STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1072-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ESEQUIEL MORALES-PEDROSA,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR KENOSHA COUNTY,
S. MICHAEL WILK, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

I. The attorney who represented Morales-Pedrosa at his trial was not ineffective for failing to object to certain evidence.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893.

To prove that his attorney's performance was deficient the defendant must overcome a strong presumption that counsel acted reasonably, and establish that counsel's representation fell below an objective standard of reasonableness. *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115; *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986). The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217.

Deficient performance is prejudicial when it is so reasonably probable that the result of the proceeding would have been different without the error that a court cannot have confidence in the reliability of the existing outcome. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20.

It is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not erred. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). When the defendant alleges that his attorney was ineffective for failing to take some action, he must show with specificity what that action would have accomplished if it had been taken, and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; *Flynn*, 190 Wis. 2d at 48.

On appeal the circuit court's findings of fact will be upheld unless they are clearly erroneous. *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334; *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). *See Thiel*, 264 Wis. 2d 571, ¶ 23. Findings are clearly erroneous when they are contrary to the great weight and clear preponderance of the credible evidence supporting a different finding. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983).

Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law which are determined independently. *Thiel*, 264 Wis. 2d 571, ¶ 23.

A. Counsel was not ineffective for declining to object to evidence regarding the percent of reported child sexual assaults that have been found to be true, which could have been admitted under the rule of curative admissibility.

1. Morales-Pedrosa failed to prove that his attorney performed deficiently.

The state's expert on child sexual assaults testified without objection that in her experience "when you're eliminating the alternative hypotheses, i[t] i[s] commonly understood that approximately 90 percent of reported cases are true" (119:149, 200).

The attorney who represented the defendant-appellant, Esequiel Morales-Pedrosa, at his trial testified at the postconviction *Machner* hearing that he decided not to object to this testimony because, among other things, having raised the issue of false allegations, he believed the state's evidence was "fair game" (124:15-16).

When attempting to show that an attorney performed deficiently by declining to object to evidence, the defendant must establish that there was a reason to object because the evidence was inadmissible. *See State v. Ewing*, 2005 WI App 206, ¶ 18, 287 Wis. 2d 327, 704 N.W.2d 405.

That is not the end of the inquiry but only the necessary predicate. The defendant must also show that his attorney's failure to object to the inadmissible evidence was objectively unreasonable. *See Mayo*, 301 Wis. 2d 642, ¶ 60; *Thiel*, 264 Wis. 2d 571, ¶ 19; *Johnson*, 133 Wis. 2d at 217. *See also State v. Koller*, 2001 WI App 253, ¶ 53, 248 Wis. 2d 259, 635 N.W.2d 838, *modified on other grounds, State v. Schaefer*, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760 (the question is not whether an attorney is

able to articulate an adequate subjective reason for his actions, but whether the actions were objectively reasonable).

There is a range of reasonableness, *Chen v. Warner*, 2005 WI 55, ¶ 37 n.24, 280 Wis. 2d 344, 695 N.W.2d 758, permitting different people to reasonably make different decisions in the same circumstances. *State v. St. George*, 2002 WI 50, ¶ 58, 252 Wis. 2d 499, 643 N.W.2d 777; *State v. Robinson*, 146 Wis. 2d 315, 330, 431 N.W.2d 165 (1988).

When different people can reasonably make different decisions, there is a limited right to be wrong. *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). To be reasonable is not to be perfect, so a decision can be perfectly reasonable even though it is mistaken. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014); *State v. Houghton*, 2015 WI 79, ¶ 44, ___ Wis. 2d ___, ___ N.W.2d ___, 2015 WL 4208659. Thus, the test for ineffective assistance of counsel does not assess the legal correctness of counsel's judgments, but the reasonableness of those judgments under the circumstances of the case. *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993).

In particular, an attorney is not ineffective for making what in retrospect appears to be an error of judgment on law that is unsettled. *State v. Van Buren*, 2008 WI App 26, ¶¶ 18-19, 307 Wis. 2d 447, 746 N.W.2d 545; *Maloney*, 281 Wis. 2d 595, ¶ 23; *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994).

At the time of Morales-Pedrosa's trial in October 2013, the law regarding the admissibility of statistical evidence concerning the number of children who fabricate claims of sexual assault was not settled in this state.

It still isn't. Defense counsel testified at the postconviction hearing that he was aware of other cases where

the same expert was allowed to testify regarding the number of truthful child sexual assault allegations (124:14-15). Morales-Pedrosa relies exclusively on cases from other jurisdictions to argue that this evidence is inadmissible because it impermissibly vouches for the credibility of the complainant. Brief for Defendant-Appellant at 9-10.

Similarly uncertain was the question whether such statistical evidence, even if ordinarily inadmissible, could still be admitted under the rule of invited response, or more correctly in this case, the rule of curative admissibility.

The rules are essentially the same in that if one party does something improper, the other party gets to do something similarly improper to respond. The rule of invited response applies to arguments, *see State v. Wolff*, 171 Wis. 2d 161, 168-69, 491 N.W.2d 498 (Ct. App. 1992), while the rule of curative admissibility applies to evidence. *See State v. Dunlap*, 2002 WI 19, ¶ 32, 250 Wis. 2d 466, 640 N.W.2d 112.

In *State v. Hernandez*, 192 Wis. 2d 251, 256, 531 N.W.2d 348 (Ct. App. 1995), this court held that statistical evidence regarding the number of children who fabricate claims of sexual assault was admissible under the rule of invited response, i.e., curative admissibility, because the defendant raised the issue by asking the state's expert on cross-examination whether she was aware of instances where children fabricated stories of sexual assault.

The court said, "The reason this is an invited response is because Hernandez elicited an admission that children may fabricate. The prosecutor was entitled to rehabilitate the expert to explain that fabrication was not common." *Hernandez*, 192 Wis. 2d at 256.

But *Hernandez* was overruled in *State v. Eugenio*, 219 Wis. 2d 391, 404, 579 N.W.2d 642 (1998). Although the supreme court disagreed with *Hernandez* on other grounds, nothing in that case remains as citable precedent under the rule of *Blum v. 1st Auto & Casualty Ins. Co.*, 2010 WI 78, 326 Wis. 2d 729, 786 N.W.2d 78.

So while the *Hernandez* case itself is clearly not citable precedent,[1] it remains an unsettled question whether the reasoning of that case continues to reflect a valid legal analysis that could be resurrected in another case. An attorney could reasonably believe that it could.

As a general proposition, "[w]hen a party opens the door on a subject, he cannot complain if the opposing party offers evidence on the same subject to explain, counteract, or disprove the evidence." *State v. Richardson*, 2001 WI App 152, ¶ 11, 246 Wis. 2d 711, 632 N.W.2d 84.

Under the Wisconsin version of the rule of curative admissibility, "when one party accidentally or purposefully takes advantage of a piece of evidence that is otherwise inadmissible, the court may, in its discretion, allow the opposing party to introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to cure some unfair prejudice." *Dunlap*, 250 Wis. 2d 466, ¶ 32.

Here, an attorney could reasonably believe that he opened the door by cross-examining the state's expert about "alternative hypotheses."

Morales-Pedrosa's attorney elicited testimony that when a child alleges she has been sexually assaulted, one hypothesis

[1]*Hernandez* is not being cited in this brief as either controlling or persuasive precedent but for its legal history.

is that the allegation is true, while an alternative hypothesis is that the allegation is either mistaken or false (119:182). The expert admitted that both of these hypotheses could be possible (119:182).

The expert then stated that in her experience working with law enforcement she often developed alternative hypotheses based on the facts of the case (119:182).

The trier of fact can choose among conflicting inferences that may be supported by the same evidence, and can adopt the inference that is consistent with guilt instead of innocence. *State v. Bodoh*, 226 Wis. 2d 718, 727-28, 595 N.W.2d 330 (1999); *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). *See also State v. Hoffman*, 106 Wis. 2d 185, 221, 316 N.W.2d 143 (Ct. App. 1982)(in the absence of a specific restriction for one issue or purpose, testimony can be used for any issue or purpose).

One inference that could be drawn from testimony that alternative hypotheses of mistake or fabrication could often be developed from the facts is that children often made allegations of sexual assault that were mistaken or false.

As the cases cited by Morales-Pedrosa suggest, this would be a logical but legally impermissible inference because it could be an indirect comment on the credibility of the victim in this case. If children who reported sexual assaults often lied or erred, the chances that the victim in this case falsely or mistakenly accused Morales-Pedrosa of sexually assaulting her were considerably increased.

Therefore, Morales-Pedrosa's attorney could reasonably believe that the evidence presented by the state, that in approximately ninety percent of reported cases the alternative hypothesis that the child lied or was mistaken could be

eliminated, was properly admitted to cure the potentially misleading evidence he had introduced.

This conclusion could come well within the rationale of the *Hernandez* case. If this court reasoned that statistical evidence of the veracity of child sexual assault victims could be properly admitted under the rule of curative admissibility when the defense introduced evidence that children may fabricate claims of sexual assault, it is possible that in a fresh case the court would use the same reasoning to approve the introduction of this kind of evidence when the defense introduced evidence indicating that children often fabricate claims of sexual assault.

The circuit court stated that "there was an invited response here based on the defendant's own actions" (125:32-33). This ruling, while not entirely clear, seems to have agreed with the prosecutor's position that the statistical evidence was admissible as an invited response to evidence introduced by the defense "about children at the macro level lying" (125:10-12).

Because Morales-Pedrosa's attorney could have declined to object to the state's statistical evidence because he could have reasonably believed it would be admissible under the curative admissibility rule, Morales-Pedrosa has failed to prove that his attorney performed deficiently.[2]

[2]Morales-Pedrosa also asserts that the reliability of the expert's testimony is suspect. Brief for Defendant-Appellant at 10-11. But reliability is a question of fact for the jury. *State v. Fischer*, 2008 WI App 152, ¶ 21, 314 Wis. 2d 324, 761 N.W.2d 7; *Ricco v. Riva*, 2003 WI App 182, ¶ 21, 266 Wis. 2d 696, 669 N.W.2d 193. It is not an issue to be litigated on appeal based on a single thirty year old article in a professional journal. And at most it only shows that there is another issue that is unsettled.

2. Morales-Pedrosa failed to prove that he was prejudiced.

Under the unique combination of circumstances in this case, Morales-Pedrosa failed to prove that he was prejudiced by the presentation of statistical evidence concerning the percent of children who fabricate claims of sexual assault.

This was not direct evidence that the expert witness believed the victim was telling the truth. The expert made clear that she never interviewed, and never even met, the victim (119:177), so she had no way of knowing whether the victim was actually telling the truth or not.

However, the victim's school counselor, who had many contacts with her, testified that in his opinion the victim was always honest and never lied (118:166, 186). *See* Wis. Stat. § 904.05(1) (2013-14) (trait of character may be proved by opinion). So there was direct evidence that there was not just a ninety percent chance that the victim was telling the truth because ninety percent of other children told the truth, but virtually a 100 percent chance that the victim was telling the truth because she always told the truth.

The court's instructions told the jury that they were not bound by any expert's opinion (121:93). They were also told that they were the sole judges of the credibility of the witnesses, and should consider a number of factors in determining whether a witness was credible (121:94-95). Thus, the jury was told that regardless of anyone else's opinion, direct or indirect, about the victim's credibility, they were supposed to judge her credibility for themselves.

Most importantly, the evidence showed that at first the victim did not make any detailed accusations of sexual assault, even when pressed by her school counselor and a child

protective service investigator (118:171, 178, 180, 189, 201-04). The victim even told her mother that Morales-Pedrosa was not touching her (119:43).

It was not until the victim's mother went to the police station to get a restraining order against Morales-Pedrosa because of their domestic difficulties that the victim finally felt free to report that he had been sexually assaulting her (118:90, 133; 119:53).

The victim told the investigating detective on May 14, 2012, that the first time Morales-Pedrosa sexually assaulted her was in November or December of 2008, between Halloween and Christmas, when she was thirteen years old and in the seventh grade at Washington Middle School (119:129, 131, 133).

The victim stated that on that occasion,

> "My dad had told my mom that he needed a pair of boots and sent her to the store to get him some. After my mom had left, my dad ordered me into his bedroom and he shut the door. My brothers and sisters were home but were in their own rooms. My dad started yelling at me and then he told me to take my clothes off. I said no, and he then started taking them off himself. I started to fight him, but he would hit me on my arms and fact with his hands and his belt.
>
> My dad ended up pushing me onto his bed, and he was holding me down with one hand fondling my breasts. And with the other hand my dad was putting his fingers inside my vagina and pulling them out and placing his fingers into my mouth.
>
> My dad pulled his pants down far enough to get his penis out and he tried to put his penis inside my vagina, but I was fighting him a lot and he ended up

stopping. He told me to get my clothes back on and to not tell anyone about what happened" (119:133-34).

The victim also told the detective about the most recent sexual assault on May 6, 2012 (119:134). She stated,

> "The last time [my] dad sexually assaulted me was approximately a week ago. It was on Saturday, May 5, 2012, at 6:00 p.m., which later turned out to be May 6th. I was at home along with my brother and sisters who were outside playing and hanging out. My mom had gone out to pick up some food for the family that we had ordered. My dad ordered me into his room, and he forced me to pull my pants down. He laid me on the bed and began licking my vagina and began putting his finger inside my vagina. When he heard my mom come back home in the car, he stopped and I got dressed" (119:135).

The victim also told the detective about another incident in August 2010 (119:135). The victim stated,

> "One other time I remember was about two summers ago when my mom had brought my two sisters to Great America for my youngest sister's birthday. . . . It was in August because that's when my sister's birthday was. I was at home with my other sister and older brother and my dad. That time again my brother and sister were outside and my dad ordered me again into his bedroom. My dad forced me onto his bed had me pull my pants down. My dad pinned one of my legs up and I couldn't move. My dad then started licking my vagina and started inserting his fingers inside my vagina pulling them out and putting them in my mouth. My did tried to put his penis inside my vagina. He couldn't. I don't remember exactly why" (119:136).

It is apparent from the nature of the victim's account of what happened to her that she was telling the truth.

It is highly unlikely that the victim could have made up these incidents in such detail. It is much more likely that she was able to say so specifically what happened to her because it actually happened.

Moreover, the detective testified that it was very difficult for the victim to make these statements, even to say some of the words describing parts of the body (119:136-37). The victim's demeanor in making these statements also shows that they were true.

Under these circumstances it is not reasonably probable that the jury would have come to any different conclusion regarding the victim's credibility or the defendant's guilt if the evidence regarding other children telling the truth had not been presented. Regardless of how many other children may or may not tell the truth, the jury would have found that the victim in this case was telling the truth.

Morales-Pedrosa failed to prove either prong of the test for ineffective assistance of counsel. He has not proved that his attorney performed deficiently by declining to object to statistical evidence concerning the number of children who fabricate claims of sexual assault, and he has not proved that he was prejudiced by that evidence.

B. Counsel was not ineffective for failing to object to statements regarding the ages of the witnesses.

The state did not introduce any other acts evidence.

Contrary to the assertion in Morales-Pedrosa's brief, brief for Defendant-Appellant at 13, the state never introduced any evidence that the victim's mother was thirteen when she first had sex with Morales-Pedrosa, and was fifteen when she gave birth to the victim.

The prosecutor never asked the victim's mother when she started having sex with Morales-Pedrosa. The state elicited evidence that the victim's mother was thirteen when she "met" Morales-Pedrosa (119:30-31).

Nor did the prosecutor ever ask the victim's mother how old she was when she gave birth to the victim.

The circuit court asked every witness who appeared at the trial, including the police officers and the state's expert, to state their age and date of birth (118:38, 162, 197; 119:15, 29, 103, 125, 149). The victim stated she was born September 27, 1995, making her eighteen years old at the time of the trial (118:38). The victim's mother stated she was born December 20, 1979, making her thirty-three years old (119: 29-30).

The jury could have inferred the age of the victim's mother at the time of the victim's birth by subtracting the victim's current age, elicited by the court, from the current age of her mother, also elicited by the court. Thirty-three minus eighteen equals fifteen.

Or if the jurors were curious to know the precise age of the victim's mother when the victim was born they could have counted the years, months and days from the date of the mother's birth to the date of the child's birth. The jury could have calculated that the victim's mother was fifteen years, nine months and seven days old when the victim was born.

Since the state never introduced any other acts evidence, defense counsel could not possibly have been ineffective for failing to object to any other acts evidence.

The problem, to the extent there may have been one, would have arisen during the prosecutor's closing argument.

The prosecutor did not explicitly argue that Morales-Pedrosa had a propensity to have sex with young teenage girls.

The prosecutor did argue, however, that both the victim and her mother were thirteen or fourteen years old when Morales-Pedrosa had sex with them (121:106-07, 110-11, 115).

If the prosecutor was hoping the jury would infer from this historical fact that Morales-Pedrosa had a propensity to have sex with young teenage girls, that was not a reasonable inference under the facts of this case, and no reasonable jury would have drawn that inference.

Except for the accident of age, the two situations were not alike in any way.

The circuit court elicited the fact that Morales-Pedrosa was thirty-seven years old at the time of the trial (119:210). Doing the math, that would have made him about seventeen when the victim's mother, then thirty-three, was thirteen.

Moreover, the victim's mother was Morales-Pedrosa's girlfriend when they were teens. She married him and had five children with him (119:31). They were still married at the time of the trial, twenty years after they met (119:31). Presumably, whatever sexual activity they shared during those many years was consensual and without force or coercion.

It simply does not follow that a teenage boy who has consensual sex with his teenage girlfriend would have forcible sex with his daughter long after he became an adult.

The fact that a boy has sex with a girl about his own age when they are both teenagers does not mean that he is subsequently going to have sex with a girl who is nowhere near his age when she is a teenager and he is an adult.

The fact that a boy has sex with his girlfriend does not mean he is later going to have sex with his daughter.

The fact that a boy has consensual sex does not mean he is going to have forcible sex as an adult.

Because no reasonable jury would have drawn any inference from the prosecutor's argument that Morales-Pedrosa had any propensity to have sex with teenage girls, his attorney did not perform deficiently by failing to object to that argument.

Because no reasonable jury would have drawn any inference from the prosecutor's argument that Morales-Pedrosa had any propensity to have sex with teenage girls, he was not prejudiced by the failure to object. There was nothing argued at the trial that could have changed the result of the trial.

II. The introduction of testimony regarding the victim's prior extrajudicial statements after she was excused as a witness did not violate the Confrontation Clause.

Morales-Pedrosa asserts that his right to confront the witnesses against him was violated when four other witnesses testified regarding the victim's prior statements after the victim was excused as a witness.

Morales-Pedrosa's right to confrontation was not violated by the testimony of any of these witnesses. But since the reasons why there was no confrontation violation are different with respect to the different witnesses, the situation with respect to each witness will be considered separately.

A. The testimony of Julie Ortiz did not violate the defendant's right to confrontation because she did not testify about any of the victim's prior statements.

Subject to exceptions, the Confrontation Clause of the Sixth Amendment prohibits the introduction of prior testimonial statements made by a person who does not testify about the statements. *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015).

The testimony of Julie Ortiz did not violate Morales-Pedrosa's right to confrontation because she did not testify about any prior statements made by the victim because the victim did not make any statements to Ortiz.

Ortiz testified that when she asked the victim about the subject of sexual assault, the victim "was unwilling to talk about that at all. She looked forward and didn't respond" (118:201). "She did not say nothing had happened. She just didn't say anything at all" (118:203). The victim did not tell Ortiz anything about a sexual assault (118:204).

There could not be any confrontation problem when no prior statements of the victim were introduced through the testimony of Ortiz.

B. The testimony of Gary Vargas did not violate the defendant's right to confrontation because the prior statements of the victim about which he testified were not testimonial.

The Confrontation Clause applies only to prior statements that are testimonial. *Clark*, 135 S. Ct. at 2179-80. Unless the primary purpose of a statement is testimonial, its admissibility is governed by the rules of evidence rather than the Constitution. *Clark*, 135 S. Ct. at 2180.

In determining whether a statement is testimonial, the question is whether, in light of all the circumstances viewed objectively, the primary purpose of the discussion in which the statement was made was to create an out of court substitute for trial testimony. *Clark*, 135 S. Ct. at 2180.

One of the considerations in determining whether a prior statement is testimonial is the identity of the person to whom the statement was made. *Clark*, 135 S. Ct. at 2180-81.

In this case, the state introduced prior statements the victim made to Gary Vargas, the youth advocate at Bradford High School in Kenosha (118:163). His job was to help kids who were in need (118:163). He was someone kids could talk to if they were having issues either at home or at school (118:163).

In *Clark*, the United States Supreme Court addressed for the first time whether statements made to persons other than police officers, in that case the victim's school teachers, could be testimonial. *Clark*, 135 S. Ct. at 2181.

Because at least some statements to persons who are not law enforcement officers could conceivably create confrontation concerns, the Court declined to adopt a

categorical rule that none of these statements are testimonial. *Clark*, 135 S. Ct. at 2181-82.

However, the Court said the fact that the declarant was speaking to someone other than a law officer was highly relevant in the analysis. *Clark*, 135 S. Ct. at 2182.

> Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements made to law enforcement officers. It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police.

Clark, 135 S. Ct. at 2182 (citation omitted).

This is so even when the listener has a mandatory reporting obligation since that responsibility alone cannot convert a conversation between a concerned teacher and his student into a law enforcement mission aimed primarily at gathering evidence for a prosecution. *Clark*, 135 S. Ct. at 2182-83.

Another consideration is whether there is an ongoing emergency. *Clark*, 135 S. Ct. at 2179-80. Even statements to the police can be nontestimonial when the circumstances objectively indicate that the primary purpose of the discussion is to provide assistance to meet an ongoing situation rather than to prove past events relevant to a criminal prosecution. *Clark*, 135 S. Ct. at 2179-80.

There was not just one but a long series of conversations between the victim and Vargas regarding the reasons for the downward spiral in her behavior at school (118:166-71). It was only in the middle of September 2011, after months of discussion, that the victim finally told Vargas that Morales-

Pedrosa had touched her (118:170, 178). And when the victim said that, Vargas did not continue to question her about the details, but contacted child protective services (118:178).

In determining whether the objective of a discussion is to prosecute or protect, it is also relevant that the teacher did not tell the student that her statements would be used to prosecute anyone, and that the student never hinted that she intended her statements to be used by police or prosecutors. *Clark*, 135 S. Ct. at 2181.

Here, there is no evidence that Vargas ever told the victim that her statements would be used to prosecute Morales-Pedrosa. The victim actually hinted that she did not intend her statements to be used to prosecute Morales-Pedrosa because she stopped talking when Vargas said he was going to call child protective services (118:179-80). The victim said she was not ready to say anything to anyone besides Vargas about what Morales-Pedrosa was doing to her (118:81).

Plainly, the primary purpose of the discussions between the victim and Vargas was not to gather evidence to prosecute Morales-Pedrosa, but to assist the victim with whatever problems were causing her to misbehave at school.

An additional factor is the informality of the discussion. *Clark*, 135 S. Ct. at 2180. Statements made outside a formal station house interrogation are less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. *Clark*, 135 S. Ct. at 2180.

Here, of course, the conversations between the victim and Vargas were at the victim's school.

Finally, the declarant's age is a factor in determining whether her statements are testimonial. *Clark*, 135 S. Ct. at 2181-

82. Statements by very young children will rarely raise confrontation concerns because they do not ordinarily understand the criminal justice system. *Clark*, 135 S. Ct. at 2182.

The victim, while not an infant, was young, i.e., not quite sixteen, when she was talking to Vargas (118:38).

The record does not support Morales-Pedrosa's assertion that the victim was old enough to understand that her statements to Vargas would lead to police involvement. Brief for Defendant-Appellant at 19. To the contrary, the record suggests that she was surprised when Vargas told her that he was going to call child protective services (118:178-79).

All the relevant factors in this case convincingly show that the victim's statements to Vargas were not testimonial. They were statements made by a young girl to her school counselor at her school for the purpose of helping her with the personal problems that were causing her to have problems at school. *Cf. State v. Manuel*, 2005 WI 75, ¶ 53, 281 Wis. 2d 554, 697 N.W.2d 811 (statements made to the declarant's girlfriend who was not a government agent during a spontaneous private conversation with no expectation that those statements would be reported to the police were not testimonial).

Vargas' testimony about the victim's nontestimonial statements did not violate Morales-Pedrosa's right to confrontation.

C. The testimony of Willie Hamilton and David May about the prior statements the victim made to them did not violate the defendant's right to confrontation because he had an ample opportunity to cross-examine the victim about those statements when she appeared as a witness at the trial.

Morales-Pedrosa argues that several other states have held that the prosecution cannot introduce prior testimonial statements of a witness after the witness has been excused, leaving it to the defendant to recall the witness for cross-examination. Brief for Defendant-Appellant at 17.

The state does not think that the couple old cases Morales-Pedrosa cites really stand for such a broad rule, but it does not really matter because the majority of jurisdictions have held that there is no confrontation violation where a witness' prior statements are introduced through the testimony of a third person after the witness has been dismissed when the defendant could have cross-examined the witness about these statements while she was on the stand, and the witness is available to be recalled by the defendant for further testimony. *State v. Tompkins*, 859 N.W.2d 631, 640-42 (Iowa 2015) (and numerous cases collected).

One of the many cases cited in *Tompkins* is *State v. Nelis*, 2007 WI 58, 300 Wis. 2d 415, 733 N.W.2d 619. *Nelis* would be controlling law in this state even if the law in other states was not in accord.

Nelis argued that his right to confrontation was violated because prior oral statements of a witness were introduced through the testimony of a police officer "after [the witness] had already testified and was told by the court that he could 'step down,' and [the witness] was not required to remain for

possible recall to the witness stand." *Nelis*, 300 Wis. 2d 415, ¶ 44.

The Wisconsin Supreme Court held that Nelis' right to confrontation was not violated because the witness testified at the trial and was cross-examined concerning his statements to the police. *Nelis*, 300 Wis. 2d 415, ¶ 46. Moreover, there was nothing in the record to establish that the witness was unavailable after he stepped down so that he could not have been recalled to testify again following the testimony of the officer. *Nelis*, 300 Wis. 2d 415, ¶ 47.

It may well be that the burden is on the prosecution, not the defense, to bring its witnesses to court. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). But once the prosecution has brought its witness to court, presented her testimony, made her available for cross-examination, and continued to have her available for further testimony after that, the defendant's right to confrontation is not denied when another witness testifies regarding the first witness' prior statements after the first witness has been excused. *Nelis*, 300 Wis. 2d 415, ¶ 48.

Here, the prosecutor brought the victim to court under subpoena (118:49). When the victim said she wanted to leave, the court told her she could step down while they took a break (118:48-49). But the victim came back to the stand (118:53).

The victim testified extensively on direct examination (118:38-104, 147-54). She was subject to extensive cross-examination by the defense (118:104-44, 154-61), including questions about the statements she made to the two police officer witnesses, Willie Hamilton and David May (118:131-33). The victim's written statements to the officers were introduced into evidence as Exhibits 2 and 3 (118:93; 119:19, 132; 128).

Under these circumstances, the defense had the opportunity to cross-examine the victim about any and all statements she made to the police witnesses, which is all that is required by the Confrontation Clause. *Nelis*, 300 Wis. 2d 415, ¶ 43. If Morales-Pedrosa's attorney did not engage in cross-examination to the extent that he might wish now, that is not a problem under that clause. *Nelis*, 300 Wis. 2d 415, ¶ 43.[3]

After the victim testified, the court said she could step down and was excused from the proceedings, not forever but "at this time" (118:162). The court did not tell the victim that she was released from her subpoena or that she could leave the courthouse.

The next morning the prosecutor asked to recall the victim for more testimony (119:3), showing that the victim continued to be available to return to the stand.

Under these circumstances, there was no confrontation problem when the state introduced prior testimonial statements of the victim through the testimony of two police officers after the victim had been excused.

The same analysis would apply to witnesses Ortiz and Vargas if they had testified about testimonial statements made to them by the victim.

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[3] The victim testified twice that the reason she waited so long to report the sexual assaults was that she was afraid of breaking up her family (118:64, 81). Officer Hamilton testified that the victim told him orally that she waited to report the sexual assaults because she feared for her and her mother's safety (119:20). In light of the victim's testimony, defense counsel should have cross-examined the officer about whether his recollection of the victim's unrecorded statement was correct. In any event, Morales-Pedrosa had an opportunity to cross-examine the victim regarding her reason for her delay. If he did not think this opportunity was sufficient he should have recalled, or had the prosecutor recall, her.

There was no violation of Morales-Pedrosa's right to confront the witnesses against him because some witnesses testified regarding prior statements made by the victim after she had been excused.

CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

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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. The length of this brief is 6,329 words.

Dated this 7th day of October, 2015.

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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 7th day of October, 2015.

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