STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP001072-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ESEQUIEL MORALES-PEDROSA,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief,
Entered in the Kenosha County Circuit Court,
the Honorable S. Michael Wilk Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether trial counsel was ineffective for failing to object to an expert's testimony that 90% of child sexual assault allegations are true, and other acts evidence that the defendant had sex with the alleged victim B.M.'s mother when she was the same age as B.M.

The circuit court denied both claims in postconviction proceedings.

2. Whether Mr. Morales-Pedrosa's right to confront his accusers was violated when the alleged victim was excused from trial before the State introduced her testimonial hearsay statements.

The circuit court overruled trial counsel's objections.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested but would be welcomed if ordered. Publication may be warranted because there is no Wisconsin law determining the admissibility of an expert's testimony about the occurrence rate of false accusations in child sexual assault cases.

STATEMENT OF THE CASE AND FACTS

Mr. Morales-Pedrosa was accused of sexually assaulting his daughter B.M. when she was between 13 and 15 years old. (1). The original complaint listed 20 counts; however, several counts were dismissed prior to trial,

including count 1, which alleged that Mr. Morales-Pedrosa sexually assaulted his wife by having sex with her when she was 13 or 14 years old (almost two decades prior to charging).

The amended information listed 14 counts. (28). The 14 counts arose from three alleged incidents: (1) November or December 2008, (2) August 2010, and (3) May 6, 2012.

The witnesses at trial were the alleged victim B.M., her mother Pauline, her sister Theresa, student liaison Gary Vargas, child protective services investigator Julie Ortiz, social worker Julie McGuire, Officer Willie Hamilton, and Detective David May.

B.M. was 18 years old at the time of trial. (118:38). She testified that the sexual assaults involved sexual contact and intercourse during which Mr. Morales-Pedrosa used his finger and/or mouth, and touched her breasts. (118:57-60, 70-74). She testified that the assaults all occurred in a bedroom in an apartment she shared with her parents, older brother, and three sisters. (118:40-41). She testified that the first two times it happened, in November 2008 and August 2010, she fought Mr. Morales-Pedrosa back. (118:63, 75, 115). She testified that the first time, he hit her with his fists and a belt, and there was yelling and screaming. (118:115). B.M. denied that Mr. Morales-Pedrosa took down his pants, but the prosecutor confronted her with her prior statement that he tried to place his penis in her vagina but was not successful. (118:61). Both incidents allegedly happened in a room that had a curtain instead of a door. (118:66, 113, 136). B.M. acknowledged that the apartment had thin walls and you could hear what was going in other rooms. (118:115). B.M.'s sisters and brother were home at the time of the alleged assaults. (118 64, 76, 115). However, no family members said

they heard anything going on in the room. B.M.'s 14-year-old sister, Theresa, testified that sometimes she saw her dad take B.M. into a room and shut the door; however, she never heard anything happening inside. (119:106, 110). She did not remember seeing him take B.M. into a room on or about any of the charged dates. (119:110).

In September 2011, B.M. told her school counselor Gary Vargas that something was going on with her dad. (118:77). Mr. Vargas testified that B.M. hinted that she was not feeling safe at home. (118:168). He testified that she indicated her dad was touching her. (118:178). However, he acknowledged that the subject of "touching" was brought up by him, not B.M. (118:190). A social worker from child protective services, Julie Ortiz, came to see B.M., but B.M. declined to speak with her. (118:186). B.M. told Ms. Ortiz that she felt safe at home, but that her dad was strict and they could do more when he was not at home. (118:188, 209). Ms. Ortiz became aware that Mr. Morales-Pedrosa may have moved out of the house, and she closed the case as unsubstantiated. (118:204, 207).

B.M. testified that the final incident happened on May 6, 2012, while her sisters were watching TV and her brother was in his bedroom. (118:82-86). Approximately one week later, on May 13, 2012, B.M.'s mom Pauline and Mr. Morales-Pedrosa got into a fight. Pauline took B.M. and her sisters to the police station to get a restraining order against Mr. Morales-Pedrosa. (119:50-52). While at the police station, Pauline told an officer that something strange was going on with B.M. (119:53). B.M. spoke with Officer Willie Hamilton in a private room and provided a written statement accusing Mr. Morales-Pedrosa of sexual assault. (119:18-19). The next day, she repeated her

accusations to Detective David May and provided another written statement. (119:129, 132).

In September 2012, B.M. wrote a letter recanting her accusations. (118:100). She said she made it up because her dad was too strict. (118:158). Pauline also submitted a letter to the court claiming that B.M. lied. At trial, B.M. testified that she wrote the letter because she wanted to protect her family, but that her original statement was the truth. (118:101-102). Pauline claimed she felt pressured to write her letter because everyone was saying the accusations were not true and she was having financial difficulties without Mr. Morales-Pedrosa in the home. (119:62). The prosecutor visited B.M. at her school, at which point B.M. returned to her original story. (118:102).

After B.M. testified, the court excused her. Later, Gary Vargas, Pauline Morales, and Julie Ortiz each testified to what B.M. had disclosed to them. Defense counsel objected on hearsay grounds and the confrontation clause because B.M. was not available for cross-examination. (118:183).

Social worker Julie McGuire was called by the State to testify about common behaviors exhibited by child sexual assault victims. She did not interview B.M. Ms. McGuire testified that there are commonalities in ways children disclose abuse. Children commonly delay disclosing, test the waters by revealing a little bit at a time, have difficulty remembering dates and times, and often recant their allegations. The prosecutor asked her, "[a]nd in your experience- - in your training and experience when you're eliminating the alternative hypotheses, is it commonly understood that approximately 90 percent of reported cases are true?" Ms. McGuire said "correct." (119:200).

Mr. Morales-Pedrosa was convicted of all counts. On December 5, 2013, the Kenosha County Circuit Court, the Honorable Michael Wilk presiding, imposed a global sentence of 80 years imprisonment, with 50 years of initial confinement and 30 years of extended supervision. (70).

On January 14, 2015, Mr. Morales-Pedrosa filed a postconviction motion requesting a new trial. (86). He alleged that trial counsel was ineffective for: (1) not objecting to the social worker's testimony that 90% of child sexual assault allegations are true; (2) not objecting to other acts evidence that the defendant and B.M. "had sex;" (3) not objecting to other acts evidence that the defendant had sex with B.M.'s mother when she was the same age as B.M., and (4) not objecting to the prosecutor's improper closing argument.[1]

The circuit court conducted a ***Machner***[2] hearing on February 24, 2015. (124). The parties subsequently briefed the issues. (90; 92; 93). And on May 5, 2015, the court made an oral ruling denying the defendant's motion. (125). A written order was entered on May 11, 2015. (94). A timely notice of appeal was filed (95), and this appeal follows.

[1] Issues two and four are not being raised on appeal.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

ARGUMENT

I. Mr. Morales-Pedrosa is Entitled to a New Trial Because He Was Denied His Constitutional Right to Effective Representation of Counsel.

A. Standard of ineffective assistance of counsel.

Criminal defendants are guaranteed the right to effective assistance of counsel by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 259, 273, 558 N.W.2d 379 (1997). In assessing whether trial counsel's performance satisfied this constitutional standard, Wisconsin courts apply the two-part test outlined in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). In order to establish that he was denied effective representation, the defendant must demonstrate both that counsel's performance was deficient and that counsel's errors or omissions were prejudicial to his defense. ***Id.***

Effective counsel must be a "prudent lawyer" who is "skilled and versed in the criminal law." ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). When the court examines counsel's conduct in a particular case, the court does not ratify it merely because the attorney had a trial strategy. ***Id.*** at 502. Rather, counsel's decisions "must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied." ***Id.*** at 503. The court "will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is based upon caprice rather than upon judgment." ***Id.***

To establish prejudice, the defendant must show that, but for trial counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. ***State v. Roberson***, 2006 WI 80, ¶29, 292 Wis. 2d 280, 717 N.W.2d 111. "A reasonable probability is one sufficient to undermine confidence in the outcome." ***Id.***

This Court accepts the trial court's findings of historical fact unless they are clearly erroneous; however, whether the attorney's conduct was deficient and prejudicial are questions of law reviewed de novo. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

B. Trial counsel was ineffective for failing to object to social worker Julie McGuire's testimony that 90% of child sexual assault accusations are true.

Social worker Julie McGuire was qualified as an expert for trial.[3] The prosecutor asked her, "[a]nd in your experience—in your training and experience when you're eliminating the alternative hypotheses, is it commonly understood that approximately 90 percent of reported cases are true." Ms. McGuire answered, "[c]orrect." (119:200). Defense counsel did not object.

It is well-established law that one witness may not give an opinion on the veracity of another witness's testimony. ***State v. Haseltine***, 120 Wis. 2d 92, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). "Such testimony invades the province of the fact-finder as the sole determiner of credibility." ***State v. Kleser***, 2010 WI 88, ¶104, 328 Wis. 2d 42, 786 N.W.2d 144 (2010).

[3] The admissibility of expert testimony is governed by Wis. Stat. § 907.02.

In ***Haseltine***, the State called a psychiatrist as an expert to testify about behaviors exhibited by incest victims. The psychiatrist also opined that there "was no doubt whatsoever" that Haseltine's daughter was an incest victim. ***Id.*** at 95-96. This Court reversed, holding that "this opinion testimony goes too far."

> Expert testimony should assist the jury. Section 907.02, Stats. The credibility of a witness is ordinarily something a lay juror can knowledgeably determine without the help of an expert opinion. "[T]he jury is the lie detector in the courtroom." The opinion that Haseltine's daughter was an incest victim is an opinion that she was telling the truth. There is no indication that Haseltine's daughter had any physical or mental disorder that might affect her credibility. (Internal citations omitted). No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."

Id. at 96.

While the rule against vouching applies to all witnesses, it is especially harmful coming from an expert. "The psychiatrist's opinion, with its aura of scientific reliability, creates too great a possibility that the jury abdicated its fact-finding role to the psychiatrist and did not independently decide Haseltine's guilt." ***Id.*** at 196.

The rule against vouching can be violated even if the witness does not use the specific words "I believe her" or "she's telling the truth." As the Wisconsin Supreme Court explained in ***Kleser***:

> We are not persuaded that the vouching rule becomes inapplicable simply because a witness does not use specific words such as "I believe X is telling the truth," or is inapplicable because X never testified as a witness.

> There is no requirement that an expert explicitly testify that she believes a person is telling the truth for the expert's opinion to constitute improper vouching testimony. In ***Haseltine***, for example, the expert testified only implicitly that the victim was telling the truth. A requirement that specific words be used would permit the rule to be circumvented easily.

328 Wis. 2d 42, ¶102 (emphasis added).

Ms. McGuire's testimony that 90% of child sexual assault accusations are true violated the ***Haseltine*** rule. Although she did not say "B.M. is an incest victim," her statistical vouching accomplished the same result. It informed the jury that there was a very low probability that B.M. was lying. This testimony did not assist the jury; rather it "usurp[ed] their role as 'lie detector in the courtroom.'" ***Haseltine***, 120 Wis. 2d at 96, 352 N.W.2d 673 (quoting ***United States v. Barnard***, 490 F.2d 907, 912 (9th Cir.1973)).

While Wisconsin does not appear to have any case law directly on point, several federal and state courts have held that such testimony is improper. In ***United States v. Brooks***, 64 M.J. 325 (C.A.A.F. 2007), the United States Court of Appeals for the Armed Forces held that an expert should not be allowed to testify that false accusations occur about 5% of the time. "This testimony provided a mathematical statement approaching certainty about the reliability of the victim's credibility and truthfulness." ***Id.*** at 329.

In ***Snowden v. Singletary***, the Eleventh Circuit Court of Appeals held that testimony that 99.5% of children tell the truth was improper and amounted to a denial of fundamental fairness. 135 F.3d 732, 739 (11th Cir. 1998).

> Witness credibility is the sole province of the jury. Very rarely will a state evidentiary error rise to a federal

> constitutional error; but given the circumstances of the trial underlying this case, we conclude that allowing expert testimony to boost the credibility of the main witness against Snowden-considering the lack of other evidence of guilt-violated his right to due process by making his criminal trial fundamentally unfair.

Likewise, in ***Wilson v. State***, 90 S.W.3d 391 (Tex. App. 2002), the Texas Court of Appeals held that the "trial court erred by allowing [expert] to testify about what percentage of children lie about being sexually assaulted" because it "did not aid, but supplanted, the jury in its decision on whether the child complainant's testimony was credible." *See also*, ***Wheat v. State***, 527 A.2d 269, 274-75 (DE 1987) (conviction reversed because expert's testimony "in effect provided a statistical evaluation of the complainant's present veracity."); ***State v. Lindsey***, 720 P.2d 73, 75 (AZ 1986) (testimony that "'most people in the field feel that it's a very small proportion [of incest victims] that lie'" is "tantamount to expert evidence on the question of guilt or innocence"); ***State v. Myers***, 382 N.W.2d 91, 92–93 (IA 1986) (testimony that "[s]tatistically... children have not lied in [the area of child sexual abuse]" and that "it is my opinion that it is very rare" is "comparable to telling the jury that the complainant would not lie about matters concerning sexual abuse"); *see also* McCord, David, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J.CRIM.L. & CRIMINOLOGY 1, 53 (1986) ("Expert opinion that it is rare for children to fabricate or fantasize claims of sexual abuse ... vouches for the complainant's credibility because it concludes that the complainant is almost certainly telling the truth.").

Moreover, the reliability of such testimony is suspect. As Professor McCord notes in his law review article, cited

above, "there has been very little empirical research concerning the extent to which children lie or fantasize in making claims of sexual abuse, and the fact that it is difficult to see how such empirical research could be conducted." Instead, "the feeling in the scientific community that deals with sexually abused children is that it is indeed rare for this to happen." ***Id.*** at 54-55. "A feeling" in the scientific community is not a proper subject of expert testimony. Wis. Stat. § 907.02 (expert may give opinion "if the testimony is based upon sufficient *facts or data*, the testimony is the product of reliable *principles and methods*." (emphasis added)). A concern over reliability also arises from the wide range of statistics cited in the aforementioned cases. In the instant case, the expert testified that 90% of accusations were true. In ***Brooks***, the expert testified that 5% of allegations were untrue. In ***Wilson***, the expert testified that 2-8% of allegations were untrue. In ***Snowden***, the expert testified that 99.5% of accusations were true.

Professor McCord additionally notes the incompatibility between the reasonable doubt standard and probability analysis. Also, he expresses concern that a jury will be overwhelmed by the "overbearing impressiveness of numbers." "In most human situations there exist factors which simply cannot be quantified." Moreover, an average juror likely does not have a helpful understanding of what probabilities do and do not prove, and this lack of understanding extends to lawyers as well. "There is a real possibility that an understanding of probabilities thorough enough to permit an effective cross-examination may be beyond the ability of many lawyers." (McCord, *supra* p. 10, at 55).

In the instant case, the erroneous admission of the 90% figure was compounded during closing arguments when the

prosecutor emphasized Ms. McGuire's improper testimony. The prosecutor stated, "[a]nother thing Julie McGuire told you is that the research also shows 90 percent of reported cases are true." (121:159). This is like in ***Snowden v. Singletary***, in which the United States Court of Appeals held that the error was made more harmful by prosecutor's argument to the jury, in which he stressed the significance of the expert's opinion. ***Snowden***, 135 F.3d 732 at 738.

The circuit court denied this claim because it found that "defendant's trial attorney [said] that strategically he felt it was not – it was not vouching, that he didn't object because he thought it was - - it was fair and reasonable I should say in terms of strategy." (124:33, App. 111; 124: 15, App. 145). This Court should disagree. An erroneous view of the law is not a reasonable strategy. Furthermore, the court found that the decision not to object fit within "a theme that goes through some of the decisions that [trial counsel] made, and they were generally of the nature of I didn't want to draw attention to it." (125:34, App. 112). However, defense counsel never said he did not object for this reason. Finally, the court was persuaded by defense counsel's explanation that he did not object because when the question had been asked in other trials, the answer was less favorable. (125:34, App. 112; 124:15, App. 145). This argument is not persuasive because, had counsel mounted the proper objection, and had the court sustained the objection, no testimony about the percentage of false allegations would have been allowed.

Defense counsel's explanations are not only unpersuasive, they are also suspect. Counsel objected to the prosecutor's use of the 90% figure during closing argument, stating the figure was not in evidence. (121: 159-60). The nature of the objection suggests that counsel had not registered the testimony, which undermines his explanation

for why he did not object when the evidence was first introduced. At the ***Machner*** hearing, he testified that he did not recall why he objected to the prosecutor's closing argument. (125: 17-18, App. 147-148).

Counsel's deficient performance prejudiced Mr. Morales-Pedrosa. The case was a credibility contest between the alleged victim and defendant. Ms. McGuire's testimony that 90% of child sexual assault accusations are true told the jury that B.M. was almost certainly telling the truth. This testimony was improper and "renders the result of the trial unreliable and the proceeding fundamentally unfair." ***State v. Marks***, 2010 WI App 172, ¶12, 330 Wis. 2d 693, 794 N.W.2d 547.

C. Trial counsel was ineffective for failing to object to other acts evidence that Mr. Morales-Pedrosa had sex with his wife when she was the same age as the alleged victim.

The State introduced evidence that B.M.'s mother, Pauline, was 13 years old at the time she first had sex with Mr. Morales-Pedrosa and 15 years old when she gave birth to B.M. (119:30-33).

Under Wis. Stat. § 904.04(2)(a), evidence of other crimes, wrongs, or acts is not admissible except for specific purposes, none of which were offered here. The rule prohibiting other acts evidence exists to protect a defendant against the jury's tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts, the tendency to condemn not because the jury believes the defendant guilty but because he has escaped punishment from other offenses, and confusion of the issues. ***Whitty v. State***, 34 Wis. 2d 278, 292, N.W.2d 557 (1967).

Admissibility of other acts evidence is addressed by using three-step analysis: (1) whether the other acts evidence is offered for an acceptable purpose such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) whether the other acts evidence is relevant; and (3) whether the probative value of other acts evidence is substantially outweighed by danger of unfair prejudice, confusion of issues or misleading jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

Evidence that Mr. Morales-Pedrosa had sex with his wife, Pauline, when she was 13 and had a child with her when she was 15 was irrelevant, and violated the prohibition against other acts evidence. Mr. Morales-Pedrosa is 3 years older than his wife, and was also a teenager at the time.[4] Moreover, there is no evidence that they were related to one another, or that the relationship was involuntary on Pauline's part. These circumstances are night and day from the facts of this case—an adult father forcefully sexually assaulting his teenage daughter. This evidence was not relevant because it did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. And "[e]vidence which is not relevant is not admissible." § 904.02.

No "acceptable purpose" for the evidence was ever suggested, and none applies. More importantly, the State transparently used the evidence to argue that Mr. Morales-Pedrosa has a propensity to commit sexual assaults against

[4] Pauline's date of birth is December 20, 1979. (119:29). Mr. Morales-Pedrosa was born on May 1, 1976.

teenage girls—which is exactly the type of argument that the other-acts rule exists to prevent. During closing arguments, the prosecutor brought up the evidence three times. First, the prosecutor stated that the "[f]irst charged incident is in 2008 when B.M. was 13 years old, about the same age her mom was when the defendant and her mother got together." (121:106-07). In addition, she stated that, "in August of 2010, B.M. was 14 years old, the exact same age as her mother when her mother had [B.M.'s brother]." (121:110-11). Again, she stated, "you know that Pauline got together with the defendant when she was only 13 or 14 years old." (121: 115).

The circuit court denied this claim after finding that defense counsel had strategic reasons for not objecting (defense counsel's explanation "just makes trial sense to me."). (125:44; App.122). At the ***Machner*** hearing, counsel testified that he wanted the ages of the family members to come in at trial. (124:21, App. 151). He believed the eldest son's age was relevant to show that another "adult" was in the home at the time police interviewed B.M. (124: 21-22; App. 151-52).[5] Counsel testified that he did not object to the prosecutor's closing argument because the ages were obvious from the record and his impression was that "the State was using the evidence to "explain how [Pauline] could have been manipulated and feel loyal to [Mr. Morales-Pedrosa] and explain her behavior." (124: 23, App. 153). This explanation is not persuasive. If the issue was Pauline's loyalty, there would have been no reason to repeatedly compare Pauline and B.M.'s ages at the times of the various assaults.

[5] B.M.'s brother was 19 at the time of trial. However, he is only one year older than B.M. and would have been between the ages of 14 and 16 when the alleged assaults and first disclosure allegedly occurred. (*See* 119: 31).

Counsel also testified that "there is the usual risk that comes with objecting to things, and that always plays a part in a decision on whether to object or not." (124: 24, App. 154). These are the risk of drawing further attention to the evidence, giving the prosecutor leeway to delve in deeper if the objection was overruled, and the risk of giving the impression that he was trying to hide something. (124:24, App. 154). Counsel's explanation about the "usual reasons" for not objecting does not offer anything to explain why he did not object in this particular instance. If counsel's reasoning was accepted, he would be justified in never objecting to anything.

II. Mr. Morales-Pedrosa is Entitled to a New Trial Because the Circuit Court Admitted Evidence in Violation of the Confrontation Clause.

A. Legal principles and standard of review.

The Sixth Amendment to the United States Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. Const. Amend. VI. The Wisconsin Constitution also guarantees the right to confrontation: "In all criminal prosecutions the accused shall enjoy the right ... to meet the witnesses face to face." Wis. Const. Art. 1, § 7. The two clauses are "generally" coterminous**.** ***State v. King***, 2005 WI App 224, ¶4, 287 Wis. 2d 756, 706 N.W.2d 181. The Confrontation Clause operates to bar from trial any witness's testimonial out-of-court statement to government officers made for the purpose of establishing or proving a fact unless the defendant has had the opportunity to cross-examine the witness. ***Crawford v. Washington***, 541 U.S. 36, 51 (2004). A statement is testimonial when the circumstances objectively indicate the

primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. ***Davis v. Washington***, 547 U.S. 813, 823 (2006).

"Whether admission of a hearsay statement violates a defendant's right to confrontation presents a question of law that this court reviews de novo." ***State v. Weed***, 2003 WI 85, ¶10, 263 Wis. 2d 434, 666 N.W.2d 485.

B. The Confrontation Clause requires the State to present a testimonial declarant for all relevant portions of a trial.

In this case, the issue is whether the Confrontation Clause was violated when B.M.'s statements to others were introduced after B.M. had already testified and was excused. There does not appear to be any Wisconsin case law exactly on point. However, Professor Daniel D. Blinka explains, "where the State intends to attack a witness with prior inconsistent statements, disclosure should occur while the witness is on the stand or subject to recall for additional cross-examination." Blinka, Daniel D., 7 Wis. Prac., Wis. Evidence § 802.303 (3d ed.). And the United States Supreme Court has ruled that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defense to bring those adverse witnesses into court." ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009).

Accordingly, several other states have held that the prosecution cannot introduce such statements after the witness has been excused, leaving it to the defendant to recall the witness for cross-examination. *See* ***Felix v. State***, 849 P.2d 220, 247 (NE 1993) (superseded by statute on other grounds as explained in ***State v. Volosin***, 2014 WL 4922883 (September 29, 2014) ("As a practical matter, if a child is excused before her hearsay statements are proffered, the

defense has no opportunity to cross-examine the child on those statements…Arguably, the defense could have recalled Susan and other children for crossexamination. However, we conclude that placing that burden on the defense is unfair."); ***State v. Daniels***, 682 P.2d 173, 178-79 (MT 1984) (superseded by statute on other grounds as explained in ***State v. Daniels***, 265 P.3d 623 (MT 2011) (where declarant is excused as a witness prior to the offering of the declarant's out-of-court statement, declarant was "not subject to cross-examination concerning the statement" and the out-of-court statement was inadmissible); ***State v. Rohrich***, 939 P.2d 697, 478 (WA 1997) ("not only [must] the declarant have been generally subject to cross-examination; he must also be subject to cross-examination concerning the out-of-court declaration.").

C. B.M. was excused before her testimonial hearsay statements were introduced in violation the Confrontation Clause.

B.M. was the first witness to testify at trial. (118: 38-162). After she testified, and was excused, the State put on several witnesses who testified to what B.M. told them about what happened. The first such witness was school counselor Gary Vargas. When the State asked him about what B.M. said, defense counsel objected. "Judge, I'm going to object and move to strike. Hearsay and confrontation clause. I have no opportunity to cross-examine [B.M.] on this. Move to strike." (118: 183). The court responded, "I'm going to - - There's nothing to prevent her from being called by you. I don't see - - she has been here. I don't think that it's a specific confrontation issue. I'm going to overrule the objection." (118:183). Defense counsel replied, "I don't know where she is." (118: 184). Defense counsel made the same objection when Julie Ortiz testified. (118: 203). Ms. Ortiz was a child

sexual assault investigator. She accompanied police officers when they went to B.M.'s school to interview her. (118: 198-199).

Defense counsel also repeatedly objected when Officer Hamilton and Detective May testified to what B.M. disclosed to them. (119: 20-21, 131, 132, 134, 135). Officer Hamilton stated that he asked B.M. why she hadn't come forward sooner and, "[s]he said she feared for her safety and her mom's safety," and defense counsel objected, "Judge, I'm going to object. Hearsay, confrontation clause, move to strike. I have no opportunity to cross-examine that. That's brand new excuses that we haven't heard before." (119: 19-20). The court overruled the objection. Finally, with Detective May, counsel repeatedly objected and was overruled every time. (119: 131, 132, 134, 135).

B.M.'s statements to Julie Ortiz, Officer Hamilton, and Detective May were testimonial for purposes of the Confrontation Clause. Statements to law enforcement and investigators whom accompany them are for "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ***Davis***, 547 U.S. at 822-23. Statements to Gary Vargas were also testimonial, despite the fact that he is not law enforcement. B.M. was 15 years old when she accused Mr. Morales-Pedrosa. She was old enough to understand that telling Mr. Vargas would lead to police involvement.

The error was not harmless. Federal constitutional error can only be ruled harmless if the beneficiary of the error (the State) proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Chapman v. California***, 386 U.S. 18, 24 (1967). This case was a credibility contest between the accuser and the accused.

It was vital for Mr. Morales-Pedrosa to be able to cross-examine B.M. about her alleged statements.

The Confrontation Clause entitles a defendant to test the accuser's reliability not generally, but in a specific way—through cross-examination. As Justice Scalia asserted in ***Crawford***:

> The Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Crawford, 541 U.S. at 68-69 (emphasis added).

The circuit court erred by overruling defense counsel's objections. The government failed to ensure that B.M. was available for cross-examination, and did not present good cause for her unavailability. Mr. Morales-Pedrosa was denied his constitutional right to confrontation, and his convictions cannot stand.

CONCLUSION

For the reasons stated above, Mr. Morales-Pedrosa respectfully asks the Court to reverse his convictions and remand for a new trial.

Dated this 12th day of August, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,256 words.

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Dated this 12th day of August, 2015.

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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