to display both ambivalent and resistive behavior towards her mother, temper tantrums, and at times clingy behavior with her mother. She was also noted by social workers to be non-verbal and displaying significant emotional behaviors in her mother’s presence. These were not noted in her visitations with her natural father, T.C.

As a result of these investigations in \_\_\_\_\_ County, H. was removed from placement with her mother. Subsequent to this, J.W. and the defendant moved to \_\_\_\_\_\_\_, Wisconsin in November 1994. M. was born shortly thereafter on November 28, 1994. On March 4, 1995, J.W. and the defendant, at the suggestion of the defendant’s mother and sister who noted that M. was not acting appropriately, took M. to\_\_\_\_\_ Hospital. Subsequent medical examinations at \_\_\_\_\_ Hospital and Children’s Hospital revealed M. sustained over 20 fractures, including rib and metaphyseal fractures, and two separate subdural hematomas. The medical consultation report of Dr. S.L., a child abuse specialist at Children’s Hospital of \_\_\_\_\_, is attached hereto and incorporated herein, detailing the physical injuries to M. Those injuries document at least three separate incidents of trauma occurring during the relative time periods set forth in the criminal information. The mechanisms for producing these injuries according to Dr. S.L. include violent shaking of M., shaking combined with impact, blunt force trauma to her extremities, and twisting and forceful pulling of her limbs.

Following disclosure of these medical findings, Deputy P.H. of the\_\_\_\_\_\_ Sheriff’s Department conducted a criminal investigation. She obtained written and oral statements from the defendant and J.W., as well as a tape-recorded statement from the defendant. Those statements are also attached hereto and incorporated herein by specific reference as a factual basis in support of this motion. Ultimately the defendant provided admissions to Deputy P.H. indicating that he had previously shaken M. several days prior to her being taken to the hospital. The defendant denied observing J.W. engaging in any behavior, which he thought might have accounted for M.’s injuries. The defendant did not provide admissions to the other injuries noted in Dr. S.L.’s report, and did not suggest prior incidents of similar behavior toward M. which would account for her injuries as set forth in Counts Two and Three of the Information. J.W. denied causing any of the injuries to M., and additionally indicated that H. had not previously had any injuries until such time as the defendant began residing with her.

The State also attaches a letter addressed by J.L. to Assistant District Attorney S.R., setting forth various factual allegations regarding meetings with the defendant while housed in the \_\_\_\_\_ County Jail. Jail records reflect the defendant and J.L. were housed in the same cellblock in the jail between May 12 and May 15, 1995, providing an opportunity for J.L. to have spoken with the defendant regarding these incidents. Jail records also reflect that the defendant’s sister and mother visited him on May 14, 1994, consistent with J.L.’s representations in the letter.

Counsel for the defendant represented to the court at the time of the pretrial hearing on May 18, 1995 that the defendant had a change of heart regarding the case, and wished to proceed to trial. Additionally, counsel suggested a need for a Miranda-Goodchild hearing regarding the voluntariness and accuracy of the defendant’s statements to Deputy P.H. Based upon these representations, the State anticipates that the defendant will attempt to recant previous admissions made to Deputy P.H. and/or suggest they were the product of coercive interrogation, and that the defendant will attempt to suggest that J.W. is responsible for some or all of the injuries to M. as diagnosed by medical professionals including Dr. S.L.

The State anticipates that at the time of trial, J.W. will provide testimony consistent with the statements she has previously provided to Deputy P.H., and would be subject to potential questioning regarding the factual circumstances of H.’s injuries. Additionally, the State anticipates that Dr. S.L. will provide medical testimony diagnosing both H. and M. as suffering from “Battered Child Syndrome” (BCS) as that term is medically defined.

The State seeks to introduce evidence of the circumstances surrounding the injuries to H. while in the custody and care of the defendant pursuant to the relevancy provisions of section 904.01 of the Wisconsin Statutes governing the Wisconsin Rules of Evidence, and section 904.04(2) of those statutes governing the admissibility of other conduct by the defendant. The State submits that such evidence is both relevant and admissible under the authority set forth below to establish the allegations set forth in the various counts of the criminal Information. More specifically such evidence is relevant to establish the *mens rea* elements for these offenses, to establish that M.’s injuries are not the result of accident but rather acts of abuse, to establish the defendant as the source for these injuries, and to corroborate the testimony of the witnesses the State will present to establish the defendant’s guilt for these offenses.

**LEGAL AUTHORITY**

**A. General Legal Requirements for Admission of "Other Acts" Evidence**

Wis. Stat. Section 904.04(2) controls the introduction of “other acts” evidence in Wisconsin criminal cases. This provision mirrors the similar provision contained in the Federal Rules of Evidence (FRE) Section 404(b). Under Section 904.04(2), “other acts” evidence is not admissible to prove the character of a person if it is offered solely for the prohibited purpose of showing that a person acted in conformity with a prior instance of conduct. However, the evidence should be admitted if it is relevant for any other “permissible purpose” allowed by the statute or case law interpreting its provisions. A partial list of “permissible purposes” is set forth within the statute itself, which expressly allows the introduction of “other acts” evidence to prove, among other things, “motive,” “identity,” “knowledge,” “intent,” “absence of mistake or accident,” and several other purposes.

The list set forth in Section 904.04(2) is merely illustrative, not exhaustive, and these categories are not mutually exclusive. *See* *United States v. Powers*, 59 F.3d 1460, 1464 (4th Cir. 1995); *Mosley v. State*, 929 S.W.2d 693, 694 (Ark. 1996); *Saffor v. State*, 660 So. 2d 668, 671 n.2 (Fla. 1996); *State v. Dillon*, 447 S.E.2d 583, 596 (W.V. 1994); *State v. DiFrisco*, 645 A.2d 734, 768 (N.J. 1994); *State v. Plymesser*, 493 N.W.2d 367 (Wis. 1992); *Montgomery v. State*, 810 S.W.2d 372, 377 (Tex. Crim. App. 1990)(stating that enumerated exceptions are neither mutually exclusive nor collectively exhaustive); *State v. Zybach*, 775 P.2d 318, 320 (Or. 1989)(noting that listed exceptions are illustrations, not limitations); *State v. Tanner*, 675 P.2d 539 (Utah, 1983).

Evidence of “other acts” is also admissible to establish “consciousness of guilt,” *see* *United States v. Maddox*, 944 F.2d 1223 (6th Cir. 1991); *State v. Amos*, 450 N.W.2d 503 (Wis. Ct. App. 1989); *Gideon v. State*, 721 P.2d 1336 (Okla. Crim. App. 1986); to establish “credibility,” *see* *United Sates v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991); *Lannan v. State*, 600 N. E.2d 1334 (Ind. 1992); *State v. Phillips*, 399 S.E.2d 293, 299 (N.C. 1991); *State v. Mink*, 429 N.W.2d 99 (Wis. Ct. App. 1988); and more particularly to establish “a pattern of behavior and an attitude toward the child that is indicative of the defendant’s state of mind,” *see* *United States v. Colvin*, 614 F.2d 44 (5th Cir. 1980) (pattern of abuse to 14-month-old daughter admissible to prove defendant parents’ malice aforethought); *State v. Allen*, 839 P.2d 291 (Utah 1992); *Commonwealth v. Azar*, 588 N.E.2d 1352, 1359 (Mass. App. Ct. 1992*)*; *State v. Ostlund*, 416 N.W.2d 755 (Minn. Ct. App. 1987); *Eslava v. State*, 473 So. 2d 1143 (Ala. Crim. App. 1985) (acts of hostility, cruelty and abuse are admissible to prove intent, motive or scienter); *State v. Applegate*, 668 S.W.2d 624 (Mo. Ct. App. 1984); *State v. Tucker*, 435 A.2d 986, 991 (Conn. 1980). Such evidence may also be admissible to complete the story of the crime or place it in context, which in many instances will “also establish identity, motive, scheme or plan or otherwise be admissible as bearing on a material fact in issue.” *Powers*, 59 F.3d at 1466;; *People v. Banks*, 641 N.E.2d 331 (Ill. 1994); *Azar*, 588 N.E.2d at 1359; *Ostlund*, 416 N.W.2d 755, 764;*. Tanner*, 675 P.2d at 546-548.

The defense frequently argues that Section 904.04(2) is a rule of exclusion, i.e., a statute that generally excludes “other acts” evidence unless the evidence falls within a narrow “exception” delineated within the statute itself. This interpretation of Section 904.04(2), however, is inaccurate. In *State v. Speer*, 501 N.W.2d 429 (Wis. 1993), the Wisconsin Supreme Court explicitly stated that Section 904.04(2) sets forth no presumptions for admissibility or exclusion of prior acts evidence. The United States Supreme Court articulated a similar position in interpreting FRE 404(b). *See* *Huddleston v. United* *States*, 485 U.S. 681, 687-88, 108 S. Ct. 1496 (1988). Other courts have adopted similar interpretations. *See* *Powers*, 59 F.3d 1460 (4th Cir. 1995); *United States v. Moye*, 951 F.2d 59, 61 (5th Cir. 1992); *United States v. Hadley*, 918 F.2d 848, 850 (9th Cir. 1990); *United States v. Long*, 574 F.2d 761, 766 (3rd Cir. 1978); *State v. West*, 404 S.E. 2d 191 (N.C. Ct. App. 1991) (stating that Rule 404(b) is a general rule of inclusion of such evidence); *State v. Edward Charles L*., 398 S.E.2d 123 (W. Va. 1990) (holding that statute is an inclusive rule); *Tanner,* 675 P.2d 539 (Utah 1983).

Simply put, Section 904.04(2) sets forth only the parameters within which courts make “relevancy” determinations of admissibility of “other acts” evidence. Indeed, many commentators have noted that Section 904.04(2) has precluded introduction of the evidence to establish the defendant’s character, not because the evidence is “not relevant,” but because it is “too relevant.” *See generally* Imwinkelried, Uncharged Misconduct Evidence (1984); *Michelson v. United States*, 335 U.S. 469, 475-76, 93 L. Ed. 168, 69 S. Ct. 213 (1948); *Tanner,* 675 P.2d at 555 (dissenting opinion).

Most courts have consistently held that so long as “other acts” evidence is not offered solely for the prohibited “bad character inference,” it qualifies for admission if the evidence is offered for virtually any other “permissible purpose.” The list of cases supporting this proposition is legion, too long to mention in a court brief. Nevertheless, the court is referred to the decisions in *Huddleston*, 485 U.S. 681 (1988);); *Powers*, 59 F.3d 1460 (4th Cir. 1995)*; Hadley,* 918 F.2d 848 (9th Cir. 1990); *State v. Johnson*, 516 N.W.2d 463 (Wis. Ct. App. 1994); *People v. Brown*, 557 N.E.2d 611 (Ill. App. Ct. 3d 1990); *State v. Coffey*, 389 S.E.2d 48 (N.C. 1990). *See also* *Plymesser,* 493 N.W.2d at 371 (noting that if other acts evidence is offered for proper purpose, the evidence is subject only to general strictures limiting admissibility under Sections 904.02 and 904.03). *Accord*, *Huddleston,* 485 U.S. at 688; *York*, 933 F.2d at 1351.

If the “other acts” evidence is admissible for any of the other “permissible purposes” set forth in Section 904.04(2), or by the case law, a trial court may commit “error as a matter of law” if it excludes the proffered “other acts” evidence. *State v. Grande*, 485 N.W.2d 282 (Wis. Ct. App. 1992). The United States Supreme Court has articulated a similar position noting that uncharged misconduct evidence “may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor’s state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.” *Huddleston*, 485 U.S. at 685. *Accord People v. Basir*, 578 N.Y.S.2d 603, 605 (N.Y. App. Div. 1992) (“[p]articularly in cases involving child abuse, evidence of prior bad acts is highly relevant to establish a lack of mistake or accident.”); *Longfellow v. State*, 803 P.2d 848 (Wyo. 1990) (extent to which prosecution has a substantial need for other crimes evidence is factor to be considered in weighing probativeness); *State v. Toennis*, 758 P.2d 539 (Wash. Ct. App. 1988) (probative value especially great when victim of offense is unable to testify because of his death).

In *State v. Taylor*, 701 A.2d 389 (Md. Ct. App. 1997) the court noted that prior conduct evidence may be the only means available to establish the elements of intent or malice. The court went on to state:

Where an act is equivocal in nature, and may be criminal or honest according to the intent with which it is done, then other acts of the defendant, and his conduct on other occasions, may be shown in order to disclose the mastering purpose of the alleged criminal act. The principle reflected in that statement is particularly applicable to child abuse cases. Evidence of intent, in such cases is ordinarily circumstantial, and injuries to children are ordinarily claimed to be accidental or unintentional. (citations omitted)

“Underlying this use is the common-sense theory that the more often a person acts in a particular way and achieves a particular result, the more likely it is that he intended the result.” 1 C. Mueller & L. Kirkpatrick, Federal Evidence sec. 112 at 638-39 (2d ed. 1994). Similarly, in *State v.Durfee*, 322 N.W.2d 778, 783 (Minn. 1982) and *Schleret v. State*, 311 N.W.2d 843 (Minn. 1981) the Minnesota Supreme Court noted the unique need for evidence of other injuries to the child in order to ascertain the validity of the caretaker’s account where they are the only witness to the events producing the injuries. *Accord State v. McKowen*, 447 N.W.2d 546 (Iowa. Ct. App. 1989).

“WSA 904.04(2) is a prime example of the doctrine of multiple admissibility. Other acts evidence will almost always be relevant to the subject’s character. The critical questions are whether it is also probative of some other proposition that is of consequence to the action, and whether it is being offered for that purpose . . . All that WSA demands is that the other acts be probative of something other than the subject’s character.”

7 D. Blinka, Wisconsin Practice: Evidence, at 115 (1991). See also, 22 C. Wright and K. Graham, Federal Practice and Procedure: Evidence, Sec. 5239 at 435 (1999); J. Wigmore, Evidence in Trials at Common Law, Sec. 215 at 1869 (1999).

FRE 105 provides that when evidence is admissible for one purpose but not admissible for another purpose, the court may admit the evidence and restrict its application to its proper scope by instructing the jury accordingly. *See Huddleston*, 485 U.S. 681 (1988).

This approach to other acts evidence is similarly followed in other jurisdictions, and well summarized by the Pennsylvania Supreme Court in *Commonwealth v. Donahue*, 549 A.2d 121 (Pa. 1988):

The rule is that the prosecution may not introduce evidence of other criminal acts

of the accused unless the evidence is substantially relevant for some other purpose

than to show a probability that he committed the crime on trial because he is a man

of criminal character. There are numerous other purposes for which evidence of

other criminal acts may be offered, and when so offered, the rule of exclusion is

simply inapplicable. *Id*. at 125.

A trial court determining admissibility of “other acts” evidence is required to use a two-pronged analysis. First, the trial court must consider whether the proposed evidence is admissible for a

permissible purpose under Section 904.04(2) and under case authority interpreting this statute. Second, the

trial court must then exercise its discretion to resolve whether the unfair prejudice resulting from the

“other acts” evidence outweighs its probative value. *Huddleston*, 485 U.S. 681 (1988); *State v. Fishnick*, 378 N.W.2d 272 (Wis. 1985). The relevancy of “other acts” evidence is a threshold question that is implicit in the two-pronged analysis. *State v. Friederich*, 398 N.W.2d 763, 771 (Wis. 1987). The trial court must decide if there is a logical or rational connection between the “other acts” evidence and any fact that is of consequence to the determination of the action being tried. *See* *State v. Alsteen*, 324 N.W.2d 426 (Wis. 1982).

In making this relevancy calculation, the trial court does not consider the credibility or believability of the evidence. As the Court noted in *Balou v. Henri Studios Inc*.:

Rule 403 does not permit exclusion of evidence because the judge does not find it

credible. Weighing probative value against unfair prejudice under 403 means

probative value with respect to a material fact if the evidence is believed [by the

jury], not the degree the court finds it believable. 656 F.2d 1147, 1154 (5th Cir. 1981).

*Accord*, *Huddleston*, 485 U.S. at 689-90. Relevancy is also generally conditioned on proof that the “other act(s)” occurred and, under most theories of admissibility, sufficient evidence that the defendant committed the “other act(s).”

Courts have adopted varying standards of proof in making this determination. In *Huddleston*, the United States Supreme Court held that the standard of proof for admissibility is whether a reasonable jury could find by a preponderance of the evidence that the defendant committed the prior act. *Huddleston*, 485 U.S. at 689-90.  *Accord* *Watkins v. Melody*, 95 F.3d 4, 6 (7th Cir. 1996); *State v. Phelps*, 478 S.E.2d 563 (W. Va. 1996); *State v. Landrum*, 528 N.W.2d 36 (Wis. Ct. App. 1995); *State v. Walker*, 879 P.2d 957, 961 (Wash. App. 1994). *People v. Vandervliet*, 508 N.W.2d 114 (Mich. 1993). Additionally, the trial court need not make a preliminary finding under FRE 104(a) that the government has proven the prior act. *Huddleston*, 485 U.S. 681 (1988).

Other courts have required clear and convincing proof of the “other acts” to warrant admission.  *See* *State v. McCary*, 922 S.W.2d 511 (Tenn. 1996); *Acuna v. State*, 629 A.2d 1233, 1236 (Md. 1993); *State v. Moorman*, 505 N.W.2d 593, 600-01 (Minn. 1993); *State v. Robideaux*, 707 P.2d 35, 37 (Okla. Crim. App. 1985*).* However, the fact that the defendant was not previously charged with or convicted of the “other acts” will not exclude its admission. A prior acquittal or dismissal of the “other act” conduct will also not prohibit admission. *See* *United Statres v. Dowling*, 493 U.S. 342, 348-49 (1990); *Watkins v. Melody*, 95 F.3d 4 (7th Cir. 1996); *State v. Driskell*, 659 P.2d 343, 349 (Okla. Crim. App. 1983); *Landrum*, 528 N.W.2d 36 (Wis. Ct. App. 1995).

However, if the other acts of abuse or prior injuries to the child are offered to establish the absence of mistake or accident under the Doctrine of Chances, or are part of the physician’s diagnosis of the Battered Child Syndrome, admissibility is not contingent on proof that the defendant caused the prior injuries. Rather, the proof of the multiple incidents is frequently offered to establish the defendant as the likely source for the child’s injuries. See *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385, (1991), and the extensive discussion of this issue which is presented in the next section. *Id*. This is one of the unique instances in which this use of other acts evidence in the child abuse arena deviates from traditional case law requiring a well established nexus between the other conduct and the current allegations before relevancy is established and the other acts are admitted.

The probative value of other acts evidence also depends partially on its nearness in time, place and circumstance to the charged crime or element to be proved. *Hadley*, 918 F.2d at 851; *United States v. Leight*, 818 F.2d 1297 (7th Cir. 1987); *State v. Long*, 532 N.W.2d 468 (Wis. Ct. App. 1995); *Fishnick*, 378 N.W.2d at 280-81. Prior acts evidence is particularly relevant when it relates specifically to a necessary element of the offense, or a requisite mental state that must be proven for the charged offense. *See Huddleston,* 485 U.S. 681 at 685; *York,* 933 F.2d at 1350; *Taylor,* 701 A.2d 389 (Md. Ct. App. 1997); *Grande,* 485 N.W.2d 282; *Hough v. State*, 235 N.W.2d 534 (Wis. 1977).

The requirements of similarity and proximity, however, are simply factors for consideration in determining the relative probative value of the evidence; they are not determinative of admissibility themselves. Similarly, the importance of these factors will depend upon the purpose for which the “other acts” evidence is being offered. For example, similarity between the prior acts and the current acts may be more important in assessing relevancy when the prior acts are being used to establish a *modus operandi* for the charged offense or the identity of the perpetrator. This factor, however, will not be as important if the evidence is offered to establish the absence of mistake or accident or the *mens rea* for the offense.

These principles are articulated by case law decisions and legal commentary. In *People v. Robbins*, 755 P.2d 355, 362 (Cal. 1988), the court stated “when evidence of an uncharged offense is introduced to prove intent, the prosecution need not show the same quantum of ‘similarity’ as when the uncharged conduct is used to prove identity.” Professor Wigmore comments that when “other acts” are offered to satisfy the “theory of probabilities” the prosecution need only establish “the occurrence of an act similar in its gross features - i.e., the same doer, and the same sort of act, but not necessarily the same mode of acting nor the same sufferer.” J. Wigmore, Evidence sec. 304 at 251 (Chadbourn rev. 1979).

And Wright and Graham note:

Whether the offenses must be similar and the degree of similarity required turns

upon the theory on which the other crime is relevant to prove intent. For example,

where intent is being proved by showing a motivating factor for the mental state no

similarity is required. 22 C. Wright & K. Graham, Federal Practice and Procedure

sec. 5240 at 480-82, sec. 5242 at 490-91, n. 36.

Numerous case law decisions also reflect this position that the prior conduct evidence need not be identical either in terms of the nature of the injuries or their mechanism for infliction, to qualify for admission. *See*, e.g., *State v. Beard*, 574 N.W.2d 87 (Minn. Ct. App. 1998); *State v. Teuscher*, 883 P.2d 922 (Utah Ct. App. 1994) (holding that prior acts toward other children in defendant’s care including shaking child, child suffering fractured leg, and children locked in closets admissible to establish identity, intent and mental state, and absence of accident in homicide); *People v. Biggs*, 509 N.W.2d 803 (Mich. Ct. App. 1993) (stating that prior acts of administering drugs to child resulting in overdose, and burning child admissible in homicide resulting from smothering); *State v. M.L*., 600 A.2d 1211 (N.J. Super. Ct. App. Div. 1991) (noting that evidence of general neglect admissible on charge of endangering safety for leaving child unattended); *People v. James*, 241 Cal. Rptr. 691 (Cal. Ct. App. 1987) (observing that prior acts of cruelty to child admitted to show injuries resulting in death were not result of an irrational explosion of violence but instead deliberate); *State v. Lee*, 746 P.2d 242 (Or. Ct. App. 1987) (stating that evidence the defendant previously struck the child with belt and shook him was not excludable because acts were not identical).

A defendant’s plea of not guilty necessarily places at issue each element of the offense with which the defendant is charged, requiring the State to establish that element beyond a reasonable doubt. Wis. Jury Instructions 110-112; *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L. Ed. 2d 385 (1991); *Taylor*, 701 A.2d 389 (Md. Ct. App. 1997); *Teuscher*, 883 P.2dat 927; *Vandervliet*,508 N.W.2d 114 (Mich. 1993); *State v. Mora*, 618 A.2d 1275 (R.I. 1993); *Brown*, 557 N.E.2d at 621; *State v. Foster*, 623 P.2d 1360, 1363 (Kan. 1981). The defendant’s denial of committing the offense necessarily places all relevant states of mind of the defendant in issue. See; *Mora*, 618 A.2d 1275 (R.I. 1993); *Fishnick,* 378 N.W.2d at 278-79. In *Plymesser*, the court held the State must prove all the elements of a crime beyond a reasonable doubt, even if the defendant does not dispute all of the elements.  *Plymesser*, 493 N.W.2d at 372. *Accord*, *McGuire*, 582 U.S. 62 (1991).

Accordingly, even if the defendant in the present case acknowledges that Mina was physically abused, but denies responsibility for that abuse, the State would not be barred from introducing “other acts” under Section 904.04 for a permissible purpose. *See*, e.g., *State v. Clark*, 507 N.W.2d 172 (Wis. Ct. App. 1993), holding that evidence of other crimes may be offered in regard to the question of intent despite the defendant’s assertion that the charged act never occurred. *Accord Hadley*, 918 F.2dat 852; *Friedrich*, 398 N.W.2d (Wis. 1987); *Plymesser*, 493 N.W.2d at 372-73; *Mink,* 429 N.W.2dat 104. *See also* *Mora*, 618 A.2d 1275 (R.I. 1993) (holding State bears the burden of proof as to all elements even if not disputed, and can “establish existence of those elements as it deems just.”) For these reasons, the prior acts evidence is admissible in the state’s case-in-chief, and its admission need not wait until rebuttal, or be contingent on the defendant’s evidence or proof. *See* *McGuire*, 502 U.S. 62 (1991); *Hadley*, 918 F.2d at 852; *United States v. Lewis*, 837 F.2d 415 (9th Cir. 1988).

Recently, the United States Supreme Court ruled that the prosecution’s refusal to stipulate to an element of proof that was conceded by the defense may constitute unfair prejudice if there are alternative methods for establishing this element of the offense that are less prejudicial to the defendant. See *United States v. Old Chief*, 519 U.S. 172, 117 S. Ct. 644,136 L. Ed. 2d 574 (1997). This case involved an offense of possession of a firearm by a convicted felon where the defendant offered to stipulate that he was a convicted felon and the government refused the stipulation, choosing instead to put in proof of the nature of the defendant’s prior conviction. Under the facts of the case the Court found the failure to accept the stipulation and the admission of the specific facts of the prior conviction constituted unfair prejudice under FRE 403.

The defense may argue that *Old Chief* bars admission of “other acts” evidence if the defendant stipulates to the issue in the case for which the “other acts” evidence is offered. For example, the defense may concede that the child’s injuries were caused by abuse, or alternatively, acknowledge that the defendant caused the injuries. However, if the defendant contests other elements of the offense, or other issues of the case to which the “other acts” evidence may be relevant, then the holding in *Old Chief* would be inapplicable under the principles articulated above. For example, the defendant may admit the injuries are abusive, but contest that he caused them, or acknowledge he caused the injuries but contest the *mens rea* element of the offense.

The holding in *Old Chief* makes it clear that in such circumstances, the defendant’s offer to stipulate to a contested issue in the case will not bar admission of “other acts” evidence which may also be relevant to other contested issues or elements.

The issue of substituting one statement for the other normally arises only when the

record of conviction would not be admissible for any purpose beyond proving status,

so that excluding it would not deprive the prosecution of evidence with multiple utility;

if, indeed, there was a justification for receiving evidence of the nature of prior acts on

some issue other than status, (i.e., to prove “motive, opportunity, intent, preparation,

plan, knowledge, identity, or absence of mistake or accident,” Fed. Rule Evid. 404(b)),

Rule 404(b) guarantees the opportunity to seek its admission. *Id*. at 519 U.S. 190.

This includes the prosecution’s need to present the “other acts” evidence to present a coherent and compelling narrative of the defendant’s “thoughts and actions in perpetrating the offense,” *id*. at 192, and to provide a complete picture of the context in which the offense occurs “not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.” *Id*. at 187.

Thus, the prosecution may fairly seek to place its evidence before the jurors, as much

to tell a story of guiltiness as to support an inference of guilt, to convince jurors that a

guilty verdict would be morally reasonable as much as to point to the discrete elements

of a defendant’s legal fault. *Id*. at 189.

If the State’s “other acts” evidence is admissible for one or more “permissible purposes” within the meaning of Wis. Stat. Section 904.04(2), the court must then determine whether any prejudice the defendant could suffer as a result of the admission of the evidence substantially outweighs its probative value. While it is true that the introduction of “other acts” evidence can potentially prejudice the defendant’s case, the only inquiry authorized under Wis. Stat. Section 904.03, and FRE 403 is whether the value of the evidence is “substantially outweighed by the danger of unfair prejudice.” This balancing determination necessitates that “other acts” evidence is not excluded merely because its prejudicial impact is greater than its probative value. The prejudicial impact must be “substantially” greater than the probative value, and the prejudice must be “unfair” to the defendant. *Old Chief*, 519 U.S. 172 (1997); *York,* 933 F.2d at 1352-1353; *Powers*, 59 F.3dat 1467;

As the courts have repeatedly noted, nearly all evidence operates to the prejudice of the party against whom it is offered. See *Long*, 574 F.2d 761 (3d Cir. 1978); *Johnson,* 516 N.W.2d at 468; *Clark,* 507 N.W.2d at 176; *Grande,* 485 N.W.2d 282 (Wis. Ct. App. 1992); *State v. Holland*, 346 N.W.2d 302 (S.D. 1984*); State v. Germain*, 433 So. 2d 110 (La. 1983). In *United States v. Figueroa*, the Court stated:

All evidence introduced against a defendant, if material to an issue in the case, tends

to prove guilt, but it is not necessarily prejudicial in any sense that matters to the rules

of evidence . . . Evidence is prejudicial only when it tends to have some adverse effect

upon a defendant beyond tending to prove the fact or issue that justified its admission

into evidence. The prejudicial effect may be created by the tendency of the evidence

to prove some adverse fact not properly in issue or unfairly excite emotions against the defendant. 618 F.2d 934, 943 (2d Cir. 1980).

Wis. Stat. Section 904.03 and FRE 403, however, exclude only evidence which is “unfairly prejudicial.” *Long*, 574 F.2d 761 (3d Cir. 1978); *Grande,* 485 N.W.2d 282 (Wis. Ct. App. 1992*)*; *Germain,* 433 So. 2d at 118. In the context of other acts evidence, the standard for unfair prejudice is not whether the evidence harms the opposing party’s case, but rather whether the evidence tends to influence the outcome of the case by “improper means.” *Old Chief*, 519 U.S. 172 (1997); *United States v. York*, 933 F.2d 1343 (7th Cir. 1991); *Johnson*, 516 N.W.2d at 468; *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1990); *Holland*, 346 N.W.2d at 309. Weinstein and Berger have commented:

“[U]nfair prejudice, as used in Rule 403 is not to be equated with testimony simply

adverse to the opposing party. Virtually all evidence is prejudicial or it isn’t material.

The prejudice must be ‘unfair’.” The Committee’s Notes explain that “unfair

prejudice” means an “undue tendency to suggest decision on an improper basis,

commonly, though not necessarily, an emotional one.” Evidence that appeals to

the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or

triggers other mainsprings of human action may cause a jury to base its decision on

something other than the established propositions in the case. Weinstein and

Berger, Weinstein’s Evidence, 403[03], at 403-29 to 403-39(1987).

Courts have also refused to apply a “heightened prejudice standard” in determining the admissibility of “other acts” evidence. In *Vandervliet,* 508 N.W.2d 114 (Mich. 1993), the Michigan Supreme Court noted that “[n]o authority has been cited for the proposition that the balancing process is other than that required by Rule 403.” As stated by the Wisconsin Supreme Court in an early “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.” *Herde v. State*, 295 N.W. 684, 687 (1941).

Courts have consistently recognized that any potential prejudice which might result from the admission of the “other acts” evidence can adequately be addressed by the use of cautionary instructions to the jury delineating the appropriate manner in which the jury is to consider such evidence. See Huddleston, 485 U.S. 681 (1988); *Powers*, 59 F.3d 1460 (4th Cir. 1995)*; Hadley*, 918 F.2dat 852; *Long*, 574 F.2d 761 (3d Cir. 1978); *Clark,* 507 N.W.2d at 177; *Grande,* 485 N.W.2d 282 (Wis. Ct. App. 1992); State *v. Pharr*, 340 N.W.2d 498 (Wis. 1983). Courts have likewise consistently held that jurors are presumed to follow such cautionary instructions. *Long*, 574 F.2d 761 (3d Cir. 1978).

**B. Specific Case Authority Relating to Other Acts Evidence in Child Abuse Cases**

In 1962, Dr. C. Henry Kempe and his colleagues coined the term “Battered Child Syndrome” (hereinafter referred to as BCS) in an article published in the Journal of the American Medical Association. Dr. Kempe described the battered child as follows:

The Battered Child Syndrome may occur at any age, but, in general, the affected children are younger than three years. In some instances, the clinical manifestations are limited to those resulting from a single episode of trauma, but more often the child’s general health is below par, and he shows evidence of neglect including poor skin hygiene, multiple soft tissue injuries, and malnutrition. One often obtains a history of previous episodes suggestive of parental neglect or trauma. A marked discrepancy between clinical findings and historical data as supplied by the parents is a major diagnostic feature of the Battered-Child Syndrome . . . subdural hematoma, with or without fracture of the skull . . . is an extremely frequent finding even in the absence of fractures of the long bones . . . the characteristic distribution of these multiple fractures and the observation that the lesions are in different stages of healing are of additional value in making the diagnosis. Kempe, Silverman, Steel, Droegmuller and Silver, *The Battered-Child Syndrome*, 184 JAMA 17 (1962).

By its definition, BCS encompasses a diagnosis that looks at “other acts” resulting in injury to the child in determining whether the present injuries are the result of abuse or some other more benign cause.

BCS is an accepted medical diagnosis, and expert testimony on BCS is routinely admitted in the courts. *See*, e.g., *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L. Ed. 2d 385 (1991); *United States v. Boise*, 916 F.2d 497, 503-04 (9th Cir. 1990); *Commonwealth v. Lazarovich*, 547 N.E.2d 940 (Mass. App. Ct. 1989); *Schleret*, 311 N.W.2d 843 (Minn. 1981); *See generally* Annotation, *Admissibility of Expert Medical Testimony on Battered Child Syndrome*, 98 A.L.R. 3d 306 (1980). *See also State v. Moorman*, 670 A.2d 81 (N.J. Super. Ct. App. Div. 1996) and *State v. Hernandez*, 805 P.2d 1057 (Ariz. Ct. App. 1990) (listing cases from various jurisdictions admitting BCS).

Virtually every appellate court to consider BCS has approved it. (See cases and annotations cited above). The courts have also recognized that BCS is not novel scientific evidence and should not be subjected to the *Frye* test. *See* *Boise,* 916 F.2d at 503; *Moorman*, 670 A.2d at 85-86. Physicians making the diagnosis that a child suffers from BCS are generally permitted to state that the child is a victim of physical abuse, based upon the medical evidence supporting that diagnosis. *See Moorman*, 670 A.2d 81 (N.J. Super Ct. App. Div. 1996); *State v. Phillips*, 399 S.E.2d 293, 298 (N.C. 1991); *State v. Jones*, 801 P.2d 263 (Wash. Ct. App. 1990). That medical evidence includes both the nature of the physical injuries the child has, as well as the explanation offered for their cause.

In *State v. Mulder*, 629 P.2d 462, 463 (Wash. Ct. App. 1981), the court stated that BCS is a diagnosis “within the area of expertise of physicians whose familiarity with numerous instances of injuries accidentally caused qualifies them to express with reasonable probability that a particular injury or group of injuries to a child is not accidental or is not consistent with the explanation offered therefor.” Courts have also recognized that testimony on BCS is “helpful” to a jury because jurors as laymen lack the medical expertise to determine whether the child’s injuries are the result of accidental causes or are intentionally inflicted. *Hernandez,* 805 P.2d at 1060; *McKowen*, 447 N.W.2d at 548; *Toennis*, 758 P.2d 539 (Wash. Ct. App. 1988); *Commonwealth v. Rogers*, 528 A.2d 610 (Pa. Super. 1987); *Tanner*,675 P.2d at 542.

Admissibility of testimony on BCS, or a proper diagnosis of BCS, does not depend on the child evidencing all of the criteria or factors listed by Dr. Kempe’s definition. Several courts have held that this definition does not establish “elements” which must all be present, the absence of which precludes a diagnosis or admissible expert testimony. *See*, e.g., *Moorman*, 670 A.2d 81 (N.J. Super. Ct. App. Div. 1996); *People v. Ewing*, 140 Cal. Rptr. 299 (Cal. Ct. App. 1977) (holding that BCS denotes repeated, sometimes serious, injuries inflicted over span of time, with their nature, severity, and number being such as to preclude inference of accident); *People v. Henson*, 304 N.E.2d 358, 364 (N.Y. 1973) (categorizing Dr. Kempe’s diagnostic components as inclusive). Similarly in *Schleret,* the court held that the symptoms needed to support a diagnosis of BCS are multiple, non-accidental injuries inflicted on a child which are in various stages of healing. *Accord* *Rogers,* 287 N.W.2d 610 (Pa. Super. Ct. 1987). Examples of these types of successive injuries include bruises, burns and fractures but the child need not suffer more than one of those successive injuries to permit the diagnosis. The absence of burns and fractures, for example, does not mean that a repeatedly bruised child is any less a victim of BCS. *Schleret*, 311 N.W.2d at 844. In *Holland,* 346 N.W.2d 302 (S.D. 1984), the court held that the exclusion of BCS evidence on the basis that all of these diagnostic criteria were not present was error.

The primary purpose of expert testimony on BCS is to establish that the child’s injuries were not accidental. *See McGuire*, 502 U.S. 73-74; *Boise,* 916 F.2d at 503; *Lazarovich,* 547 N.E.2d at 943; *Schleret,* 311 N.W.2d at 844. A finding of non-accidental injury can be premised partially or entirely on expert testimony of BCS. *See* *People v. Pope*, 660 N.Y.S.2d 466 (N.Y. App. Div. 1997); *State v. Jurgens*, 424 N.W.2d 546, 555 (Minn. Ct. App. 1988).

Admission of expert testimony on BCS does not require proof that the defendant personally inflicted the injuries on the child. In *McGuire*, the Supreme Court held:

When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted those injuries… Because the prosecution had charged McGuire with second-degree murder, it was required to prove that Tori’s death was caused by the defendant’s intentional act. Proof of Tori’s battered child status helped to do just that; although not linked by any direct evidence to McGuire, the evidence demonstrated that Tori’s death was the result of an intentional act by someone, and not an accident... We conclude that the evidence of prior injuries presented at McGuire’s trial, whether it was directly linked to McGuire or not, was probative on the question of the intent with which the person who caused the injuries acted. *McGuire,* 502 U.S. at 73-74, (citations omitted).

The Court went on to note:

The proof of Battered Child Syndrome itself narrowed the group of possible perpetrators to McGuire and his wife, because they were the only two people regularly caring for Tori during her short life. See *People v. Jackson*, 95 Cal. Rptr. at 921 (Cal. Ct. App. 1971). (“Only someone regularly ‘caring’ for the child has the continuing opportunity to inflict these types of injuries. An isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months.”)  *McGuire,* 502 U.S. at 77.

This holding represents a significant distinction from the Court’s earlier precedent in *Huddleston*, which held that “other act” evidence may be admitted “only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.” *Huddleston*, 485 U.S. at 689-90. Under the *McGuire* rationale, evidence of prior injuries will be admissible to establish that the present injuries were not the result of an accident, and to establish that the defendant may be the person who caused these injuries, if the prosecution can establish that the defendant had access to the child during the time period in which the injuries occurred. Obviously, if the defendant did not have access to the child during the time period when the prior injuries occurred, evidence of the prior injuries would certainly not tend to prove that the defendant was responsible for causing them by narrowing down the “group of possible perpetrators” who could have repeatedly injured the child. Nor would it tend to prove that the current injuries were caused by a deliberate act rather than by accident. If the prior acts cannot be tied to the defendant at all they cannot help establish his *mens rea* as the agent for the current injuries.

In the present case, the fact that the defendant did act as a caretaker for both Heidi and Mina during the time period when they sustained their repeated sets of injuries is sufficient under the holding in *McGuire* to admit the evidence of these patterns of injuries to establish that both children were abused, and that the defendant is the person most likely to have abused them. Conversely, had the defendant been out to sea on military duty at the time when Heidi’s injuries were caused, evidence of her injuries would have no probative value in establishing the defendant as the agent for Mina’s injuries. Neither would such evidence help establish the defendant’s *mens rea* for Mina’s injuries, unless it were shown that the defendant, when he returned from duty, gained “knowledge” of how Heidi came to be injured and that he subsequently engaged in similar acts with Mina. Here, however, the evidence tends to show that the defendant engaged in a repetitive series of abusive acts with two different children entrusted to his care. Such evidence speaks volumes regarding the *mens rea* requirements for the offenses with which he is charged, provides relevant evidence of his consciousness of guilt and undermines the credibility of his explanations for the events resulting in the injuries to these two children.

The Court in *McGuire* also ruled that evidence regarding BCS was admissible, and relevant, regardless of whether the defendant at trial claimed the child died accidentally, or disputed the government’s evidence that the child was a victim of abuse.

. . . The prosecution must prove all the elements of a criminal offense beyond a reasonable doubt. In this second degree murder case, for example, the prosecution was required to demonstrate that the killing was intentional . . . By eliminating the possibility of accident, the evidence regarding Battered Child Syndrome was clearly probative of that essential element, especially in light of the fact that McGuire had claimed prior to trial that Tori had injured herself by falling from the couch. The Court of Appeals, however, ruled that the evidence should have been excluded because McGuire did not raise the defense of accidental death at trial. But the prosecution’s burden to prove every element of the crime is not relieved by a defendant’s tactical decision not to contest an essential element of the offense. In the federal courts “[a] simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged.” . . . The evidence of Battered Child Syndrome was relevant to show intent and nothing in the Due Process Clause of the Fourteenth Amendment requires the State to refrain from introducing relevant evidence simply because the defense chooses not to contest the point. *McGuire*, 502 U.S. at 74.

The state courts have articulated similar positions. In *People v. Evers*, 12 Cal. Rptr. 2d 637 (Cal. Ct. App. 1992) the court noted the prosecution must establish that the injuries did not occur accidentally. Proof of this element of the offense may be particularly difficult when the defendant does not stipulate the injuries occurred through deliberate abuse and the evidence is largely circumstantial. Consequently, even where the defense does not present evidence challenging the deliberate causation for the injuries, evidence of other injuries is still relevant and admissible to establish this element. *Accord* *Hadley,* 918 F.2dat 852; *Foster,* 623 P.2d 1360 (Kan. 1981). In *State v. Tanner*, 675 P.2d 539, 543 (Utah 1983), the court commented that “[e]xpert testimony as to the types of injuries, their size, location and severity, together with evidence of their varying age and progress in healing, allows the lifeless or preverbal victim to testify in the only way possible.”

Several pre*-McGuire* decisions restricted the admissibility of BCS evidence, holding that such evidence was admissible only to establish that the child’s injuries were non-accidental and not allowing the admissibility of such evidence to establish identity of the abuser. See *McKowen*, 447 N.W.2d 546 (Iowa Ct. App. 1989)*;* *Durfee*,532 N.W.2d 778 (Minn. 1982); *State v. Wilkerson*, 247 S.E.2d 905 (N.C. 1978). The holding in *McGuire*, however, clearly undermines the authority of these cases, since *McGuire* specifically indicates that evidence of BCS is relevant on the issue of identity, by narrowing the class of potential abusers who could contribute to the child’s injuries over a prolonged period of time.

At least one post-*McGuire* decison has reached a similar conclusion, although it did not rely on or cite to *McGuire* in support of its holding. In *Moorman*, 670 A.2d at 88, the court stated:

The fact that there was no direct evidence linking defendant to the battery, or that [the

doctor] could not identify the perpetrator of the abuse is irrelevant. To admit its prior

bad act evidence to disprove defendant’s contention, the State was only obligated to

produce clear and convincing evidence of defendant’s involvement in [the child’s] death.

The jury could have fairly inferred that a vicitm of BCS could not have sustained repeated injuries of a similar nature except at the hands of her primary caretaker. *See* *People v. Henson*, 304 N.E.2d at 364; *People v. Jackson*, 95 Cal. Rptr. 919 (Cal. Ct. App. 1971).

The court also noted that the defendant’s admissions that she was the child’s sole caretaker and her other incriminatory statements that she didn’t intend to kill the child provided circumstantial proof that she caused the child’s death.

In *United States v. Boise,* 916 F.2d 497 (9th Cir. 1990), another pre-*McGuire* decision, the Court recognized that BCS evidence could circumstantially establish the identity of the person who abuses the child. The court noted several factors which circumstantially can demonstrate that multiple injuries incurred by a child over a protracted period of time are admissible, both to establish non-accidental causes for the injury, and to establish the identity of the abuser. Those factors included whether the defendant was a primary, or joint caretaker during the time period when the injuries occurred, whether the defendant acknowledged causing some of the injuries which are similar in nature, or caused by similar mechanisms to unidentified injuries for which there was not an admission, and evidence that another caretaker did not cause the injuries. Consequently, even though there was not direct evidence establishing that the defendant in *Boise* caused all of the injuries to the child the Court upheld admissibility of all of those injuries under a diagnoses of BCS under these factors, finding sufficient circumstantial evidence to demonstrate the defendant was the source for those injuries.

The Minnesota Supreme Court in *Schleret,* 311 N.W.2d 843 (Minn. 1981), similarly noted:

Much of the evidence that can be gathered to show an instance of “Battered Child

Syndrome” is circumstantial. In allowing such evidence to support a conviction, this

court has recognized that those felonious assaults are in a unique category. Most cases

of felonious assault tend to occur in a single episode to which there are sometimes

witnesses. By contrast, cases that involve “Battered Child Syndrome” occur in two or

more episodes to which there are seldom any witnesses. In addition, they usually

involve harm done by those who have a duty to protect the child. The harm often

occurs when the child is in the exclusive control of the parent. Usually the child is too

young or too intimidated to testify as to what happened and is easily manipulated on

cross-examination. That the child in the instant case did not survive, strengthens, rather

than diminishes, the law’s concern for the special problems of prosecuting a defendant

in a “battered child” case. As background, direct testimony of earlier episodes of harm

done to the child is admissible. Crucial to identifying such cases are the discrepancies

between the parents’ version of what happened to the child when the injuries occurred

and the testimony of medical experts as to what could not have happened, or must have happened, to produce the injuries. *Schleret,* 311 N.W.2d at 844-45.

The holding in *Schleret* clearly recognizes that evidence of BCS frequently provides circumstantial evidence of the “class” of potential perpetrators who could have abused the child. The court’s decision also underscores the importance of admitting such evidence in child abuse cases, given the lack of potential eyewitnesses to the assaultive behavior, and the need to establish identity through other means.  *See also Leight,* 815 F.2d 1297 (7th Cir. 1987) (and authorities cited therein); *Pope*,660 N.Y.S.2d 466 (N.Y. App. Div. 1997) (stating that admission particularly appropriate because crime occurred within “privacy of the home”); *Moorman*, 670 A.2dat 81(noting that abuse occurs while in parental custody beyond public view and parent’s “accident” explanation cannot be disproven without evidence of pattern or history of abuse); *Basir*, 578 N.Y.S.2d 603 (N.Y. App. Div. 1992); *Evers,* 12 Cal. Rptr. 2d 637 (Cal. Ct. App. 1992)*; State v. Johnson*, 400 N.W.2d 502 (Wis. Ct. App. 1986); *Germain,* 433 So. 2d at 118 (recognizing importance of such evidence in physical abuse cases which are largely circumstantial); *Foster,* 623 P.2d 1360 (Kan. 1981); Note, The Admissibility of Prior Crimes Evidence in Prosecutions for Child Abuse, 31 Wash. & Lee L. Rev. 207, 220-21 (1974) (commenting that need for evidence is enhanced in child abuse cases by “private nature of the crime”).

These positions parallel the Wisconsin Supreme Court and Court of Appeals’ holdings providing “greater latitude” of other acts evidence in sexual abuse prosecutions involving young children. *See* *Mink,* 429 N.W.2dat 104; *Friederich,* 398 N.W.2d at 771, 774-78; *Fishnick*, 378 N.W.2d at 277-78 (explaining rationale for rule).

Where there is child abuse, there will invariably be secrecy. The great disparity of

power and control between the abuser and the child assures that there will be little,

if any, direct evidence. Even in cases where the victim survives, the child’s age and vulnerability make it unlikely that he or she could be expected to testify competently.

In these cases, it is probable that evidence of prior abusive conduct by a caretaker

may be the only available link between the specific nature of the child’s injuries and

the caretaker who has offered either no explanation, or an inadequate explanation

for those injuries. *Tanner,* 675 P.2d at 547.

*See also* *Leight,* 818 F.2d at 1304, suggesting that the difficult circumstances of proving child abuse “suggest an even wider discretion than usual in admitting…other acts of abuse…”

These principles are echoed in other decisions. In *United States v. Bower*, 660 F.2d 527, 529 (5th Cir. 1981), the court noted that evidence of BCS, coupled with proof that the child was in the sole custody of the parent may well permit a jury to infer not only that the child’s injuries were not accidental, but that they occurred deliberately, at the hands of the parent. *See also* *Pope*, 660 N.Y.S.2d 466 (N.Y. App. Div. 1997); *Jurgens*,424 N.W.2d 546 (Minn. Ct. App. 1988); *State v. Moyer*, 727 P.2d 31, 33 (Ariz. Ct. App. 1986) (holding that proof of BCS and that injuries occurred while child was entrusted to care of defendant is sufficient to uphold conviction); *Henson,* 304 N.E.2d at 364. And in *Phillips* the North Carolina Supreme Court approved a jury instruction that advised if the jury found the child suffered from BCS, this finding permitted an inference that a caretaker inflicted such injuries. *Phillips,* 399 S.E.2d at 299.

Evidence of abusive injuries suffered by other children while in the care of a defendant is likewise frequently admitted to establish the absence of accidental causes for the charged injuries to the alleged victim, and to identify the defendant as the source for such injuries. In both *Teuscher*, 883 P.2d 922 (Utah Ct. App. 1994) and *Phillips*, 399 S.E.2d 293 (N.C. 1991), evidence of injuries to children other than the victim, and acts of inappropriate caretaking by the defendant toward other children were admitted to establish identity and the absence of accident. *Accord* *Long*, 574 F.2d 761 (3d Cir. 1978); *Clemens v. State*, 610 N.E.2d 236 (Ind. 1993); *Longfellow*, 803 P.2d 848 (Wyo. 1990); *Grabill v. State*, 621 P.2d 802 (Wyo. 1980).

Similarly in *United States v. Woods*, 484 F.2d 127, 133 (4th Cir. 1973), the Court stated:

Only when all of the evidence concerning the nine other children and Paul is considered collectively is the conclusion impelled that the probability that some or all of the other deaths, cyanotic seizures, and respiratory deficiencies were accidental or attributable to natural causes was so remote, the truth must be that Paul and some or all of the other children died at the hands of the defendant. We think also that when the crime is one of infanticide, or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime. A child of the age of Paul and of the others about whom evidence was received is a helpless, defenseless unit of human life. Such a child is too young, if he survives, to relate the facts concerning the attempt on his life, and too young, if he does not survive, to have exerted enough resistance that the marks of his cause of death will survive him. Absent the fortuitous presence of an eyewitness, infanticide or child abuse by suffocation would largely go unpunished.

In *Woods*, evidence of multiple instances in which children under the defendant’s care suffered cyanotic deaths, or seizures, was admitted by the trial court to establish “plan,” “absence of mistake or accident,” and “identity.” On appeal, the court upheld admissibility to establish the defendant’s identity as the perpetrator of the offense, under the “signature” exception, and to establish lack of “accident.”  *Woods,* 484 F.2d at 134. However, the court went on to state that “simply fitting evidence of this nature into an exception heretofore recognized is, to our minds, too mechanistic an approach.”  *Id*. at 134. Quoting from McCormick, the court stated:

[S]ome of the wiser opinions (especially recent ones) recognize that the problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other crimes evidence in the light of the issues, and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.  *Id.*

The court went on to note:

As we stated at the outset, if the evidence with regard to each child is considered separately, it is true that some of the incidents are less conclusive than others; but we think the incidents must be considered collectively, and when they are, an unmistakable pattern emerges. That pattern overwhelmingly establishes defendant’s guilt.  *Id*. at 135.

Evidence of prior abusive injuries to a child or other children can also establish the defendant’s subjective awareness or “knowledge” of the risks of harm associated with abusive conduct. In *People v. Evers*, 12 Cal. Rptr. 2d 637 (Ca. Ct. App. 1992) the court held that evidence of the defendant’s prior acts of abuse to another child caused by violent shaking were properly admitted to establish his knowledge that such injuries resulted from non-accidental means, and his awareness that serious injuries or death could result from violent shaking. Such evidence also established the potential need for immediate medical attention resulting from this behavior and the absence of accidental causes for the present victim’s injuries.

In *United States v. Lewis*, 837 F.2d 415 (9th Cir. 1988), the court upheld the admission of prior acts involving the defendant’s striking of his child in order to negate any inference that the blows producing the child’s death were a result of an isolated incident of overreaction, as well as to establish that the defendant had notice that he was capable of potentially inflicting serious harm to the child. In *Rhodes v. State*, 717 P.2d 422 (Alaska Ct. App. 1986), the defendant claimed his daughter sustained a skull fracture when he threw her onto a waterbed. The defendant was charged with assault, requiring proof that he acted “under circumstances manifesting an extreme indifference to the value of human life.” Evidence that the defendant’s son had previously died of a skull fracture while under the defendant’s care was admitted to establish the defendant’s “knowledge” that throwing his daughter could result in similar grave injuries, thereby establishing the statute’s requisite *mens rea*. *Accord*, *People v. Wong*, 588 N.Y.S.2d 119, *rev’d on other grounds* 619 N.E.2d 377 (1993)(concerning joint prosecution of husband and wife; evidence other children abused while in defendants’ care relevant to establish awareness of risk of harm if child left unattended with either defendant); *People v. Harris*, 580 N.E.2d 185 (Ill. Ct. App. 1991).

Evidence of prior abusive injuries to the same child or to a different child is also supported by the “Doctrine of Chances,” (hereinafter referenced as DOC). The reasoning underlying this doctrine 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 Nev. 1979)).

The basic idea is that although two different children may, at different times, be seriously injured or killed while in a person’s care, and that this may happen without

his intentional conduct, as the number of such incidents grows, the likelihood that his conduct was unintentional decreases. It is merely a matter of probabilities. *People v. Brown*, 557 N.E.2d 611, 621 (Ill. App. Dist. 1990) (quoting *Donahue,* 549 A.2d at 127).

Therefore, evidence of other instances of the same result tends to prove that the instances under consideration came about through human agency, i.e., through an *actus reus*, rather than by mere chance. E. Imwinkelried, Uncharged Misconduct Evidence sec. 4:03 (1984). Professor Imwinkelried further comments that other acts are admitted under the DOC to rebut the claim of “accident or mistake” in one of two instances: (1) when the defendant admits performing the act but claims to have done so with innocent intent, i.e. he confesses the *actus reus* but claims he did so accidentally, inadvertently or mistakenly, or (2) when the defendant concedes the act occurred, e.g. the death, but claims it did not result from human agency or his own conduct.  *Id*.

The principles of the DOC in child abuse cases have been around for over a century. In 1876 the New Hampshire Supreme Court noted, “So, that a child should be suffocated in bed by its mother might happen once, but several similar deaths in the same family could not reasonably be accounted for as accidents.” *State v. Lapage*, 57 N.H. 245, 294 (1876). The DOC has received increasing attention in legal scholarship as a basis for admission of “other acts” evidence, especially in child abuse cases. See e.g., Mark Cammack, Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Reconsidered, 29 U.C. Davis L. Rev. 355 (1996); David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 Kent L. Rev. 15 (1994).

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, 323-24 (Or. 1986) (citing W. Imwinkelreid, Uncharged Misconduct Evidence, §5.05 at 10 (1984)). *Accord*, *York,* 933 F.2d at 1350.

Children naturally suffer minor scrapes and bruises, and occasionally are seriously injured as a result of an accident. However, as the number of such injuries increases, especially over a relatively short period of time, the likelihood that such injuries are the result of human design rather than accident increases.

The sheer number of injuries suffered by the victim over a relatively short period of time would have led common persons to conclude that the charged injury was less likely to have been accidental, thus rebutting the inference of possible accident that arose from the testimony elicited . . . *United States v. Merriweather*, 22 M.J. 657, 661 (A.C.M.R. 1986).

The DOC does not require that the prosecution establish the defendant as the source of the prior injuries before they may be admitted to establish the charged act was deliberate and not the result of accident. The relevance of the prior injury evidence under the DOC stems from the fact that it tends to prove that the charged act was deliberately caused by someone.

Appellants also erroneously argue that the bite mark evidence and evidence of

other bruises were incompetent because there was no prior establishment . . .

that either [defendant] was responsible for each of the prior injuries.

Admissibility of the bite mark and other bruise evidence does not depend on

connecting either defendant to the infliction of the injury. It is independent,

relevant circumstantial evidence tending to show that the child was intentionally,

rather than accidentally injured on the day in question. Proof that a child has

experienced injuries in many purported accidents is evidence that the most recent

injury may not have resulted from yet another accident. *Bludsworth v. State*, 646 P.2d 558, 559 (Nev. 1982).

Rather, the prosecution need only establish that the defendant had the opportunity to inflict the prior injuries. *Accord* *McGuire,* 502 U.S. at 76-77.

When a jury must decide who caused a child’s injures, and whether they were intentional or accidental, evidence of prior maltreatment of a child under the defendant’s care is relevant and admissible to show that the victim’s injuries were caused intentionally, not accidentally, even if the defendant claims he was not involved in causing them. *McGuire,* 502 U.S. at 75-77; *Leight,* 818 F.2d at 1303; *Brown*, 557 N.E.2d at 618-23; *Drew v. State*, 771 P.2d 224, 229 (Okl. Crim. App. 1989); *Drew v. State*, 771 P.2d 224, 229 (Okl. Crim. App. 1989); *State v. Riggsbee*, 323 S.E.2d 502, 506 (N.C. Ct. App. 1984); *State v. Morosin*, 262 N.W.2d 194, 195-97 (Neb. 1978); *Foster,* 623 P.2d at 1362-63. *See also* *State v. Hughes*, 457 N.W.2d 25, 26-27 (Iowa Ct. App. 1990) (stating that prosecution permitted to present evidence of prior incident where child was injured and defendant claimed injury was result of accident, admitted to show present injury was not result of accident as defendant explained).

The DOC, however, also tends to establish identity in much the same fashion as evidence of BCS does. That is, repeated incidents of injury to a child under the defendant’s control lessens the probability that someone other than the defendant is the source for those injuries. This is especially true where the defendant offers an explanation for such injuries inconsistent with the medical explanation or diagnosis. As the BCS itself provides, “a marked discrepancy between clinical findings and historical data as supplied by the parents is a major diagnostic feature of the battered child syndrome.” *See also* *State v. Butterfield*, 874 P.2d 1339, 1345-46 (Or. Ct. App. 1994) (noting appropriateness of doctor’s testimony that one of classic diagnostic indicators of BCS is that child’s caretakers change their explanation for child’s injuries); *Hernandez,* 805 P.2d 1057 (Ariz. Ct. App. 1990) (noting the importance of discrepant histories in BCS); *Schleret*, 311 N.W.2d 843 (Minn. 1981). Proof that a child suffers from BCS may show that a parent’s explanation for the child's injuries is a fabrication.  *United States v. Bowers*, 660 F.2d 527, 529 (5th Cir. 1981) (citing *Henson,*  304 N.E.2d at 364).

The fact that a caretaker provides a discrepant or changing history as an explanation for the child’s injuries establishes the defendant’s identity as the source for those injuries in several ways. First, only someone who was present when the injuries occurred would realistically be in a position to offer an explanation for their cause. Second, innocent explanations, which are offered to conceal the abusive nature of the conduct producing the injury, tend to circumstantially establish identity through evidence of “consciousness to guilt.”  *Evers*, 12 Cal. Rptr. 2d at 644-45; *Commonwealth v. Lazarovich*, 547 N.E.2d 940 (Mass. App. Ct. 1989); *Commonwealth v. Merola*, 542 N.E.2d 249 (Mass. 1989); *Henson,* 304 N.E.2d 358 (N.Y. 1973)*.* Finally, the more times a single caretaker offers explanations for separate injuries suggesting an accidental causation, the less likely it is that such explanations are reliable, and the more likely that caretaker is attempting to conceal their own wrong doing in producing the injury.

**ARGUMENT**

The case authority cited above supports admissibility of the evidence involving the prior injuries to H. to establish “identity,” “knowledge,” “absence of mistake or accident,” “consciousness of guilt,” and “credibility” pursuant to Section 940.04(2), Wis. Stats., for the charged injuries involving M. The decisions cited above establish that evidence of BCS involving Heidi would tend to identify the defendant as the source for the multiple injuries observed in M. The defendant’s presence as a caretaker, having access to both H. and M. during the relative time periods in which they incurred their injuries, the fact that both children sustained multiple traumatic injuries over protracted periods of time, and the fact that these children suffer similar types of serious injuries including fractures, substantially restricts the class of “potential perpetrators” substantially, which tends to identify the defendant as the agent for these injuries. This fact is buttressed by the defendant’s own admissions to causing some of the injuries to M., and his admission involving both H. and M. as related to J.L.

The defendant’s admissions to J.L. qualify for admission independently of any separate evidence of H.’s injuries, pursuant to Wis. Stat. Section 908.01(4)(b)1, since they are admissions by a party opponent. However, independent evidence of H.’s injuries, including medical testimony that H. suffered from BCS, would corroborate the admissions made by the defendant to J.L. and would circumstantially corroborate the inference that the defendant was the perpetrator of the injuries to both children. The decisions in *McGuire*, *Moorman*, *Schleret*, and *Boise* discussed above also recognize that it is not necessary that evidence of BCS establish identity to the exclusion of all other individuals.

Evidence of the prior acts involving H. also establishes that M.’s injuries are non-accidental in nature. As these decisions note, it is immaterial that the defendant does not contest whether M.’s injuries are accidental or abusive, since the State bears the burden of proof in this regard. Nevertheless, the defendant’s statements to Deputy P.H., and the conflicting nature of his representations to J.L. indicate that the nature and circumstances of how M. sustained her injuries will be a material issue in the defendant’s trial. Similarly, although the defendant is charged with reckless causation of great bodily harm, as opposed to intentional conduct, the State must still establish the requisite criminal *mens rea* elements for the charged offenses. In the present case, M. suffered numerous internal injuries consisting of multiple subdural hematomas, and over twenty fractures. However, none of those serious physical injuries resulted in outward manifestations of observable injury other than her eye crossing, as indicated in the defendant’s statements. The State, however, must establish that the defendant had a subjective awareness of the risks associated with any abusive conduct towards M.

As these cases demonstrate, such awareness may be established by the defendant’s admissions, his visual observations of physical signs of injury, and medical testimony regarding the degree of force necessary to produce the injuries. This awareness can also be demonstrated circumstantially in the present case by evidence of the prior injuries to H., which are of a similar nature, and which resulted in significant medical treatment and removal of H. from the care, custody and control of her mother and the defendant. The defendant’s awareness of his conduct towards H. tends to establish his subjective awareness of the risk of similar acts of abusive behavior directed towards M., especially where she is a more physically vulnerable child due to her age and size. Consequently, evidence of the prior injuries, and resulting medical and court interventions involving H., provide circumstantial evidence of the defendant’s requisite state of mind involving the current charges.

For the reasons articulated above, the prior acts evidence is also relevant in establishing the credibility of the witnesses, and for establishing the defendant’s consciousness of guilt, especially as it relates to the defendant’s statements to law enforcement officials, medical personnel, and to J.L., to whom the defendant made admissions.

For the foregoing reasons, the State respectfully moves the court for admissibility of evidence concerning the injuries to H., under the provisions of Wis. Stat. Section 940.04(2)

Dated:

Respectfully submitted,

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Assistant District Attorney