STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2015AP2154-CR and 2015AP2155-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EARNEST LEE NICHOLSON,

Defendant-Appellant.

ON APPEAL FROM TWO JUDGMENTS OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MEL FLANAGAN, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE

The defendant-appellant, Earnest Lee Nicholson, appeals judgments convicting him of aggravated battery and violating a no-contact order, both as a domestic violence offender and a repeater. (31; 2015AP2155-CR:10.)[1] He also appeals an order denying his motion for postconviction relief. (49; 2015AP2155-CR:18.)

Nicholson was originally charged with aggravated battery and resisting an officer in case no. 11CF5715. (*See* 49:2.) The charges stemmed from allegations that on November 24, 2011, Nicholson punched his live-in girlfriend, MDF, in the face, causing her serious injury, and then resisted the police officers who arrived and attempted to take him into custody. (*See* 49:2.) The trial court dismissed the aggravated battery charge without prejudice when MDF did not appear for trial. (*See* 49:3.) A jury found Nicholson guilty of resisting. (*See* 49:3.) The circuit court, the Honorable Mel Flanagan, imposed sentence for resisting, and also entered a no-contact order prohibiting Nicholson from having contact with MDF or her son. (2015AP2155-CR:3; *see* 49:3-4.)

On June 6, 2013, police went to MDF's residence to investigate a domestic violence complaint, and observed Nicholson outside the apartment building. (*See* 49:2-3.) Nicholson was charged with the November 24, 2011 aggravated battery in case no. 13CF2723 (2), and with violating the no-contact order in case no. 13CM2488.

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[1] All citations to the appellate record are to the record in case no. 2015AP2154-CR, unless otherwise noted.

(2015:AP2155-CR:2:1.) The cases were joined for trial, and a jury found Nicholson guilty of both charges.

Nicholson moved for postconviction relief, seeking a new trial in case no. 13CF2723, and dismissal or a new trial in case no. 13CM2488. (48.) He asserted that the no-contact order in case no. 13CM2488 was void (48:1-2), that the trial court erroneously admitted MDF's statements in case no. 13CF2723 (48:2), and that he was denied the right to testify in both cases (48:2).

The circuit court denied Nicholson's motion without a hearing. (49.) It concluded that it properly issued the no-contact order because MDF was victim of a crime considered at sentencing in case no. 11CF5715 (49:3-5), that it properly admitted MDF's statements as excited utterances (49:5-6), and that Nicholson was not denied the right to testify at trial (49:6-8). Nicholson now appeals.

SUPPLEMENTAL STATEMENT OF FACTS

As respondent, the State will present facts as appropriate in the argument section of this brief.

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED NICHOLSON'S MOTION FOR POSTCONVICTION RELIEF WITHOUT A HEARING.

A. Applicable legal principles and standard of review.

The circuit court denied Nicholson's motion for postconviction relief without holding a hearing. (49.) An appellate court reviews a court's decision denying a motion without a hearing under a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. A court determines de novo "whether the motion on its face alleges sufficient material facts that, if true, would entitle

the defendant to relief." *Id.* (citing *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996)). "If the motion raises such facts, the circuit court must hold an evidentiary hearing." *Id.* (citing *Bentley*, 201 Wis. 2d at 310, *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972)). But "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id.* (citing *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98). The court's decision to deny the motion without a hearing is reviewed "under the deferential erroneous exercise of discretion standard." *Id.* (citations omitted).

B. The circuit court properly rejected Nicholson's claim that he is entitled to dismissal of case no. 2013CM2488 because the no-contact order he violated was void.

Nicholson asserts that the circuit court erred by not dismissing case no. 2013CM2488, in which Nicholson was convicted of violating a no-contact order. (Nicholson's Br. 11-20.) In his motion for postconviction relief, Nicholson challenged his conviction for violating the no-contact order on three grounds, arguing that the no-contact order was void ab initio, his trial counsel was ineffective, and insufficient evidence supported the jury's guilty verdict. (48:7-11.)

The no-contact order was issued in case no. 2011CF5715. Police were dispatched to a battery complaint at 4651 North 36th Street in Milwaukee. (59:11-12.) When police arrived, they heard a woman screaming and observed MDF in the doorway of an upstairs apartment. (59:14.) A police officer reported that MDF "had an eye injury in which there was blood coursing down her face, but at the same time there was blood on her face, there was a trail of clear, viscous fluid. She was holding her eye closed, and between her eyelashes, I could see there was a white, meatlike substance between her eyelashes."

(59:15-16.) MDF told police that Nicholson, her live-in boyfriend, had punched her in the face. (59:17.) MDF was taken to the hospital, where her eye, which had ruptured, was surgically removed. (*See* 49:2; 69:exh. 2.) Police were unable to locate Nicholson. (59:18.)

Police returned to the residence when they received a call indicating that Nicholson had returned. (58:45.) The officers took Nicholson into custody following a struggle, which was the basis of the resisting charge in case no. 2011CF5715. (58:50-53.) Nicholson was also charged with aggravated battery. (*See* 49:3.)

At trial, the police were unable to produce MDF to testify. (*See* 49:3.) The State therefore dismissed the aggravated battery charge without prejudice. (*See* 49:3.) A jury found Nicholson guilty of resisting an officer. (*See* 49:3.)

Judge Flanagan imposed sentence for resisting. The court also issued a no-contact order for MDF. (2015AP2155-CR:3.) The court explained that it understood that Nicholson had dissuaded MDF from testifying against him. The court said, "But I don't believe it's in the community's interest to let the two of you continue in a relationship which is clearly dysfunctional, dangerous, for that child and your neighbors and everybody else." (*See* 49:3-4.) The court ordered, "You are to have no contact at all with this victim. None." It added, "if you were to violate the no-contact order . . . you could be charged with another nine-month offense." (*See* 49:4.)

Nicholson was charged with another offense—violating the no-contact order—after police were called to a domestic violence complaint by MDF, and observed Nicholson outside the apartment building at 4651 North 36th Street in Milwaukee, on June 6, 2013. (2015AP2488-CR:2:1.)

At trial, the State presented into evidence a letter that Nicholson sent to the circuit court on October 10, 2012, asking the court to lift the no-contact order it had imposed.

(69:exh. 19.) A jury found Nicholson guilty of violating the no-contact order. (61:6.)

In his motion for postconviction relief Nicholson argued that the no-contact order was void because it was based on the court finding MDF to be a victim in case no. 2011CF5715, for the purposes of Wis. Stat. § 973.049(1)(b), which allows a court to prohibit contact between a defendant and a victim of a "crime considered at sentencing." (48:11-12.) Nicholson argued that because the aggravated battery charge was dismissed, and he was convicted only of resisting an officer, MDF was not a victim of a crime considered at sentencing. (48:11-12.) He argued that his trial counsel was ineffective for not moving to dismiss on the same ground. (48:10.)

The circuit court rejected Nicholson's arguments. The court noted that under § 973.049(2) and *State v. Campbell*, 2011 WI App 18, 331 Wis. 2d 91, 794 N.W.2d 276, it had discretion to determine who was a victim in case no. 2011CF5715. (49:4-5.) The court acknowledged that the aggravated battery charge was dismissed, but concluded that it properly exercised its discretion in finding that MDF was a victim. (49:5.) The court noted that the crime of resisting an officer has four elements: "(1) the defendant resisted or obstructed an officer; (2) the officer was doing an act in an official capacity; (3) the officer was acting with lawful authority; and (4) the defendant knew the officer was acting in an official capacity with lawful authority" (49:4-5 (citing Wis. JI-Criminal 1765 (2012).) The court concluded that "the officers were acting in their official capacities and with lawful authority while investigating the horrendous injuries sustained by [MDF]." (49:5.) The court noted that the officers were attempting to arrest Nicholson after they determined that they had probable cause to believe he had committed a violent crime against MDF, and that when they attempted to arrest him for the crime, he resisted. (49:5.) The court concluded that Nicholson "views the resisting offense in isolation; however, that offense was part of a larger criminal episode which commenced with his arrest." (49:5.)

The court concluded that because it properly exercised its discretion in concluding that MDF was a victim, Nicholson's counsel was not ineffective for failing to dismiss. (49:5.) The court also concluded that the State presented sufficient evidence to prove Nicholson guilty of violating the no-contact order. (49:5.)

On appeal, Nicholson no longer argues that the State failed to present evidence sufficient for the jury to find him guilty. Nicholson argues that the no-contact order that the circuit court issued was void ab initio because MDF was not a victim of a crime the circuit court considered at sentencing, under Wis. Stat. §§ 941.039 and 973.049.

Wisconsin Stat. § 941.039, "victim, witness, or co-actor contact," provides, as follows:

> Whoever intentionally violates a court order issued under s. 973.049 (2) is guilty of one of the following:
>
> (1) If the court order results from a conviction for a felony, a Class H felony.
>
> (2) If the court order results from a conviction for a misdemeanor, a Class A misdemeanor.

Wisconsin Stat. § 973.049 (2009-10),[2] "Sentencing; restrictions on contact," provided, in relevant part, as follows:

> (1) In this section:
>
> (a) "Co-actor" means any individual who was a party to a crime considered at sentencing, whether or not the

[2] As Nicholson notes in his brief, § 973.049 was amended by 2011 Wis. Act 267. (Nicholson's Br. 12-14.) The amended statute provides that a court may order no contact with witnesses of a crime, Wis. Stat. § 973.049(2), and that a court shall include the prohibition on contact in the judgment of conviction. Wis. Stat. § 973.049(3). As Nicholson also points out, 2011 Wis. Act 267 took effect on April 24, 2012, after Nicholson was sentenced in case no. 2011CF1575, on April 3, 2012. Therefore, the 2009-10 version of the statute applies in this case.

> individual was charged with or convicted of the crime considered at sentencing.
>
> (b) "Crime considered at sentencing" means any crime for which the defendant was convicted or any read-in crime, as defined in s. 973.20 (1g) (b).
>
> (2) When a court imposes a sentence on an individual or places an individual on probation for the conviction of a crime, the court may prohibit the individual from contacting victims of, or co-actors in, a crime considered at sentencing during any part of the individual's sentence or period of probation if the court determines that the prohibition would be in the interest of public protection. For purposes of the prohibition, the court may determine who are the victims of any crime considered at sentencing.
>
> (3) If a court issues an order under sub. (2), the court shall inform the individual of the prohibition and of the penalty under s. 941.39.

Nicholson seems to assert that the issue is whether his battery of MDF was a "crime considered at sentencing" under § 973.049. He argues that since the battery charge was dismissed, it was not a "crime considered at sentencing." (Nicholson's Br. 18.)

The State agrees. But the issue is not whether Nicholson's battery of MDF was a crime considered at sentencing. The issue is whether the circuit court properly exercised its discretion in concluding that MDF was a victim of the resisting an officer crime that was considered at sentencing.

A sentencing court has discretion in imposing sentence. As Nicholson acknowledges, the court in this case could reasonably have determined that a no-contact order with MDF was appropriate. (Nicholson's Br. 17.) As Nicholson also acknowledges, § 973.049(2) provides that "the court may determine who are the victims of any crime considered at sentencing," and in *Campbell*, 331 Wis. 2d 91, this court recognized the circuit court's discretion to

determine who is a victim of a crime considered at sentencing. (Nicholson's Br. 17.)

But Nicholson argues that *Campbell* is "factually specific" to the case and "inapposite here" (Nicholson's Br. 18), and that the court in this case could not issue a no-contact order under § 973.049. (Nicholson's Br. 17-18.)

The circuit court properly relied on *Campbell*. In *Campbell*, the defendant was convicted of sexually assaulting his minor daughter. *Campbell*, 331 Wis. 2d 91, ¶ 2. The sentencing court ordered that the defendant have no contact with his minor son. *Id.* ¶¶ 20, 24. The question on appeal was "whether the circuit court properly exercised its discretion when it determined Campbell's son was a 'victim' of the crime for which Campbell was sentenced." *Id.* ¶ 24.

This court noted that the defendant's son was present when the defendant sexually assaulted his daughter. *Id.* ¶¶ 25-26. It concluded that "[t]he potential emotional harm associated with observing Campbell's sexual misconduct is sufficient to make his son a victim of the crime for purposes of WIS. STAT. § 973.049(2)," and that "by allowing his son to witness the sexual assaults, Campbell has put his son at risk of 'modeling' this behavior and growing up to become sexually abusive." *Id.* ¶¶ 25-26.

Campbell makes clear that a court has broad discretion in determining whether a person is a victim of a crime considered at sentencing. The legislative history of 2005 Wis. Act. 32, which created § 973.049, confirms that the legislature intended that a court have broad discretion.

A Wisconsin Legislative Council Amendment Memo for 2005 Assembly Bill 62, which became 2005 Wisconsin Act 32, states that AB 62 authorizes a court to prohibit a convicted individual "from contacting victims of, or co-actors in, a crime considered at sentencing if the court determines that the prohibition would be in the interest of public protection." (R-App. 101-02.) The same legislative council memo explains that Assembly Amendment 1, to 2005

Assembly Bill 62 by Representative Gundrum, "[E]xpressly authorizes the court to determine who was a victim of the crime for purposes of the no-contact order. (There is no definition of 'victim' in the original bill; allowing the court to determine who is a victim of a particular crime allows the court flexibility to tailor a no-contact order to individual circumstances.)" (R-App. 101.) The amendment was adopted, and the language of the amendment, stating, "For purposes of the prohibition, the court may determine who are the victims of any crime considered at sentencing," is contained in the enacted law. (R-App. 101, 103.)

In this case, the sentencing court properly exercised its broad discretion and tailored a no-contact order to individual circumstances by determining that MDF was a victim of Nicholson's resisting or obstructing an officer conviction. At sentencing, the court stated:

> [Y]ou put the officers at risk, you put your child at risk, you put this woman at risk for further harm. . . .
>
> It's amazing that nobody did get hurt worse.
>
> So that's the situation I have to look at, in terms of the seriousness of the offense.
>
> And . . . [y]ou know, I understand that this woman is crazy enough to want you back.
>
> I mean, you have harmed her tremendously. . . . You have made her believe that she is going to have a wonderful life now, that you're gonna marry her, that everything will be great. . . .
>
> You used charm. . . . You didn't put pressure on her, threaten her, coerce her, you charmed her out of coming to court.
>
> And it worked. It worked for you.
>
> But I don't believe it's in the community's interest to let the two of you continue in a relationship which is

> clearly dysfunctional, dangerous, for that child and your neighbors and everybody else. . . .

(*See* 49:3-4.)

As the circuit court recognized in its decision denying Nicholson's motion for postconviction relief, when it ordered Nicholson to have no contact with MDF, it was properly exercising its discretion to protect the public. As the circuit court noted:

> [T]he officers were acting in their official capacities and with lawful authority while investigating the horrible injuries sustained by [MDF]. The defendant had been named as a suspect, and the officers were looking for him. When they received information about his whereabouts, they attempted to arrest him. The lawful authority to arrest the defendant stemmed from the officers' determination that they had probable cause to believe that he committed a violent crime against [MDF], and when they tried to arrest him, he resisted. The defendant's conviction for resisting an officer is therefore inexorably linked to his alleged actions toward [MDF]. Had the officers not attempted to arrest the defendant for the injuries to [MDF], the resisting would not have occurred. The defendant views the resisting offense in isolation; however, that offense was part of a larger criminal episode which culminated with allegations of extreme violence by the defendant against his then-girlfriend and culminated with his arrest. The court finds that the prohibition on contact was proper under the circumstances, and therefore trial counsel was not ineffective for failing to collaterally attack it.

(49:5.)

On appeal, Nicholson does not explain how the sentencing court erroneously exercised its discretion in finding that MDF was a victim of Nicholson's crime of resisting an officer. As the circuit court concluded, the sentencing court applied the law to the facts, and properly concluded that MDF was a victim of the resisting conviction the court considered at sentencing, and that a no-contact order was necessary to protect MDF, her child, and the public.

Nicholson also claims that his trial counsel provided ineffective assistance by not moving to dismiss the charge for violating a no-contact order. (Nicholson's Br. 18-20.) To prevail on an ineffective assistance of counsel claim, "[a] defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial." *Allen*, 274 Wis. 2d 568, ¶ 26 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prove deficient performance, a defendant must prove that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citations omitted).

To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* (citing *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citations omitted).

Nicholson has shown neither deficient performance for not challenging the no-contact order, nor prejudice. As the court concluded, the "prohibition on contact was proper under the circumstances, and therefore trial counsel was not ineffective for failing to collaterally attack it." (49:5.) As explained above, the court properly exercised its discretion in prohibiting contact. And trial counsel's decision not to challenge the order could not have been prejudicial because, as the circuit court noted, it would not have granted the motion had it been filed.

Because the record conclusively disproves Nicholson's claims, the circuit court properly exercised its discretion in denying his claims without a hearing.

C. The circuit court properly denied Nicholson's motion for a new trial in case no. 2013CF2723 because it concluded that it did not erroneously admit evidence.

Nicholson asserted in his motion for postconviction relief that he is entitled to a new trial in case no. 2013CF2723 because the trial court improperly admitted evidence at trial, specifically remarks MDF made to a police officer who had been dispatched to her residence on a battery complaint. (48:13-18.)

Before trial, the State moved to introduce MDF's statements. (7.) The State asserted that when Officer Jeffrey Waldorf arrived at the residence, he observed MDF screaming in pain. He said that MDF was able to tell him that Nicholson had choked her and struck her in the face. (7:2.) The State asserted that MDF's statement was admissible as an excited utterance, which is an out-of-court statement that relates to a startling event made while the declarant is under the stress of excitement caused by the event. Wis. Stat. § 908.03(2). An excited utterance constitutes admissible hearsay if the party who seeks to admit the out-of-court statement demonstrates: (1) the existence of a startling event or condition; (2) that the statement relates to the startling event or condition; and (3) that the declarant made the statement while still under the stress or excitement that the event or condition caused. *State v. Huntington*, 216 Wis. 2d 671, 681-82, 575 N.W.2d 268 (1998). Under the excited utterance exception, time is measured by the duration of the condition of excitement rather than the mere passage of time from the event described. *Id.* at 683.

Nicholson opposed the motion to admit the evidence, on confrontation grounds. In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the Supreme Court held that the Confrontation Clause generally prohibits the admission of a declarant's out-of-court testimonial statements if the declarant does not testify at trial and the defendant has not had an opportunity to cross-examine the declarant.

When a defendant raises a confrontation challenge to an out-of-court statement's admissibility, the court applies a two-step test to resolve the issue. First, the court must decide whether the challenged statement is admissible under the rules of evidence. *State v. Manuel*, 2005 WI 75, ¶ 23, 281 Wis. 2d 554, 697 N.W.2d 811. Second, if the statement is admissible under the rules of evidence, the court must determine if the statement's admission violates a defendant's right to confrontation. *Id.* ¶ 25.

In assessing whether a statement violates a defendant's confrontation rights, the court must assess whether the statement is testimonial or nontestimonial. The United States Supreme Court did not define "testimonial" in *Crawford*. But it identified three formulations of testimonial statements.

> [E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.
>
> . . . .
>
> [E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.
>
> . . . .
>
> [S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51-52 (citation omitted). The Wisconsin Supreme Court recognizes all three formulations. *Manuel*, 281 Wis. 2d 554, ¶ 39. If the statement was testimonial, then the statement was admissible under the Sixth Amendment only if the witness was unavailable and the defendant had a prior opportunity to cross-examine the witness. *Id.* ¶ 36.

A court may admit a nontestimonial, out-of-court statement of an unavailable person if the statement has adequate indicia of reliability. A statement is reliable if it falls within a firmly rooted hearsay exception or upon a showing of a particularized guarantee of trustworthiness. *Manuel*, 281 Wis. 2d 554, ¶ 61 (citing *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980*),* (abrogated as applicable to testimonial statements, but not as to nontestimonial statements, by *Crawford*, 541 U.S. 36)).

Whether the admission of evidence violates a defendant's right to confrontation presents an issue of constitutional fact. A reviewing court adopts the circuit court's findings of fact unless they are clearly erroneous, but independently applies the appropriate constitutional standard to those facts. *State v. Norman*, 2003 WI 72, ¶ 24, 262 Wis. 2d 506, 664 N.W.2d 97.

After a hearing on the motion, the circuit court concluded that the evidence was admissible under the excited utterance exception to the hearsay rule. The court found that MDF "was extremely uncomfortable and in tremendous pain and loud and yelling and screaming and crying." (56:42.) The court concluded that the questions Officer Waldorf asked MDF "were necessary for medical and safety reasons." (56:43.) The court concluded that the officer needed to learn whether he was dealing with a gunshot wound or a stabbing, or something else, so that he could determine what type of medical attention MDF needed, and whether MDF, officers, or anyone else in the area were in danger. (56:43.) The court concluded that the questioning was critical and in the interests of safety, and that "brief statement that we've discussed at length," was admissible. (56:43.)

On appeal, Nicholson argues that the circuit court erroneously exercised its discretion in admitting MDF's remarks as an excited utterance. (Nicholson's Br. 20-24.) He quotes Officer Waldorf's testimony at the motion hearing,

but does not explain exactly what evidence he believes was erroneously admitted.

At trial, Officer Waldorf testified about his observations when he arrived at MDF's residence. He said he observed that MDF had an eye injury, and that "she had blood coursing down her face, but at the same time there was blood on her face, there was a trail of clear viscous fluid. She was holding her eye closed, and between her eyelashes, I could see that there was a white, meatlike substance between her eyelashes." (59:15-16.) Officer Waldorf testified that MDF was screaming and crying. (59:15.) He said he moved MDF inside her apartment, and asked her for some details, "to ascertain the situation, find out what was going on, find out if it was safe for myself and fellow officers," and that he got "basic details" from her. (59:17.)

The "basic details" are presumably what Nicholson asserts were erroneously admitted. Officer Waldorf said that MDF told him that "her live-in boyfriend, Earnest Nicholson, had punched her in the face and choked her." (59:17.) The prosecutor later asked Officer Waldorf if MDF had said that Nicholson was her "live-in boyfriend," and Officer Waldorf responded that she had said "something to that effect." (59:21.) He also verified that MDF "use[d] a name." (59:21.)

Nicholson sets forth the three-part test for determining whether a statement is an excited utterance, and asserts that MDF's statement to Officer Waldorf does not fall under the excited utterance exception because it "does not meet this criterion." (Nicholson's Br. 23-24.)

It is unclear exactly what part of the test Nicholson believes the evidence did not satisfy. As the circuit court recognized, MDF had just suffered a serious and extremely painful injury, her statement related to the violent incident and her condition, and she made the statement while still "in tremendous pain and loud and yelling and screaming and crying." (56:42.)

Nicholson asserts that MDF's statement was testimonial because Officer Waldrof said at the motion hearing that MDF said that Nicholson had injured her and she was willing to be a complainant. He argues that "[p]olice asking who has committed a particular act would lead an objective witness to reasonably believe that the statement would be available for use at trial." (Nicholson's Br. 24.)

But as the circuit court concluded, Officer Waldorf asked Nicholson who had injured her in order to determine if the perpetrator was in the area, and posed a danger to MDF or the officers. (56:43.) As the court recognized, this information was necessary for "medical and safety reasons," not for the purpose of prosecuting Nicholson. (56:43.)

The circuit court's conclusion that the trial court properly admitted the evidence was correct, and this court should affirm.

D. The circuit court correctly denied Nicholson's claim that he was denied his right to testify at trial.

In his motion for postconviction relief, Nicholson argued that he was denied his constitutional right to testify. (48:18-19.)

The court denied Nicholson's claim, pointing to the portions of the transcript in which it asked Nicholson, again and again, if he wanted to testify. The court concluded that it had

> [M]ade it abundantly clear to the defendant that he had a choice to testify or not to testify. Likewise, the court gave the defendant several opportunities to inform the court that he would like to testify. Trial counsel indicated to the court that he and the defendant had discussed the possibility of the defendant testifying. The court gave the defendant notice that his failure to respond to the court's questions would lead the court to presume that he did not want to testify. The court gave the defendant multiple opportunities to say he wanted to testify, and he chose not to respond to the court's questions and thereby

> waived his right to do so. The defendant cannot refuse to cooperate and later complain that he was denied his right to testify.

(49:8.)

On appeal, Nicholson acknowledges that the court held a colloquy with him to determine whether he wanted to testify, but he asserts that "[t]here was no distinct conclusion to that colloquy," and that "[t]he record is devoid of evidence that he had waived the right to testify." (Nicholson's Br. 26.) He asserts that "[h]e should have been allowed to testify and the total denial of that right violated his right to a fair trial." (Nicholson's Br. 27.)

There is no dispute about the standards that apply to a defendant's decision whether to testify. A trial court must conduct a colloquy with a defendant to determine if the defendant understands the right to testify, has discussed the decision with counsel, and is waiving the right to testify. *State v. Weed*, 2003 WI 85, ¶ 43, 263 Wis. 2d 434, 666 N.W.2d 485. If the court fails to conduct an adequate waiver colloquy, the defendant is entitled to a new trial unless the court's error was harmless. *State v. Nelson*, 2014 WI 70, ¶43, 355 Wis. 2d 722, 849 N.W.2d 317.

In this case, the circuit court properly denied Nicholson's motion for postconviction relief, and declined to grant him a new trial, because the record conclusively disproves his claim. The trial court conducted a thorough colloquy with Nicholson, explained Nicholson's rights to him, and made certain that Nicholson's counsel had done the same thing. The court repeatedly asked Nicholson if he wanted to testify, and he repeatedly failed to answer. The court gave Nicholson multiple opportunities to say that he

wanted to testify, but he refused to tell the court what he wanted to do. He was not denied his right to counsel—he simply chose not to testify.

The court informed Nicholson of his right to counsel, and asked Nicholson and his counsel if Nicholson wanted to exercise that right, stating:

> It's the time in the trial where the defense, yourself, the defendant, has to decide whether to produce any evidence in this case. You've heard us explain to the jury that you have no obligation to present any evidence whatsoever, but you do have the opportunity to present evidence if you choose to. You may testify in this case or you may remain silent. It's up to you and your choice. Would you like to testify at this time, sir?
>
> You're demonstrating by your silence by remaining silent at the moment to my question. This -- if you remain silent -- continue to remain silent in the courtroom, I can't -- I have to presume that that's what you want to do and you do not want to testify, unless you tell me that you want to testify, sir.
>
> Counsel, is there anything you want to -- any record you want to make?

(60:27.)

Nicholson's trial counsel then moved to dismiss the case, but the court denied the motion. (60:27-28.) Counsel then moved for a mistrial on the ground that Nicholson's refusal to remain in the courtroom would prejudice the jury. (60:29.) The court denied the motion, noting that it appeared that Nicholson had attempted to provoke a mistrial. (60:30.)

The court then returned to whether Nicholson would exercise his right to testify. The court said:

> So if I'm reading his silence correctly, and if I'm not please tell me, I am assuming that you do not want to testify, sir. And if I am wrong please speak up and let me know.
>
> He continues to look down and not respond, so I am finding that he is waiving his testimony and his right

> to testify in this proceeding, and the evidence is closed at this time.

(60:31.)

The prosecutor then suggested that Nicholson's trial counsel make a record about whether counsel had spoken to Nicholson about testifying, and Nicholson's counsel said that he had done so. (60:31.) Counsel said:

> Well, we did talk about whether or not he would testify over the course of this trial. I'd say after the first day -- well after Monday he did want to testify, after Tuesday he wanted to testify. But then today beginning of the morning he wasn't quite sure and he wanted to think about it. And he in the end decided -- well I don't know what his final decision was, because it reached a point during the noon hour when he refused to talk to me, so I couldn't discuss it any further.
>
> I mean, I did go up to the bullpen on the sixth floor at approximately 12:15 p.m., and he really did not want to talk to me. He just kept telling me that I was fired.

(60:31-32.)

The court then gave Nicholson yet another chance to say whether he wanted to testify in the following exchange:

> THE COURT: Okay. Well, he certainly has had notice all week long that he has the opportunity to testify and it was explained to him and to the jury in his presence. And if he is not responding that he wants to testify now he is waiving his right to testify, and the court will proceed with closings and instructions.
>
> THE DEFENDANT: I'm not waiving my rights.
>
> THE COURT: Then do you want to testify?
>
> THE DEFENDANT: I'm not waiving my rights.

THE COURT: Then do you want to testify?

THE DEFENDANT: I don't have an attorney.

THE COURT: It's a yes or no question. Do you want to testify?

THE DEFENDANT: I don't have an attorney to testify.

THE COURT: The attorney doesn't testify, you do.

THE DEFENDANT: I don't have an attorney to proceed.

THE COURT: You have an attorney now, yes or no, do you want to testify?

THE DEFENDANT: I do not have an attorney to proceed.

THE COURT: Your attorney is still representing you, I have not released him.

THE DEFENDANT: My attorney is not representing me. I don't have an attorney.

THE COURT: Sir, you are waiving your right to testify.

THE DEFENDANT: No, I'm not.

THE COURT: I'm sorry, but the court is so finding -- you do not talk over me.

THE DEFENDANT: I said that is not what I want to do.

THE COURT: I said do not talk over me.

THE DEFENDANT: Yes, ma'am.

THE COURT: I am finding that you are waiving your right to testify because you are refusing to answer the question yes or no, you will not give a straight answer, and you are refusing to take the stand with your attorney

> asking you questions. And that is the opportunity that you have. If you give up that opportunity, you give up all opportunities. You understand?
>
> THE DEFENDANT: I understand you, but I'm not -- I don't want to give up my rights.

(60:32-34.)

Because Nicholson did not say that he would testify, the court told the parties that it would advise the jury that the court was preparing jury instructions. (60:34.) Nicholson's counsel then asked the court to determine whether Nicholson wanted to be present in the courtroom for closing arguments. The court asked Nicholson if he wanted to remain in the courtroom, and told him that if he stayed in the courtroom, he would have to sit quietly and listen. (60:35-36.)

Nicholson then said, "So I'm not going to have an opportunity to stand trial?" (60:36), and the court gave Nicholson yet another opportunity to exercise his right to testify:

> THE COURT: You've had your opportunity since Monday, sir. This is your trial. You just said you were not going to take the stand.
>
> THE DEFENDANT: I didn't say I wasn't.
>
> THE COURT: This is your attorney, he would ask you questions. If you're saying no to that you're saying no to testifying.
>
> THE DEFENDANT: Well, that's not what I -- I'm not saying that I won't testify. That's not what I'm saying.
>
> THE COURT: Sir, if you want to take the stand, your attorney sitting next to you will ask the questions. Do you want to do that?
>
> THE DEFENDANT: I'm not saying --
>
> THE COURT: No, it's not an, I'm not saying, it's a yes or no question. The only way you can take the stand --

you can't just get up here and put on a show. You can't just say whatever you want to talk about, whatever you want. It's not going to happen. You are asked questions according to the rules of evidence and that's why the attorney asks the questions, and you answer only the questions asked of you.

Now, if you want to do that, of course you can do it, but I'm not going to keep playing games with you. You either say yes or no or it is no. Now what is it?

THE DEFENDANT: Can I have a moment to think about it for a second?

THE COURT: You can have a moment. Go ahead.

. . . .

THE COURT: -- you wanted a little time, I've given you about ten minutes to think. Did you want to testify?

THE DEFENDANT: I feel that to make that decision I need the help of an attorney to represent me. I can't make that decision on my own. I need representation.

THE COURT: Okay. You have representation that you are choosing to ignore and to not use. Your attorney is within two feet of you and you have plenty of time to talk to him about this decision or any other. You choose not to, and for that reason, you're saying that you have chosen not to testify then. Right?

THE DEFENDANT: The person next to me is not my attorney.

THE COURT: That is not a decision that you make in this proceeding. I am making that decision. Now, as I understand it then you're not testifying and we will then -- when the jury brings -- if they're all here we'll bring them down and we'll go into closings.

(60:36-38.)

The court then asked Nicholson if he would listen to the arguments and not get upset or disorderly, or if he wanted to be removed from the courtroom. (60:39.) Nicholson assured the court that he wanted to be present and would be quiet. (60:39-41.)

The jury returned to the courtroom, and the court informed it that the evidence was closed. (60:41.) Nicholson then said, "We have not rested. The person sitting next to me . . . is not my attorney." Nicholson repeated, "The person sitting next to me is not my attorney," and said, "I fired the attorney" and, "I fired this person" and, "This person is not my attorney" and, "he was fired." (60:42.) The court had Nicholson removed from the courtroom (60:43), and he was not present for closing.

As the record demonstrates, the court conducted a colloquy with Nicholson which informed him that he had the right to counsel, and made certain that Nicholson's counsel had discussed the right with him. The court gave Nicholson many opportunities to testify and he simply chose not to do so. Nicholson's claim that he was denied the right to testify is conclusively disproved by the record, and the circuit court properly rejected it. This court should therefore affirm.

CONCLUSION

For the reasons explained above, this court should affirm the judgments of conviction and the order denying a motion for postconviction relief filed by the defendant-appellant, Earnest L. Nicholson.

Dated this 1st day of June, 2016

Respectfully submitted,

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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 6,696 words.

_____
MICHAEL C. SANDERS
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 1st day of June, 2016.

_____
MICHAEL C. SANDERS
Assistant Attorney General

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

DISTRICT I

Case Nos. 2015AP2154-CR and 2015AP2155-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EARNEST LEE NICHOLSON,

Defendant-Appellant.

ON APPEAL FROM TWO JUDGMENTS OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MEL FLANAGAN, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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INDEX TO SUPPLEMENTAL APPENDIX

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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MICHAEL C. SANDERS
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Dated this 1st day of June, 2016.

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