STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2012AP839-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CURTIS E. FORBES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR COLUMBIA COUNTY, THE HONORABLE ALAN J. WHITE PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State agrees with defendant-appellant Curtis Forbes that neither oral argument nor publication are warranted because the issues presented can be resolved by applying established legal principles to the facts.

SUPPLEMENTAL STATEMENT OF FACTS

The State submits the following supplemental facts that either do not appear in Forbes's brief or warrant emphasis because of their relevance to the issues on appeal.

Initial murder investigation, 1980-81. Eighteen-year-old Marilyn McIntyre's body was discovered by her husband Lane early on March 11, 1980, after he returned to their apartment in Columbus, Wisconsin from his overnight work shift (161:434-37). Marilyn had been beaten and strangled, and a knife from their kitchen was in her chest (160:31; 164:1230).[1] The couple's three-month-old baby Christopher was unharmed and quiet in his room when Lane discovered Marilyn's body (161:437). After conducting an autopsy, the forensic pathologist concluded that Marilyn could have died anytime between 10:45 a.m. on March 10 and 7:15 a.m. on March 11 (160:34).

Police investigated the murder in 1980 and 1981 and considered several persons of interest, including Forbes (160:188), but did not make any arrests or file charges until after they reopened the case in 2008.

Reopened investigation, 2008-09. As part of the reopened investigation, on March 24, 2009, officers executed a warrant to collect DNA samples from Forbes (1-3). The officers joined Forbes in his house at approximately 6:40 a.m., where his wife Debra was present (149:74; 163:859). Shortly before those officers escorted Forbes out, two additional officers, Detectives Garrigan and Yerges, arrived at the house, saw people standing in the kitchen, and entered (150:250-51). After the other officers left with Forbes, Garrigan and Yerges

[1] Many of the people involved in this case share last names by family or marriage and have changed names since 1980. When describing trial testimony, the State generally uses the last name that each witness used to self-identify at trial. Where necessary to avoid confusion, however, the State refers to individuals with common last names by their first names.

remained, approached Debra, and asked her if there was a place where they could sit and talk (150:252; 171:Exh. 18; R-Ap. 101-02).[2] Debra led them to a breakfast nook (150:252, 298-99).

At first, Debra seemed upset with the situation and the officers' presence (163:859). However, Yerges testified that moments after he and Garrigan sat down, they explained that they had questions about what happened in 1980 and wanted to explain the situation to her (164:1065). At that point, "she became docile . . . . She was in agreement or was more at ease with that" (164:1065).

Garrigan and Yerges acknowledged that their interview approach was to build trust, assure Debra that she was safe, and establish that they were there to assist her (150:272). Moreover, they used particular questions and interview techniques, such as telling Debra that Forbes was not returning and intimating that they had more evidence against him than they did (150:280, 283-84), understanding that Debra was unlikely to be forthcoming: After talking to members of Debra's family, Garrigan believed that she feared Forbes and would not provide information unless she felt safe from her husband (150:287-88). Similarly, Yerges believed that Debra was the submissive half of a power-and-control relationship with Forbes (164:1076).

After about two hours, Debra's adult daughter Michelle joined them and sat with Debra for the rest of the interview holding her hand (150:208-09; 164:1104-06). There were also multiple breaks in the interview where Debra moved around the house, answered her telephone, ran her business, fed animals, and used the bathroom (150:291-92; 164:1104; 171:Exh. 18; R-Ap. 101-02). At several points in the interview, Marvin Dilley, who drove trucks for Debra's business, entered and left the house,

[2] Yerges created a timeline of events occurring during the interview (171:Exh. 18). The State attaches it to this brief for the court's convenience (R-Ap. 101-02).

had private conversations with Debra, talked to the detectives, took phone calls, and made preparations for his trucking run that morning (171:Exh. 18; R-Ap. 101-02). Garrigan and Yerges were in the house for nearly seven hours, but the questions and conversation took an estimated five of them (150:306; 164:1046).

Four-and-a-half hours into the interview, Debra told police that when Forbes arrived at her parents' house on March 11, 1980, she saw blood on the left cuff of his shirt: "That's where it was, he had a white shirt on underneath that blue sweater and I saw blood there" (177:Exh. 65).[3]

In the days following the interview, Debra sought advice from Garrigan over the phone and email about how to handle the media, safety, and other issues (150:260-67).

Pretrial motions. On March 30, 2009, based on evidence collected from both the 1980 and the reopened investigations, Forbes was charged with first-degree murder (4).

Both parties filed multiple pretrial evidentiary motions, some of which the court granted for Forbes, and some of which it granted for the State. Two of those latter decisions are at issue on appeal: First, Forbes challenges the court's admission of Debra's statement to police. Second, Forbes sought to admit other-acts evidence supporting the theory that Lane had motive, opportunity, and proximity to the crime. The court admitted some of that evidence, but its exclusion of other pieces is the basis of the second issue on appeal, details of which are discussed in the argument section.

[3] That statement was the only statement from that interview used at trial.

The State's case. In the six-day trial that followed, the State presented significant circumstantial evidence supporting its theory of how and why Forbes killed Marilyn:

- **Motive.** As of March 8, 1980, Forbes and his girlfriend Debra Attleson (now Forbes) had broken up and Debra had moved out of their shared housing into her parents' house (162:699; 163:759-60). The State theorized that in the early morning hours of March 11, 1980, Forbes was "on the prowl" for sex and Marilyn was one of the women he sought (165:2, 10).

  On the night of March 10, Forbes propositioned Rhonda Erikson (then Seidlinger) at a bar, telling her that he had a "pocket full of money" and asking her to run away with him (160:65-66). When she turned him down, he became "very angry" and asked her why (160:68). Erikson reminded him that she was married (160:68). She also asked about Debra and Forbes responded that they had split (160:68) Shortly after that, Forbes tried to kiss Erikson (160:68). Erikson pushed him away and left him (160:68).

  Forbes then left the bar and appeared on Lori Beattie's (then Dilley) doorstep in Fall River at approximately 1:10 a.m. (160:112). Forbes had been unsuccessfully propositioning Beattie for sex in the days leading to that encounter: Two weeks earlier Forbes had arrived at Beattie's home and became physically aggressive trying to kiss and fondle her (160:108, 120). Beattie told Forbes to stop and struggled to push him away (160:108, 120-21). He stopped only when Beattie's brother, Marvin, arrived (160:108). In addition, on March 9, Forbes again visited Beattie's

apartment and again made a pass at her (160:108).

On the March 11 visit, Forbes did not have an opportunity to try to kiss Beattie, because Beattie's boyfriend was there (160:111). Within five minutes, or by 1:15 a.m., Forbes left (160:111-12). No one could account for Forbes's whereabouts between 1:15 and 4:00 a.m., when he arrived at the Attlesons' house.[4]

The State believed that Forbes, having struck out twice, then sought out Marilyn for sex. Forbes and the McIntyres were friends (160:65). Given that Lane worked the night shift, Forbes would have known that Marilyn would likely be at home without Lane and awake with Christopher (160:92; 161:332). In addition, Forbes's brother Bill twice told police—in 1980 and 2008—that Forbes was "sweet on" Marilyn and wanted to have an affair with her (160:138, 145).

- **Opportunity.** The State introduced the following evidence suggesting that Marilyn's death occurred between 3:00 and 3:30 a.m. on March 11: Tom Seidlinger, Lane's then-brother-in-law, drove by the McIntyres' at 12:35 a.m. and noticed that the lights were out; he did not notice whether a dog was outside (161:298-300). He drove by the McIntyres' again at around 3:15 a.m. and noticed a light was on and the McIntyres' dog, Clyde, tied outside (161:299-300).

  The McIntyres' upstairs neighbor Betty Wolf (then Klenz) awoke between 3:00 and

[4] Testimony indicated that the drive from Beattie's apartment in Fall River to the McIntyres' residence in Columbus took 7 minutes; the drive from the McIntyres' to the Attlesons' in Randolph took between 14 and 19 minutes (162:691-93).

3:30 a.m. to Clyde's loud barking (161:316-17). Wolf said that Clyde "sounded like he was very aggravated" and she could feel him tugging hard against the post to which he was tied, as if he was trying to get free (161:316-17). Wolf described Clyde as a normally well-behaved dog that mainly stayed indoors and barked only on occasion (161:315-17). A neighbor living in an apartment adjacent to the McIntyres could customarily hear loud noises occurring within the McIntyres' apartment, but she did not hear Christopher crying that late evening and following morning (161:343).

Lane stated that it took him about 15 minutes to get to or from his job (161:436-37). His timecard indicated that he punched in to work at 10:47 p.m. on March 10 (161:436). According to testimony, employees were permitted three breaks during a shift—1:00, 3:00, and 5:00 a.m. (164:1155). Employees did not clock out and were not permitted to leave the premises for breaks (164:1188). Lane's shift manager recalled seeing Lane resting in the break room during the 3:00 a.m. break and stated that he would have noticed if Lane had left for more than 20 minutes during his shift (161:286, 290).

Lane's timecard indicated that he punched out of work at 7:01 a.m. (161:436). Wolf stated that she heard Lane banging on her door at 7:15 a.m. to alert her that he found Marilyn murdered (161:318).

- **Intent.** The scope and extent of Marilyn's injuries by beating, strangulation, and stabbing showed an intent to kill. *See* 160:25, 31, 36.

Additionally, the State set forth substantial circumstantial evidence of Forbes's culpability:

- **Forbes's appearance at the Attleson home.** Shortly after the murder, Debra told police and at least three acquaintances—Cindy Lawton, Lori Beattie, and Rick Dilley—that Forbes arrived at her parents' house in Randolph at 4 a.m. on March 11, 1980 (162:724, 730; 163:766, 802). Debra told police that he was shaking and trembling when he arrived and continued to shake as they tried to fall asleep together (163:822-23); to Dilley, she described Forbes as "agitated" (162:730). Debra also told Dilley that she saw scratches on Forbes's back (162:730-31).

  At trial, Beattie recalled Debra telling her that she saw blood on Forbes's shirt or sweater and that Forbes wanted her to "take care of" his clothing (163:802).

  Dilley, at trial, could only recall Debra saying that Forbes had a "sweater that he needed washed" (162:730). Dilley later confirmed that he had told police in 2008 that Debra had mentioned seeing blood on Forbes's clothes (162:742).

  Lawton testified that Debra told her that Debra's mother washed Forbes's clothes that morning (163:766). Lawton further stated that Debra told her that Forbes provided three different explanations for where he was before 4:00 a.m., first omitting his visit to Beattie's, then acknowledging that visit, and then claiming he could not remember where he was (162:763, 772, 784-85).

  Two days after police took Forbes into custody in 2009, Debra talked to Forbes on the

phone (176:Exh. 74 at 16:12-16:27).[5] In a recording of that call, Forbes denied killing Marilyn, and Debra asked him to explain the "bloody shirt" (*id.*). Forbes repeated that he did not kill Marilyn and that he would "explain all that" but "[n]ot on the phone" (*id.*).

- **Forbes's sudden disappearance.** Before Marilyn's burial on March 14, 1980 (163:940), Forbes left Columbus in Debra's car and with $2,000 from his and his brother Michael's construction business (160:150, 156). Forbes drove to Kenosha, where he left Debra's car (176:Exh. 52). He then made his way to Chicago, where he flew to Louisiana and Florida (163:1005). Forbes did not tell anyone where he was going, but soon after leaving, he mailed letters to his family, Lane, and Debra, stating that he was innocent, but he was leaving because there was too much circumstantial evidence against him (176:Exhs. 51-53). Ultimately, Forbes returned to Columbus within the year, with longer hair and a beard (162:731-32).

- **Forbes's bragging.** Three people testified that Forbes made statements boasting about having murdered a woman or getting away with murder: First, Mary Bailey, who had dated Forbes in the past, recalled that in early 1982, her then-boyfriend Dean Sonnenberg mentioned that a person with whom he worked in construction named "Curt" had revealed that he had gotten "away with murder" (161:268). Bailey understood "Curt" to be Forbes

[5] The transcripts do not reflect the content of audio clips played in court. Forbes's transcription of the contents of the 15-second clip of the jail phone call is accurate. *See* Forbes's brief at 8-9. To clarify, however, the court's admission of the jail phone call is not at issue in this appeal. The only piece of evidence that Forbes claims was admitted in error is Debra's statement to police.

(161:269). Due to past bad experiences with police, Bailey did not approach authorities with the information until 2008 (161:273-74).

Second, Gary Bednar testified that he and his wife Laura visited the Forbes house in 2001 or 2002 (161:451-52). During the visit, Forbes brought up the subject of Gary's past-served conviction for murder (161:453). Forbes then said that Gary did not "know how to [kill someone] and get away with it" (161:453). He then told Gary that he had once given a friend's wife a ride home from a bar, "fucked her," then beat, choked, and killed her (161:453). Forbes then told Gary that he got away with it by leaving the country for a few years (161:453). Laura did not hear the whole conversation, but overheard Forbes tell Gary that Gary did not know how to get away with murder and remark, "[T]hat's the last time that bitch will need a ride home" (161:469).

The Bednars did not immediately report the statement to police because they did not take Forbes seriously and thought he was just trying to impress Gary (161:456, 460, 471). They approached police in 2009 after Marilyn's body was exhumed (161:455, 472).

Third, Shane Thompson met Forbes while Forbes was in custody and the two spent four to six months together in the same cellblock (162:505, 508). Forbes told Thompson that he considered him to be a "friend" and, according to Thompson, described details of the night in question (162:508-09). According to Thompson, Forbes "went to go see the lady" but "[t]hings got out of hand" after she told Forbes she would tell "his wife that [Forbes] was cheating" and Forbes, "in his words, took care of the problem" (162:507). When asked

whether Forbes used the name of the woman he was cheating with, Thompson said that Forbes mentioned the name "Marilyn" (162:508). He testified that Forbes further described taking "care of the problem" as strangling and stabbing her (162:508-09). According to Thompson, Forbes "said he was in overkill" (162:508-09).

Thompson said that Forbes also revealed that another friend arrived at the McIntyres' apartment during the crime and that he could beat the State's case by rolling over on that third party (162:510). According to Thompson, Forbes also said that "sometimes bitches just deserve to die" (162:510).

David Weider, another prisoner in Forbes's cellblock, testified that Forbes asked him to lie that Thompson and another prisoner were conspiring against Forbes and lying to police about what Forbes told them (162:525, 535).

- **Forbes's inconsistent statements to police.** In a police interview immediately after Marilyn's murder, Forbes first denied propositioning Rhonda Erikson, saying that he was only joking around with her (172:Exh. 1). In a later interview, Forbes admitted inviting Erikson to Minneapolis, but said that it was simply an offer for her to ride along as he drove there for business (176:Exh. 21 at 9:14-10:10).

  Forbes told police in days after the murder that he was at Beattie's place between 1:30 and 1:45 a.m. talking with Beattie and her boyfriend and arrived at the Attlesons' at 2:30 a.m. (172:Exh. 1). In a later interview, he denied having gone to Beattie's, knowing her then-boyfriend, or even knowing where she lived (176:Exh. 21 at 11:53-12:45). Forbes also

denied to police that he was attracted to Marilyn (176:Exh. 21 at 21:23-21:56).

- **Forbes's other suspicious behavior.** Two days after the murder, Forbes contacted Beattie to ask what time she told police that he left her house (160:114). When she told him that he was at her house until 1:15 a.m., he complained that "our stories don't fit" and that he told police he was there until 1:45 a.m. (160:115).

  Shortly after police exhumed Marilyn's body in 2008, Forbes purchased a rubber raft, which he returned months later (163:934, 1002-03). During that time, Debra told Forbes's mother that Forbes planned to stage his death by sinking the raft in Lake Michigan and then meeting Debra in Hawaii (163:1003).

Forbes's defense. Forbes's defense strategy was twofold: He argued that there was insufficient evidence to convict him of the crime, and that Lane's culpability cast reasonable doubt as to Forbes's guilt (166:56-59, 112-18). Accordingly, Forbes vigorously cross-examined the State's witnesses, highlighting inconsistencies between their testimony and police reports, grudges that some witnesses had against Forbes, and the likelihood that statements given to police nearly 30 years after the crime were inaccurate.

Specifically, the defense extensively examined Detectives Garrigan and Yerges, highlighting several different interrogation techniques they used with Debra, including misrepresenting that she was potentially a suspect and reasking questions until they received an answer consistent with her past statements and those of other witnesses (163:856, 863-64). Additionally, the jury heard evidence that Lane had motive, opportunity, and proximity to Marilyn's murder, details of which appear in the argument below.

On the same day as the close of evidence and closing arguments, the jury found Forbes guilty of first-degree murder (166:130). After sentencing, Forbes filed postconviction motions for a new trial in the interest of justice and based on insufficient evidence, both of which the court denied (130; 169:75-76). This appeal follows.

ARGUMENT

I. THIS COURT SHOULD AFFIRM FORBES'S CONVICTION BECAUSE THE ADMISSION OF DEBRA'S STATEMENT WAS NOT IN ERROR AND ANY ERROR WAS HARMLESS.

This issue concerns Debra's statement to police in March 2009 that when Forbes arrived at her parents' house on March 11, 1980, she saw blood on his clothing: "That's where it was, he had a white shirt on underneath that blue sweater and I saw blood there." (177:Exh. 65).

Because Detectives Garrigan and Yerges entered the Forbeses' home without consent before they took Debra's statement, the circuit court initially ruled that the statement was obtained in violation of Forbes's Fourth Amendment rights and that the statement was suppressed as fruits of the poisonous tree. However, the court later allowed use of the statement to impeach Debra as a hostile State's witness, because the statement was otherwise voluntary and attenuated from the police illegality.

This case involves an unusual situation in which the defendant may challenge the statement of a non-defendant witness as a violation of that defendant's Fourth Amendment rights. *See, e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 140 (1978) (requiring that defendants show that challenged search infringed upon defendant's Forth Amendment interest). The circuit court permitted use of the statement to impeach Debra, but did so after taking a somewhat circuitous path and by applying multiple tests

implicating Fifth Amendment voluntariness, Fourth Amendment attenuation, and the impeachment exception.

In the end, the circuit court reached the right result. It reversed itself to the extent that it framed the police officers' continued presence in the Forbeses' home as illegal based on Debra's cooperation and the tenor of the interview. Further, it found that her statement, made hours after the officers' illegal entry, was both voluntary and attenuated, and thus admissible.

That said, harmless error provides the narrowest grounds for this court to affirm the circuit court. *See State v. Blalock*, 150 Wis.2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (appellate courts should decide cases on the narrowest possible grounds). Accordingly, the State presents that analysis first. However, it nevertheless follows with an explanation for why the circuit court did not err in admitting Debra's statement.

A. Any error in the court's admitting Debra's statement was harmless.

The majority of constitutional trial errors are subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991). A harmless error is one that occurs "during the presentation of the case to the jury, and [that] may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-08. Admission at trial of evidence obtained in violation of the Fourth Amendment is subject to harmless-error analysis. *See, e.g.*, *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970).

For an error to be harmless, the party benefitting from the error must demonstrate that "'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Martin*, 2012 WI 96, ¶45, 343 Wis.2d 278, 816 N.W.2d 270 (quoting

Neder v. United States, 527 U.S. 1, 18 (1999)); *see also State v. Mayo*, 2007 WI 78, ¶47, 301 Wis.2d 642, 734 N.W.2d 115 (stating that "error is harmless if the beneficiary of the error . . . 'complained of did not contribute to the verdict obtained'") (citation omitted). In other words, this court must be satisfied beyond a reasonable doubt that the jury would have—not simply could have—arrived at the same verdict absent the error. *Martin*, 343 Wis.2d 278, ¶45.

When considering whether the erroneous admission of evidence is harmless, the following seven factors, among others, assist the court's analysis: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) and the overall strength of the State's case. *Martin*, 343 Wis.2d 278, ¶46 (citing *Mayo*, 301 Wis.2d 642, ¶48).

Here, assuming admission of Debra's statement was erroneous, the jury would have reached the same verdict without it.

1. The State infrequently used Debra's statement.

As an initial matter, Forbes misleadingly equates any mention by the prosecutor of blood with a use of Debra's statement. *See* Forbes's brief at 11. The prosecutor could have made general remarks about Debra seeing blood based on other unchallenged evidence to that effect. Accordingly, the focus is on the State's specific use of Debra's statement. [6]

[6]For example, in his opening statement, the prosecutor referenced Debra's seeing blood on Forbes's shirt (159:37). That and other remarks generally referring to blood were not uses of Debra's statement because, the prosecutor could have made those

The State used Debra's statement in no more than six total instances during the six-day trial. The jury heard the statement three times during the State's case-in-chief. The prosecutor called Debra as a witness and asked her about her March 24, 2009 interview with police (163:820). Debra acknowledged that she told police that Forbes was shaking and trembling when he arrived at her parents' house, but denied saying that he was wearing a white shirt under his sweater (163:821-23). Debra also claimed that her statement regarding the blood was inaccurate (163:821-22). The prosecutor then clarified that Debra disputed the accuracy of that particular statement by reading it aloud and receiving Debra's confirmation (163:822).

The prosecutor then called Detective Garrigan, who confirmed that Debra said that she saw blood on Forbes's shirt (163:839). The prosecutor then played the six-second audio clip of the statement (163:839). Garrigan also said that Debra gestured to her left wrist when she made the statement (163:839-40).

After Garrigan was cross-examined on the circumstances surrounding Debra's interview, the State recalled Debra to inquire about her claim that she had said that she had seen "a spot," not "blood" (163:909). At the prosecutor's request, Debra read aloud the portion of the transcript in which she indicated that she saw blood (163:909-10).

In addition, the State referenced the statement three times in closing argument and rebuttal. First, the prosecutor reviewed Beattie's testimony that Debra told her that she had seen blood on Forbes's sweater or shirt (165:48). He noted that Debra's statement to police corroborated that testimony, and argued that her reluctance in acknowledging that information was understandable given her long history and relationship

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statements based on Beattie's testimony, Dilley's statement, and the jail phone call referencing blood on Forbes's clothing.

with Forbes (165:48-49). The prosecutor later re-referenced Debra's statement in summing up the State's case, replayed the clip, and repeated, "She saw the blood there" (165:76).

Finally, the prosecutor rebutted the defense's closing argument that the police forced Debra to make the statement: "A digital recording has Deb Forbes saying, 'Yes, the defendant came to my home, my parents' home. And when he came there at 4 in the morning he had blood on his shirt, and I saw it myself'" (165:82).

In all, the State used the statement itself a half-dozen times. Viewed in the context of the entire trial, the use was infrequent. *See Mayo*, 301 Wis.2d 642, ¶49 (examining the frequency of challenged references in the context of the entire trial). The State's references to Debra's statement take only approximately 9 out of over 1,500 pages of trial transcript, *see id.* (a challenged statement appearing in 7 sentences of 177-page transcript was not frequent). Moreover, as explained in more detail below, the prosecutor did not rely on it so much as to form the "backbone" of the State's case. *Cf. Martin*, 343 Wis.2d 278, ¶47 (use was frequent where the State discussed statements at length in its opening, closing, and case-in-chief).

2. Debra's statement that she saw blood on Forbes's shirt was not important to the jury's determination.

Determining what weight a jury places on a piece of erroneously admitted evidence can be difficult. However, in *Martin*, the supreme court isolated three factors that persuaded it that the challenged evidence—Martin's incriminating statement taken in violation of *Miranda*—was important. First, Martin's statement was the only piece of direct evidence linking Martin to the crime; second, the State highlighted "at length" Martin's

statement in both its opening and closing arguments making it the "backbone" of its case; and third, the jury, soon after beginning deliberations, sought clarification on the content of Martin's statement and the officer's questions prompting it. 343 Wis.2d 278, ¶¶48-51.

Two of the factors that persuaded the court in *Martin* are not present here. First, Debra's statement was not direct evidence; rather, it was one small piece in an avalanche of circumstantial evidence: Forbes was attracted to Marilyn; he made advances toward several women that night; he knew that Marilyn was home without her husband; he had no explanation for his whereabouts between 1:15 and 4 a.m.; he was shaking and trembling at the Attlesons'; two people recall Debra telling them that Forbes had blood on him; Forbes implicitly acknowledged the bloody shirt's existence in the jail phone call; Forbes fled the state soon after the murder; in intervening years, he told several people that he had gotten away with murdering a woman; he gave statements to police inconsistent with those of witnesses; and there was evidence that he planned to disappear again when the investigation reopened in 2008.

Furthermore, unlike in *Martin*, there is nothing to suggest that the jurors in fact relied on Debra's statement. The jurors did not send any questions to the court or seek clarification after starting their deliberations, which began and ended on the same day. *See* 166:127-29. The only question from the jury came during trial, in which it asked for clarification on the rule of spousal privilege based on Debra's testimony (104). The court responded, "The court determines what testimony is permitted based on the law" (104). That question and the court's answer do nothing to suggest what weight, if any, the jury placed on Debra's statement.

To be sure, the State referenced Debra's statement in closing and rebuttal, which also occurred in *Martin*. However, the State highlighted the other unchallenged evidence indicating that Debra saw blood on Forbes's

shirt presented through Beattie and Dilley. *See* 165:48, 75-76. Those two pieces of evidence, plus the jail phone call, would have provided the jury with the same reasonable basis to infer that Forbes had blood on his shirt absent Debra's statement. In sum, Debra's statement was neither the sole source of that evidence nor the keystone of the State's case.

3. Other evidence corroborates Debra's statement; little evidence contradicts it.

Again, the State introduced three unchallenged pieces of evidence corroborating Debra's statement: (1) Beattie's testimony (163:802); (2) Dilley's statement (162:742-43); and (3) the jail phone call between Forbes and Debra (163:943-44). Additionally, there was correspondingly little to contradict Debra's statement. The statement was recorded. Moreover, while Dilley and Beattie had some confusion over details such as what clothing was bloody or whether the blood was related to something else, neither of them contradicted the statement's content.

This is unlike the situation in *Martin* where there was no other evidence to corroborate the challenged statement and thus likely elevated the significance of the challenged admitted statement. Compounding that, there was substantial evidence contradicting Martin's challenged statement, thus increasing the likelihood that the contradictory evidence would have been stronger without the challenged statement. *See* 343 Wis.2d 278, ¶55. That combination is not present here. Rather, with much to corroborate Debra's statement and little to directly contradict it, it likely had minimal impact on the jury's deliberation.

4. The other untainted evidence, taken together, duplicates Debra's statement to police.

This factor overlaps with the second factor above, and, for similar reasons, supports a determination of harmless error. The untainted Beattie and Dilley statements combined with the jail phone call duplicates Debra's statement: Two people reported either hearing or being told by Debra shortly after the murder that Forbes showed up at her parents' house with blood on his clothes. After Forbes was taken into custody, Debra asked Forbes to "explain the bloody shirt" and Forbes responded that he would do so later (176:Exh. 74 at 16:12-16:27). Thus, had Debra's statement never been used, the jury nevertheless would have had a basis upon which to find that Debra saw blood on Forbes's shirt.

5. Debra's statement had little to no impact on contradicting the defense theory.

Forbes's theory at trial was that the evidence was insufficient to support a finding of guilt and that Lane murdered Marilyn before leaving for his work shift on March 10, 1980. Debra's statement had little to no role in the State's rebuttal of either defense theory. As noted in the analyses above, Debra's statement was not only one of several pieces of evidence linking blood to Forbes's clothing, it was also one small piece in a tremendous amount of circumstantial evidence supporting the State's theory. The jury simply did not have to believe that Debra saw blood to reject the defense theory.

6. Debra's statement was not integral to the State's theory or strength of its case.

Taking the final two factors together, the State's case relied on a vast collection of circumstantial evidence that created a narrative explaining how Forbes had the opportunity and motive to murder Marilyn. Debra's statement was certainly part of that narrative, but it was not intractable, especially considering the other evidence from Beattie, Dilley, and Forbes himself. In his closing statements, the prosecutor painstakingly reviewed evidence explaining Forbes's motivation (he was seeking sexual gratification, had a known attraction to Marilyn, and he had been twice rejected that night); his opportunity (he had no explanation for where he was between 1:15 and 4 a.m., he knew Marilyn would be home alone, Clyde was unusually aggravated at 3 or 3:30 a.m.); and his actions suggesting his guilt (he left the state after the murder without telling anyone, his version of where he was that night changed several times and contradicted witness statements, and he commented to others about having murdered a woman) (165:2-48, 50-73). Mention of Debra's statement came late in the argument (165:48-49, 76), and again, it was just a small part of the quartet of "blood" evidence that the State presented.

Given all of that, Debra's statement that she saw some blood on Forbes's clothing was not a key to the State's theory. For that matter, it was not even inherently damning. Assuming the jury believed Debra's statement that she saw a stain that she believed to be blood, there was no evidence that it actually was blood or whose it was. It lacked details indicating how much blood was involved or that it was consistent with Forbes having committed a violent murder. A bloodstain on the cuff of the shirt was hardly is an essential, required fact, in light of the other evidence presented, for the jury to have found Forbes guilty beyond a reasonable doubt.

In sum, Debra's statement was infrequently used at trial, it was not highly important to the verdict, there was other untainted evidence corroborating and duplicating it, it had no impact on the defense theory, and it was not central to the overall strength of the State's case. The jury would have reached its verdict without it. Accordingly, the use of Debra's statement, even if it could be said to have been in error, was harmless. Hence, Forbes is not entitled to relief.

Because any assumed error based on the use of Debra's statement was harmless, this court need not address the remainder of the argument on this issue. If this court chooses to reach that argument, it was not error for the court to allow the State to use Debra's statement for the reasons explained below.

B. Debra's statement was not obtained in violation of the Fourth Amendment because it was attenuated from the illegal police entry.

Forbes argues that the circuit court erred in holding that Debra's statement, which in his view was obtained in violation of his Fourth Amendment rights, was admissible as impeachment evidence (Forbes' brief at 28-31). The State disagrees with that characterization of the circuit court's ultimate ruling on November 1, 2010. In its view, the circuit court properly reached the following conclusion:

- Garrigan and Yerges illegally entered the Forbeses' home in violation of Curtis Forbes's Fourth Amendment rights;

- While they remained in the home, Debra's statement to officers that Forbes had blood on his shirt was voluntary; and

- That statement was sufficiently attenuated from the illegal entry, and hence, were admissible for impeachment purposes.

Accordingly, Debra's statement was not obtained in violation of the Fourth Amendment; thus her statement was admissible.

To be sure, the circuit court's ruling on the admissibility of Debra's statement spanned several hearings. Depending on what the parties sought in their motions, the court applied the facts through multiple analytical frameworks, some of which were out of order or arguably unnecessary based on its previous decisions. Thus, a review of the court's decisions provides helpful context.

1. The circuit court initially held that the officers (1) entering the house and (2) remaining in the house were illegal and that Debra's subsequent conduct did not constitute "consent."

Initially, Forbes sought to suppress Debra's statements as well as items taken from his house when police took him into custody on March 24, 2009 (24). The circuit court held a two-day hearing at which Debra, Garrigan, and Yerges, among others, testified (149, 150).

The court considered the issue under the framework set forth in *State v. Phillips*, 218 Wis.2d 180, 577 N.W.2d 794 (1998). It held that Garrigan's and Yerges's entries and their remaining in the house to question Debra were both without consent. In reaching that conclusion, the court found significant testimony that Debra was unhappy with the officers' presence and observed that aspects of the officers' questioning could

"hardly be viewed as non-threatening" (33:11; A-Ap. B:11).

Hence, the court concluded that Debra did not voluntarily consent to the police remaining in her home (33:11-12; A-Ap. B:11). It also determined that even if she did, the State could not demonstrate sufficient attenuation because the statements resulted from improper questioning, which almost immediately followed the illegal entry (33:11; A-Ap. B:11). *See Phillips*, 218 Wis.2d at 206 (later consent to search must be sufficiently attenuated from the initial illegality). Accordingly, Debra's statements were to be suppressed as illegal fruits of the warrantless search under *Wong Sun v. United States*, 371 U.S. 471 (1963) (33:12; A-Ap. B:12).

2. The circuit court subsequently held that Debra's statements could be used to impeach her.

The State then sought an order allowing it to impeach Debra's testimony at trial with her previously suppressed statements based on the exception to the exclusionary rule permitting such use (66). *See New York v. Harris*, 495 U.S. 14, 20-21 (1990).

At a hearing, the circuit court asked the parties for briefs on whether a witness who "gives a voluntary statement [can be] impeached with that voluntary statement" in the context of a Fourth Amendment violation (152:152; A-Ap. C:15). However, the court indicated that after having listened to the audio recording of the interview between the detectives and Debra, it no longer believed that her statements were the product of threatening conduct (152:148-50; A-Ap. C:11-13). It acknowledged that it had originally suppressed Debra's statements because the officer's questioning, based on the transcript of the interview, seemed "on the written page to be threatening" (152:151; A-Ap. C:14). However, the

court observed, "after listening to how Mrs. Forbes reacted to those questions, she continually seemed to be searching her mind for what happened the night of Marilyn McIntyre's murder" (*id.*). In light of its request for briefing, however, the court declined to issue a decision at that point (*id.*).

After briefing (81; 87), the court first orally ruled that *James v. Illinois*, 493 U.S. 307 (1990), did not preclude the use of Debra's statement for impeachment because that case addressed the use of a defendant's illegally obtained statement to impeach a defense witness, and the justifications supporting the *James* holding were not present in the current case (154:5-6; A-Ap. D:3).

It then concluded that under the circumstances, the truth-seeking purpose of the jury trial outweighed the Fourth Amendment violation (154:9, 11; A-Ap. D:7, 9). In its view, application of the exclusionary rule to Debra's voluntary statement would not have a deterrent effect under the circumstances (154:10-11; A-Ap. D:8-9). Accordingly, it held that Debra's statements were admissible in audio and written form if the State called her as a witness and if she offered an answer inconsistent with the statement (154:12; A-Ap. D:10). It further explained that if the statement did come in, the defense could explore the circumstances surrounding the interview (154:12-13; A-Ap. D:10-11).

3. The circuit court later concluded that Debra voluntarily made statements and that they were attenuated from the illegal entry.

Forbes later asked the court to revisit its ruling permitting the State to use Debra's statement to impeach her, reasserting that *James* precluded statements suppressed under the Fourth Amendment from being used to impeach a witness (96:2). Additionally, Forbes asked

the court to deny the State "the very use of [Debra] as a witness" based on *United States v. Ceccolini*, 435 U.S. 268 (1978) (96:2-5).

In a subsequent hearing, the circuit court summarily held that *James* was inapplicable for its previously stated reasons (157:54; A-Ap. E:4). It nevertheless reconsidered its ruling on the use of Debra's statement and considered Forbes's motion to suppress the State's use of Debra as a witness based on *Ceccolini* (157:53-54; A-Ap. E:3-4).

The court held that *Ceccolini* did not require suppression of Debra's statement or her testimony (157:59-60; A-Ap. E:9-10). As for Debra's testimony, it explained that *Ceccolini* addressed situations in which the illegality involved police discovery of a live witness (157:56; A-Ap. E:6). In this case, the police knew of Debra's existence before Garrigan and Yerges entered the house (*id.*).[7]

As for Debra's statement, the court concluded that it satisfied the "free will" test in *Ceccolini*, which attenuated it from the officers' initial illegal entry (157:58; A-Ap. E:8). It reiterated that excluding Debra's statement would have no deterrent effect on the detectives' mistake in illegally entering the house (157:57; A-Ap. E:7). It found that, based on Debra's later initiation of contact with law enforcement for advice on media and other matters, "a certain amount of trust . . . had been built up" as a result of the police interview with her (157:58; A-Ap. E:8). It believed that if the officers had come at another time, there was nothing to suggest they would not have received permission to enter or not obtained the same information (*id.*). It also observed that Debra's statement "did not take place until quite a long time after initial contact had been made with her" (*id.*).

[7] The court did not expressly hold that Debra's testimony should not be suppressed, but that conclusion was clear in context. In any event, Forbes does not challenge the circuit court's implicit denial of his motion to suppress Debra's testimony.

Further, based on listening to the entire interview, Debra was cooperative and willing to talk: "[S]he was trying to remember as best [as] she could, because these memories did not come back to her until hours . . . of not only questions from . . . law enforcement . . . but discussions with her daughter" and other ancillary discussions (157:58-59; A-Ap. E:8-9). Based on its observations of Debra at previous hearings, the court also discounted the previous significance it had placed on the "deer in the headlights" remark by the officers in the interview. Rather, Debra's response to the questioning "was a detached reflection of her desire to be cooperative with law enforcement on that day" (157:59; A-Ap. E:9).

Accordingly, it determined that because Debra's statement was made after several hours of questioning, that questioning was repeatedly broken up, and the officers likely could have legally accessed her later that day, the questioning was consensual and Debra's statement was attenuated from the initial entry by police (157:60; A-Ap. E:10).

4. The circuit court's findings support the conclusion that the only police illegality was the officers' entry into the Forbeses' home.

In sum, the court, in its November 1, 2010 oral ruling, produced findings and a determination that Debra's statement was admissible. In that way, its holding was in accord with *State v. Phillips*, coming full circle and reversing the portion of its original holding that the officers' continued presence in the Forbeses' house was illegal.

In *Phillips*, the supreme court set forth the analysis for a situation where an initial illegal police entry leads to later voluntary consent to search, which in turn leads to

the discovery of evidence. Under those circumstances, the court is to first consider whether the consent was "voluntarily" given. 218 Wis.2d at 197. The test requires that the State demonstrate by clear and convincing evidence that consent was given free of duress or coercion under the totality of the circumstances. *Id.* If consent was freely given, the court must further determine whether the evidence was seized as a result of the agents' exploiting the initial entry, or was sufficiently attenuated so "as to dissipate the taint caused by that entry." *Id.* at 204 (citing *Wong Sun*, 371 U.S. at 487).

Here, like in *Phillips*, the officers entering the Forbeses' house was improper. That holding by the circuit court did not change between its original decision and its later oral ruling.

What changed was the court's view that the officers' continued presence in the house violated Forbes's Fourth Amendment rights. Significantly, as the circuit court found, the audio recording of the interview cast a dramatically different light on the tone and tenor of the interview than was apparent at the suppression hearing. After listening to the recording, the court stated that Debra's responses were not the product of undue pressure or duress but a conscientious effort to remember what happened in 1980 and to cooperate with the police. Further, listening to the audio also helped the court understand that Michelle was present for much of the interview, and that Debra took breaks to operate her business, make phone calls, and talk with Marvin Dilley. *See also* 171:Exh. 18; R-Ap. 101-02.

Thus, the circuit court essentially reversed its earlier determination that the officers' remaining in the Forbeses' home and questioning Debra was illegal. Rather, it essentially determined that Debra consented to the interview. In that way, the circuit court's findings and determinations bring the analysis back to the framework of *Phillips* and support the conclusion that, although the officer's initial entry into the Forbes's home was illegal,

their questioning of Debra was consensual. *See Phillips*, 218 Wis.2d at 206.

5. The circuit court's findings support the conclusion that Debra's statement was attenuated from the illegal entry.

Hence, the remaining question for the court was whether Debra's statement was sufficiently attenuated from the officers' illegal entry. *Phillips*, 218 Wis.2d at 206. Because the challenge here involves a witness's past statement obtained in violation of the defendant's Fourth Amendment rights, there is a question of whether the proper attenuation test to apply is *Brown* or *Ceccolini*.

In most circumstances, courts apply the three-factor test in *Brown*, which requires courts to consider whether the challenged evidence was attenuated from the illegality based on: (1) the temporal proximity of the official misconduct and seizure of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Phillips*, 218 Wis.2d at 205 (citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)).[8]

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[8] When the suppression question involves a statement potentially obtained in violation of both the defendant's Fifth Amendment and Fourth Amendment rights, the *Brown* Court explained that the threshold question for courts is whether the statement was voluntary under the Fifth Amendment. *Brown*, 422 U.S. at 602, 604. If the statement was voluntary, it nevertheless needs to be the product of Fourth Amendment "free will," which requires application of an attenuation test. *Id.*

As for the threshold question, the test for whether a non-defendant witness's statement was "voluntary" is set forth in *State v. Samuel*, and requires that, for such a statement to be suppressed, the police misconduct be "egregious such that it produces statements that are unreliable as a matter of law." 2002 WI 34, ¶30, 252 Wis.2d 26, 643 N.W.2d 423. The circuit court in this case held that, consistent with *Samuel*, Debra's statement was voluntary and not the product of

However, where the challenge involves live-witness testimony where the witness's identity was discovered based on a Fourth Amendment violation, courts consider free-will attenuation under *Ceccolini*. The *Ceccolini* attenuation test asks (1) the degree of willingness of the witness to testify, (2) whether the illegality leading to the discovery of the witness played a meaningful part in the witness's willingness to testify, (3) the amount of time passing between the illegality and the contact with the witness and between the contact and the witness's testimony, (4) whether police knew the identity of the witness before the illegality, (5) whether the illegality was made with the purpose of discovering a knowing and willing witness to testify against the defendant, and (6) whether the deterrent effect of applying the exclusionary rule under the circumstances outweighs the cost of preventing the trier of fact from hearing relevant and reliable evidence. *Ceccolini*, 435 U.S. at 279-80.

There is no controlling authority identifying which attenuation test is proper when the challenge involves *only* witness statements—not testimony. However, picking one test over the other under these circumstances is unnecessary, given that the *Ceccolini* factors subsume the concerns addressed by the *Brown* factors. To wit, the third *Ceccolini* factor considering timing subsumes *Brown*'s temporal prong; its second and fourth factors examining whether the illegality led to the discovery of the witness address the considerations of *Brown*'s intervening circumstances prong; and the fourth, fifth, and sixth *Ceccolini* factors echo the analysis under the third *Brown* factor examining the purpose and flagrancy of the police conduct. In other words, both tests address the same concerns in determining free-will attenuation, and the result under application of either should be the same.

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egregious police conduct (152:150). Forbes does not challenge that conclusion. Accordingly, the threshold question of voluntariness is not at issue on appeal. Rather, the focus is on the Fourth Amendment attenuation analysis.

For that reason, Forbes's position that courts must apply both *Ceccolini* and *Brown* is wrong (Forbes's brief at 18-19). He provides no controlling or persuasive authority supporting that position, nor does he provide an explanation of why both tests are necessary.[9] Accordingly, the State proceeds on the assumption that *Ceccolini* is the proper test to apply, with the view that the analysis likewise would satisfy *Brown.*

Here, as the circuit court concluded, the first *Ceccolini* factor was satisfied because Debra's statement was "the product of detached reflection and a desire to be cooperative on the part of the witness." *See Ceccolini*, 435 U.S. at 277. The circuit court listened to the police interview and found that the tone and tenor was cooperative, that information was being shared between police and Debra, that it was not an interrogation, and that Debra's "deer in the headlights" reaction was the product of her efforts to remember what happened in 1980, not a reflection of fear or stress from the questioning. Moreover, although the statement came hours into the police interview, it was in her home, her adult daughter was present for most of the discussion, and there were multiple breaks in which Debra freely engaged in other activities.

Second, the illegality did not play a meaningful part in Debra's willingness to make the statement. As the circuit court noted, the illegality could have been cured had the officers left, returned later, and asked permission to enter, and nothing suggested that they would not have been able to access Debra had they done that.

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[9] Forbes invokes and fails to designate as unpublished a 2006 opinion for the proposition that both *Ceccolini* and *Brown* should be applied. *See* Forbes's brief at 19 (citing and quoting *State v. Reiman*, Case Nos. 2005AP1380 and 2005AP1382, 2006 WL 328091 (Wis. Ct. App. 2006) (unpublished)). His invocation of that case as controlling authority is improper, Wis. Stat. (Rule) § 809.23(3)(b), and should be disregarded.

Third, over four-and-a-half hours passed between the illegal entry and Debra's statement, a span that did not involve continuous questioning or a custodial atmosphere. Rather, as the circuit court found, Debra's attitude during the interview, after her initial displeasure at the officer's presence, was cooperative.

Fourth, police were aware of Debra's identity before the illegal entry. This factor does not support suppression. Fifth, while the officers entered the Forbeses' home with the purpose of interviewing Debra, it cannot be said that the officers *had* to enter the house to obtain that information. Again, the officers likely would have obtained the statement from Debra had they sought her later that day. Nevertheless, even if this factor supports suppression, it alone would not tilt the balance, given that the remaining *Ceccolini* factors favor attenuation. *See United States v. Ienco*, 182 F.3d 517, 531 n.17 (7th Cir. 1999).

Sixth, as the circuit court determined, the purpose of the exclusionary rule would not be served by applying it here. The detectives' entry into the home was based on their misunderstanding the circumstances. It was not a knowing effort to gain access to a place where they knew they could not legally go. Moreover, entry into the house was not a necessary prerequisite for the officers to identify, contact, or interview Debra. Accordingly, applying the exclusionary rule here was not justified under the circumstances.

Given those findings, the *Ceccolini* factors support a determination that Debra's statement was attenuated from the detectives' illegal entry. Because the statement was attenuated, it was not obtained in violation of Forbes's Fourth Amendment rights. Hence, the circuit court's decision admitting Debra's statement was proper.[10]

[10] The State did not argue that the inevitable discovery doctrine would have been satisfied, nor does it read the circuit court's decision as so holding. Rather, the circuit court's discussion suggesting that the police were likely to obtain Debra's statements

C. *James* is inapplicable under the circumstances.

Based on the above analysis, the State was entitled to use Debra's statement at trial. Indeed, if the circuit court erred in its decision, it was to the State's detriment by limiting the use of Debra's statement for impeachment purposes only. If a statement satisfies attenuation, nothing in *Wong Sun*, *Brown*, or *Ceccolini* requires that its use be limited to impeachment. Thus, *James* does not apply because Debra's statement was attenuated. Accordingly, there is no need to assess whether the impeachment exception applies to the use of a witness statement to impeach a State's witness.

Even if this court concluded that the use of Debra's statement was not harmless and that the circuit court erred in holding that it was attenuated, *James* remains inapplicable. In *James*, the Supreme Court declined to extend the rule to permit the government to impeach a defense witness with the defendant's statement. 493 U.S. at 313-14. The Court so held, in part, out of concern for chilling some defendants from presenting their best—or any—defense. *Id.* at 314-16.

That concern is not present when the witness is a State's witness or when the statement is that of the witness herself. Moreover, there is nothing to the *James* holding to suggest that it controls the question of the use of witness statements to impeach that same witness when she testifies for the State. The circuit court correctly concluded that *James* was inapplicable in this situation.

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appeared to be part of the attenuation analysis exploring whether the officers exploited their entry into the house to obtain Debra's statement. *See* 157:57-58; A-Ap. E:8-9.

Accordingly, because the record as to the inevitable discovery factors is undeveloped, the State does not respond to Forbes's inevitable discovery argument (Forbes's brief at 27-28).

In sum, assuming that the admission of Debra's statement was in error, it was harmless. Nevertheless, there was no error because Debra's statement was attenuated from the police illegality and, as a result, it was admissible at trial.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING SOME OTHER-ACTS EVIDENCE; ALTERNATIVELY, ANY ERROR WAS HARMLESS.

Forbes filed pretrial motions seeking, pursuant to *State v. Denny*, 120 Wis.2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984), admission of third-party perpetrator evidence supporting the theory that Lane had motive, opportunity, and direct connection to the crime (44; 58). The circuit court held that Forbes was entitled to present *Denny* evidence (152:21; A-Ap. F:3). It acknowledged that *Denny* permits use of evidence showing "motive, plus opportunity, plus proximity" to establish a defense as to a third-party perpetrator (*id.*). Accordingly, the court found that most of the evidence, which did not involve other acts, satisfied the *Denny* criteria and was admissible (152:21-22; A-Ap. F:3-4).

However, the court excluded four pieces of proffered other-acts evidence based on improper purpose and relevancy: (1) during a 1979 Christmas party, a witness saw Lane beat Marilyn (hereinafter "Christmas act"); (2) a witness saw Lane strike Marilyn in an altercation before their marriage ("premarital act"); (3) Lane once, while arguing with his second wife, grabbed her by the throat and lifted her up a wall ("second wife act"); and (4) Lane told police that he had grabbed his second wife because he was "the man of the house" ("man-of-the-house statement") (152:22-25; A-Ap. F:4-7). *See also* Forbes's brief at 33.

On appeal, Forbes argues that the circuit court erred in excluding those pieces of evidence because they satisfy the *Denny* test to establish motive, opportunity, and Lane's direct connection to Marilyn's murder, as well as the *Sullivan* factors (Forbes's brief at 35).

Forbes is not entitled to relief. The circuit court did not erroneously exercise its discretion in excluding the evidence. Even assuming an improper exercise of discretion by the court, any error was harmless.

A. This court reviews the circuit court's decision for erroneous exercise of discretion.

Forbes states that when the focus of the circuit court's ruling "'is on a defendant's asserted due process right to introduce evidence, the issue is more properly characterized as one of constitutional fact, and is, therefore, subject to de novo review'" (Forbes's brief at 34-35 (quoted source omitted)). Forbes is not entitled to the advantage of this standard of review for several reasons.

First, he did not assert to the circuit court that its ruling implicated his due process right to present a defense. Accordingly, Forbes forfeited this claim to the extent that he raises it now as a constitutional violation. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140 (1980) (appellate courts generally decline to address arguments first raised on appeal).

Nor is this an issue of whether Forbes was prevented from presenting a *Denny* defense. Here, Forbes presented evidence alleging that Lane was culpable with the court's blessing. Rather, the issue here is whether the circuit court erroneously exercised its discretion in excluding certain other-acts evidence that it deemed to be inadmissible under *Sullivan*.

Once permitted to admit evidence supporting a *Denny* defense, a defendant "'does not have an unfettered right to offer testimony that is . . . inadmissible under the standard rules of evidence.'" *State v. Muckerheide*, 2007 WI 5, ¶40, 298 Wis.2d 553, 725 N.W.2d 930 (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)). Thus, when a defendant proffers *Denny* evidence of other acts by a third party, the court should engage in the three-part analytical framework set forth in *Sullivan*. *State v. Scheidell*, 227 Wis.2d 285, 294-95, 595 N.W.2d 661 (1999)). A court's exclusion of other-acts *Denny* evidence on those grounds "does not violate a defendant's constitutional right to present a defense." *Muckerheide*, 298 Wis.2d 553, ¶40.

Hence, this court reviews a circuit court's discretionary decision to exclude other-acts evidence for erroneous exercise of discretion. *Muckerheide*, 298 Wis.2d 553, ¶17. This court will uphold a circuit court's decision to exclude evidence if the court examined relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process. *Id.* If the circuit court fails to set forth its reasoning, this court independently reviews the record to determine whether it provides a basis for the circuit court's exercise of discretion. *State v. Hunt*, 2003 WI 81, ¶¶50, 52, 263 Wis.2d 1, 666 N.W.2d 771.

B. The circuit court did not erroneously exercise its discretion in refusing to admit the four challenged pieces of evidence.

When a court permits a defendant to present *Denny* evidence supporting a defense of third-party culpability, the court must nevertheless assess the admissibility of proffered other-acts evidence under the three-part test in *Sullivan*, which applies the admissibility standards set forth in Wis. Stat. §§ 904.04(2), 904.01, and 904.03. *Muckerheide*, 298 Wis.2d 553, ¶20 (citing *State v.*

Sullivan, 216 Wis.2d 768, 771-72, 576 N.W.2d 30 (1198)); *Scheidell*, 227 Wis.2d at 301-02.

Under *Sullivan*, the circuit court must first determine whether the other-acts evidence is offered for an acceptable purpose under Wis. Stat. § 904.04(2). 216 Wis.2d at 772. Second, the court must determine whether the evidence is relevant under Wis. Stat. §904.01. *Id.* Third, the court must be satisfied that the probative value of the other-acts evidence is not substantially outweighed by the danger of prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. *Id.*; *see* Wis. Stat. § 904.03.

C. The evidence was properly excluded under *Sullivan*.

The first prong of the *Sullivan* test requires that the proponent offer other-acts evidence for a permissible purpose under Wis. Stat. § 904.04. 216 Wis.2d at 772. That section provides that other-acts evidence is inadmissible "to prove the character of a person in order to show that the person acted in conformity therewith." Wis. Stat. § 904.04(2). However, such evidence may be offered for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* As noted above, when evidence is offered in the context of a *Denny* defense, the purpose is to show motive, opportunity, and proximity to the crime. *See Denny*, 120 Wis.2d at 623-24.

Once a proper purpose is established, the second *Sullivan* consideration requires the court to assess relevance, or whether the evidence has a tendency to make a consequential fact more or less probable than it would be without the evidence. 216 Wis.2d at 786. That probative value "depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." *Id.*

Courts' analysis of the relevance prong is tied to the purpose for which the evidence is admitted. *See, e.g.*, *Sullivan*, 216 Wis.2d at 786-87 (determining whether other-acts evidence introduced to show intent or absence of mistake was probative as to those purposes); *State v. Clark*, 179 Wis.2d 484, 495, 507 N.W.2d 172 (Ct. App. 1993) (determining whether other-acts evidence introduced to show intent was probative to intent).

The analysis here stalls out with the first prong of *Sullivan*, because Forbes does not identify the purpose for which he offers the other-acts evidence. On one hand, he simply lists permissible purposes under Wis. Stat. § 904.04, in apparent hopes that one will resonate. *See* Forbes's brief at 37-38 (stating that evidence of Lane's other acts of violence are probative of his intent, motive, plan, and preparation, "the overall context of his relationship with the victim"). Later, he argues, the evidence goes to show "Lane's pattern of control and physical violence" (Forbes's brief at 40).

Here, the circuit court excluded, or could have excluded, all four pieces of evidence as being offered for an improper purpose. The circuit court found that the premarital act was "too far afield and is tending to try and get in character type of evidence that the Court feels is . . . prohibited" (152:22-23; A-Ap. F:4-5). In addition, the Christmas act was "too remote in time . . . to be relevant here. There[are] a lot of people that have problems in public and in private" (152:22; A-Ap. F:4). The second-wife act occurred after and therefore was "irrelevant" to the facts surrounding Marilyn's murder (152:24-25; A-Ap. F:6-7). Finally, the man-of-the-house statement was character evidence and was not probative to how Lane felt about women in March 1980 (152:25; A-Ap. F:7). In sum, in the circuit court's view, the evidence was not being offered to show, consistent with *Denny*, that Lane had motive, opportunity, or proximity to murder Marilyn—the evidence simply suggested that Lane potentially "had it in him" to be physically violent with his partners.

That does not demonstrate motive, opportunity, or proximity. As a point of comparison, the court allowed admission of other-acts evidence that two days before Marilyn's murder, Lane called her a "whore" and assaulted her in a way consistent with some of the injuries on her body (152:23; 161:415-22; A-Ap. F:5). As the circuit court concluded, that evidence was probative to motive, inasmuch as it suggested that close to the time Marilyn was murdered, Lane possibly suspected that she was unfaithful or promiscuous (152:23). In contrast, the other excluded pieces of other-acts evidence did not similarly support a permissible purpose.

And without a clearly identified permissible purpose, assessing probative value under the second step of *Sullivan* is prohibitively difficult. To the extent, however, that the circuit court concluded that the other-acts evidence was not probative, it properly exercised its discretion. As it noted, the previous and subsequent acts of violence were too remote in time and context to be probative of Lane's motive, opportunity, or direct connection to Marilyn's murder in March 1980. Given that the evidence was offered in the context of a *Denny* defense, the circuit court examined the relevant facts and reasonably applied *Sullivan* in concluding that the evidence lacked a permissible purpose and probative value. That was not an erroneous exercise of discretion.

Finally, the circuit court did not reach the third *Sullivan* prong, which asks whether the prejudicial effect of admitting such evidence was outweighed by its probative value. *Sullivan*, 216 Wis.2d at 772-73. Again, because the evidence was not offered for a permissible purpose and thus lacked probative value, it cannot be said that the value outweighs the prejudicial effect. Alternatively, the court could have excluded the evidence, even if it was deemed probative, as an unnecessary presentation of cumulative evidence, given the admitted evidence of Marilyn and Lane's regular arguments and Lane's beating Marilyn two days before her murder.

D. Any assumed erroneous exercise in excluding the challenged other-acts evidence was harmless.

Even if this court assumed that the circuit court's exercise of discretion was improper, the decision is subject to harmless-error analysis. *Accord Muckerheide*, 298 Wis.2d 553, ¶34. Again, for an error to be harmless, the beneficiary must demonstrate that, beyond a reasonable doubt, a rational jury would have found the defendant guilty had the error not occurred. *Martin*, 343 Wis.2d 278, ¶45; *see also Mayo*, 301 Wis.2d 642, ¶47 ("[E]rror is harmless if the beneficiary of the error . . . 'complained of did not contribute to the verdict obtained'").

Consistent with Forbes's defense that Lane had motive, opportunity, and proximity to Marilyn's murder so as to create reasonable doubt as to Forbes's culpability, the jury heard evidence that:

- Three days before Marilyn's death, Lane purchased a life insurance policy, including a $10,000 rider for Marilyn. Lane collected on the policy after Marilyn died (164:1213-14).

- Two days before Marilyn's death, a witness saw Lane call Marilyn a "whore," knock her to the ground, and kick her from behind while she crawled away (161:415-22).

- The forensic pathologist could not narrow the time of death to when Lane was at work (160:34). Marilyn also had older bruises on her body, including bruises on both knees (160:36).

- At around 10 or 10:30 p.m. on March 10, neighbors heard Lane and Marilyn loudly arguing (161:322, 341), which was not unusual (161:322-23, 346).

- There was no evidence of forced entry and the knife found in Marilyn's chest was from a drawer in their kitchen, which was closed when her body was found (164:1230-32).

- Lane called his mother, not police, when he discovered Marilyn's body (164:1221). Also, Wolf described Lane as "calm" when he told her that he had just discovered Marilyn's body (161:328).

- When Lane ordered Marilyn's gravestone, he designated her date of death as March 10, 1980, not March 11 (164:1243).

- Soon after the murder, Lane told police that they should investigate Forbes (164:1225).

Finally, the court advised the jury on reasonable doubt, telling it, "If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty" (166:47). *See* Wis. JI-Criminal 140.

The excluded evidence would not have changed the verdict. The jury heard ample evidence that Lane and Marilyn had a volatile relationship and that Lane had physically assaulted her. Moreover, the jury was instructed on reasonable doubt and presumably understood that it could not find Forbes guilty if it believed that Lane could have committed the murder. *See State v. Truax*, 151 Wis.2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (this court assumes jury follows instructions).

Significantly, the excluded evidence would not have impacted what was really at issue in this case, i.e., the timing of the murder. It would not have contradicted the State's theory that the murder occurred between 3:00 and 3:30 a.m., while Lane was at work. Nor would it have contradicted testimony that Christopher did not cry at any

point over the nighttime and early morning hours leading to the discovery of Marilyn's body, that the light was on and Clyde was out at 3:15 a.m. but not at 12:35 a.m., Clyde's behavior, and evidence of Forbes's behavior that night and the days following. In all, beyond a reasonable doubt, the jury would have reached its same verdict had those four pieces of other-acts evidence been admitted.

In sum, Forbes had a full and meaningful opportunity to present his defense. Even assuming the pieces of other-acts evidence were improperly excluded, any erroneous exercise was harmless. Forbes is not entitled to relief.

CONCLUSION

For the foregoing reasons, this court should affirm the judgment of conviction.

Dated this 9th day of November, 2012.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font, and with this court's order dated November 2, 2012, permitting respondent to file a brief not exceeding 12,000 words. The length of this brief is 11,465 words.

_____
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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of November, 2012.

_____
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Assistant Attorney General