STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2017AP0850-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH B. REINWAND,

Defendant-Appellant.

APPEAL OF A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR WOOD COUNTY, THE HONORABLE GREGORY J. POTTER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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1. Were Dale Meister's statements to his friends and pastor in which he stated that he was seeking visitation of his daughter and that he feared for his life from Joseph Reinwand, testimonial statements inadmissible under the Confrontation Clause?

The trial court held statements that he was seeking visitation of his daughter were non-testimonial but statements that he feared for his life from Reinwand were testimonial.

This Court should hold under *Ohio v. Clark* that both categories of statements were not testimonial.

2. Were Dale Meister's statements to his friends and pastor in which he stated that if anything happened to him they should look to Joseph Reinwand testimonial statements inadmissible under the Confrontation Clause?

The trial court held the statements were testimonial but admissible under the forfeiture by wrongdoing doctrine.

This Court should hold under *Giles v. California* that the statements were admissible under the forfeiture by wrongdoing doctrine.

3. Did the circuit court misuse its discretion in admitting other acts evidence?

The trial court answered this question no.

This Court should uphold the circuit court's exercise of discretion.

4. Did Reinwand's trial attorney provide ineffective assistance of counsel by either:

(a.) "opening the door" to the admission of DNA evidence that the circuit court had excluded; or

(b.) not asking for a presentence investigation (PSI) or presenting mitigating facts at sentencing?

The trial court answered this question no.

This Court should answer this question no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument.

If the Court decides this case on the ground that Meister's statements are testimonial, the State does not believe publication is appropriate. *State v. Mattox*, 2017 WI 9, 373 Wis. 2d 122, 890 N.W.2d 256, definitively addresses the test for testimonial statements. If the Court decides this case on the ground that the forfeiture by wrongdoing doctrine applies, the State believes the case does warrant publication. No published Wisconsin case addresses whether the intent to prevent the witness at issue from testifying must be to prevent the witness at issue from testifying in the criminal case at bar.

INTRODUCTION

Joseph Reinwand appeals a judgment of conviction for first-degree intentional homicide in the shooting death of Dale Meister and an order denying postconviction relief. As part of the State's evidence against Reinwand, the Wood County Circuit Court admitted statements Meister made to friends and his pastor stating he wanted custody/visitation of his daughter, describing Reinwand's threats to harm or kill him and also Meister's statements "if anything happens to me look to [Reinwand]." In a ruling on whether the Confrontation Clause barred these statements, the circuit court held that Meister's statements regarding custody/visitation of his daughter were not testimonial but that statements about Reinwand's threats and the statements "if anything happens

to me look to [Reinwand]" were testimonial. The court found that Reinwand had killed Meister in part to prevent him from testifying in a paternity action involving Meister and Reinwand's daughter, JR, so the testimonial statements were admissible under the doctrine of forfeiture by wrongdoing.

The circuit court was correct in holding that Meister's statements regarding visitation were not testimonial and that forfeiture by wrongdoing applied to any testimonial statements. In the State's view, Meister's expressions of fear and Reinwand's threats are not testimonial.

The State also presented evidence of the burglary of Terry Pelot's home and the theft of tools from the Varga brothers. Reinwand claims the circuit court improperly admitted the evidence because it was barred by Wis. Stat. § 904.04. The circuit court correctly admitted this evidence. The burglary and theft presented a panorama of the police questioning when Reinwand claimed he had memory problems. The evidence was also properly offered for the purpose of credibility.

During the investigation stage, the police executed a search warrant on Reinwand's truck. They recovered a partial pistol grip. In 2008 and again in 2013, the crime lab performed DNA testing on the grip and other items. Prior to the trial, the defense filed a motion to preclude the test results from 2008 testing of the pistol grip. The circuit court excluded the 2008 DNA results because the lab no longer used the 2008 protocols. During cross-examination, Reinwand's counsel, Troy Nielsen, asked the State's expert about DNA test results performed in 2008 on the items other than the pistol grip; the court then permitted the State to admit the 2008 pistol grip results. Reinwand contends Nielsen provided ineffective assistance of counsel by asking about the other DNA results. Nielsen was not ineffective. His interpretation of the circuit court's order was reasonable even if it was mistaken. Moreover, Reinwand was not prejudiced. On re-cross Nielsen

had the lab analyst explain the current protocols were more accurate. The pistol grip was discovered in Reinwand's truck and witnesses placed it in his possession.

Sentencing proceeded shortly after the jury returned the guilty verdict. Reinwand claims that Nielsen provided ineffective assistance when he did not request a PSI and when he did not argue mitigating facts. Nielsen did not perform deficiently because the circuit court knew Reinwand from a 2011 PSI and from sitting as the John Doe judge in the investigation of both Meister's and Pam Reinwand's murders. Reinwand was not prejudiced because the circuit court was aware of and considered Reinwand's claimed mitigation.

STATEMENT OF THE CASE

Dale Meister had a dating relationship with Reinwand's Daughter, JR. (R. 323:206.) They became a couple for about three and one-half years. (R. 323:208.) The relationship produced one child, E. (R. 312:34–35; 323:214.) After Christmas, 2007, Meister and JR broke up. (R. 323:208.)

On January 29, 2008, Meister requested that mediation be ordered in Wood County Case No. 2006PA12 (R. 311:35; 312:60.) Reinwand did not want Meister to have visitation. (R. 320:306.) He wanted Meister to leave JR and her children alone. (R. 325:177–78.) A court commissioner ordered mediation. (R. 312:61.) Mediation occurred on February 25, 2008. (R. 311:37.) The mediator awarded Meister visitation of two partial days per week and every other weekend. (R. 311:39–40.) According to Michelle Meister, Dale Meister was to meet with Reinwand after the mediation. (R. 320:70–72.)

On March 4, 2008, Randy Winkels discovered Dale Meister's body in his trailer home. (R. 319:158, 162–63.) Meister died from three gunshot wounds, one to the chest, one to the left cheek area and one to the left temple. (R. 319:212,

247.) Meister had been dead for a few days. (R. 319:209–10.) Shortly before his death, Meister told several friends that Reinwand had threatened him. (R. 4:2; 322:166.) He was afraid Reinwand might kill him. (R. 320:71, 246.)

Police executed a search warrant on Reinwand's truck. (R. 322:6, 139–40.) They recovered a partial pistol grip. (R. 322:21–22, 34–35, 140.) The Wisconsin State Crime Lab performed DNA testing on the grip. (R. 324:184–85.) Prior to trial, the defense filed a motion to "prohibit[] the State from introducing opinions based upon DNA testing of mixture profiles prior to November 2009." (R. 79:1.) The motion specifically referred to the pistol grip. (R. 79:1.)

The basis of the motion was that in November 2009, the crime lab revised its interpretive guidelines for "mixture DNA samples." (R. 79:2.) The revision instituted "a more conservative type of interpretation." (R. 79:2.) The purpose was "[t]o improve reliability." (R. 79:2.)

DNA testing on the pistol grip using the 2008 protocol included Reinwand as a contributor to DNA mixture found on the pistol grip. (R. 315:96, 117.) But using the post-2009 protocols, Reinwand was not included as a contributor. (R. 324:193.) The reason for the difference stems from the probability of a random match. Under the 2008 protocol, a 61,000 to 64,000 to 1 odds of a random match did not prevent including a contributor. (R. 315:96.) Under the post-2009 protocol, that random probability was too high to permit inclusion of a contributor. (R. 324:193.)

After a hearing, the circuit court concluded "the 2008 results . . . are not based upon reliable principles and methods. The science that was used has been changed . . . . I find that the 2008 DNA test results are not reliable and not admissible." (R. 334:8.)

At trial, the State presented the testimony that Reinwand was neither included nor excluded from the DNA

collected on the pistol grip. (R. 324:193, 196.) On cross-examination, Nielsen established that on a flashlight, a battery, two cigarette butts, a fired cartridge and a lamp, DNA results excluded Reinwand. (R. 324:203–15.) On re-direct, the prosecutor established that the cross-examination about "the flashlight, battery, things in the trailer . . . had [been] summarized . . . in a 2008 report." (R. 324:215.) The prosecutor argued that the cross-examination about items using the 2008 report, opened the door to the 2008 result of the sample found on the pistol grip including Reinwand as a possible contributor. (R. 324:216.) The circuit court recognized that the motion referenced only the pistol grip and that Nielson did not ask any questions on cross about the pistol grip, but the court interpreted its evidentiary ruling to logically cover all of the numerical probabilities in the 2008 report and since Nielson had elicited those on other items, the State could bring out Reinwand's inclusion on the pistol grip sample. (R. 324:221–224.)

Detectives took a statement from Reinwand on April 11, 2008. (R. 322:153.) Numerous times during that interview, Reinwand claimed that he had memory problems and could not remember details. (R. 59:4.) Reinwand claimed he could not remember a burglary of Terry Pelot's home and stealing tools from Marty Varga and his brother. (R. 156:9; 322:171.) Of particular importance to the State's case, detective Wetterau confronted Reinwand with Meister's statements that Meister was afraid Reinwand would kill him. (R. 75:11.) When Wetterau asked "What does that tell you Joe?" Reinwand responded, "That I killed him. There's . . . I don't think I'm really arguing about that. It's just how come I can't remember it? You know, how come I can't remember Terry's safes and how come I can't remember Marty's shit . . . ." (R. 75:11 (first alteration in original).)

The State charged Reinwand with first-degree intentional homicide, arson of a building with intent to defraud, and two counts of felony bail jumping.[1] (R. 24.)

The State filed a motion to admit "other acts" evidence of the Pelot burglary and the theft of the Varga brothers' tools, (R. 59), including a letter Reinwand wrote to his granddaughter admitting to the Pelot burglary (59:5). The State offered the evidence on the theory that the evidence "shows that [Reinwand] did not have a memory problem and could, in fact, remember committing the Pelot burglary." (R. 59:5.) The circuit court reviewed the "taped statement" and found that Reinwand initiated the conversation about his lack of memory. (R. 335:3.) The court admitted the evidence because it was necessary to show the "overall panorama of the interview." (R. 335:4.) The court also found the evidence went to "inconsistent statements." (R. 335:4.) The court concluded:

> I understand that it goes to other bad acts evidence and you can look and do a *Sullivan* analysis and look that it does go for another purpose, more specifically intent or motive. So there is a basis and I find that it is highly relevant; and lastly, that I don't find the prejudicial value is outweighed by the -- excuse me, the probative value is not outweighed by the prejudicial fact in this case.

(R. 335:4.)

The State also filed a motion to admit the series of statements that Meister made to his friends and pastor. (R. 58.) The circuit court held a two-day hearing on the motion (R. 311; 312.) At the hearing, the State made an offer of proof in the form of testimony from 13 witnesses, most of whom repeated their testimony at trial. (R. 311; 312.) In addition, the State offered the following evidence.

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[1] The circuit court severed the intentional homicide from the other counts. (R. 89.)

Detective Tad Wetterau, the lead investigator into Meister's death, identified Wood County Case No. 2006PA12. (R. 311:5–7, 35.) Meister petitioned for custody of E in early 2008. (R. 311:36.) The court date for court ordered mediation was February 25, 2008. (R. 311:37.)

Attorney Leon Schmidt represented Meister in the custody matter. (R. 311:35; 312:59–60.) Schmidt testified that if a party violated a mediation order, the aggrieved party could either move the court to revise the placement or move the court to hold the violating party in contempt. (R. 312:63–64.) If such a motion were filed and a party insists on some custody and the other party continually refuses, the court would conduct a trial. (R. 312:67.) If a trial had occurred in Meister's custody matter, the likelihood that Meister would have testified was "close to 100%." (R. 312:68.)

The circuit court determined, "[A]ny testimony with respect to the fact that Dale Meister was seeking additional placement or visitation of his child I find would be nontestimonial. . . . [T]estimonial statements come into play when the various witnesses have stated if something happened to Dale, they were supposed to look to . . . Reinwand." (R. 313:5.)

The circuit court admitted the following at trial.

Jodi Biadasz had been Meister's friend for about 21 years. (R. 311:168; 320:8.) On the night of February 24, 2008, the night before the court-ordered mediation, Meister returned from a trip to see Alice Conwell and stayed at Jodi's house. (R. 320:18–20, 25.) Meister was trying to work out something with JR so he could see E but JR resisted. (R. 320:21–22.) Reinwand and JR did not want him to have any visitation. (R. 320:23.) He told Jodi that he was having problems with Reinwand. (R. 320:22.) Meister said to Jodi, "[I]f anything happens to me, to let Ray know." (R. 320:25.) Meister was referring to Reinwand. (R. 320:25.) On the night

of February 25, 2008, after the mediation, Meister told Jodi that Reinwand told him to stay away from JR and E. (R. 320:29.) Meister was worried and afraid of Reinwand. (R. 320:32.)

Todd Biadasz, Jodi's husband, also testified that Meister was afraid Reinwand would harm him in some way. (R. 320:290, 308.) Reinwand had said he would shoot Meister in the temple and get away with it. (R. 320:308.) Meister repeated this on several occasions. (R. 320:308.) He said, "If anything happened to him, it was Joe Reinwand." (R 320:308.)

Michelle Meister, Dale Meister's sister-in-law, testified that Dale told her Reinwand was threatening him. (R. 320:56, 65.) Dale told Michelle that Reinwand said if Dale pressed visitation rights he would never see E again. (R. 320:69.) Meister mentioned something about a gun and said he was afraid Reinwand would kill him. (320:71–72.)

Renee Steger, JR's aunt, testified Reinwand was making it difficult for Meister to see E. (R. 320:166.) During the week of February 16 through 24, 2008, Meister visited JR's grandmother who was also Renee Steger's mother. (R. 320:160–61.) During that visit, multiple times Meister expressed concern that Reinwand was going to come after him if he continued to pursue visitation. (R. 320:167–68.) Meister said, "if something happened [to him], look to Joe." (R. 320:172.)

Michael Steger, Renee Steger's husband, testified that at the end of the week of February 16 through 24, 2008, Meister attended a family dinner at Michael and Renee's house. (R. 323:183–84.) Michael and Meister viewed the on-line schedule for visitation and discussed approaches Meister could take at mediation. (R. 323:186–89.) Meister expressed his fear of Reinwand and that he thought Reinwand would hurt or kill him. (R. 323:187, 191.) Meister called Michael after the mediation to give him an update. (R. 323:190, 193–

94.) Meister had gotten all of the visitation he wanted. (R. 323:194–95.) But he thought JR was backing out of the agreement. (R. 323:195.)

Monica Mason, who had known Meister for over 20 years, ran into him at a gas station in late February, 2008. (R. 320:180, 183.) Meister wanted to talk, so Mason invited him to her house. (R. 320:183.) Meister was excited because he had gotten visitation with E. (R. 320:185–86.) He told Mason that a few days earlier, Reinwand had showed up at his trailer and the two had a verbal confrontation. (R. 320:186.) Meister felt threatened because Reinwand told him if he tried to get visitation that Meister's life would be on the line. (R. 320:188–89.) Meister asked Mason to come by his trailer and check up on him and if anything looked unusual to let somebody know. (R. 320:187.) She did check several times but never saw anybody. (R. 320:187–88.)

Alice Conwell, JR's grandmother, testified that Meister came to visit her in Mequon February 16 through 24, 2008. (R. 320:205, 214.) Meister said JR was not allowing him to see E. (R. 320:215–16.) Meister talked about mediation and felt he would get push back from JR because Reinwand would try to influence JR into changing the schedule. (R. 320:216–17.) Reinwand was possessive of JR's children. (R. 320:217–18.) Meister said if anything happened to him, look to Reinwand. (R. 320:217.) Meister did not direct Conwell to go to the police. (R. 320:219.)

Ethan Bauer, Reinwand's son, testified that on February 25, 2008, after Meister's mediation, he received a text message from Meister. (R. 320:227, 239, 242.) When he called in return, Meister was upset. (R. 320:239.) He and Meister arranged to meet at Arby's in Stevens Point. (R. 320:240–41.) At that meeting, Meister told Bauer that Reinwand made a threat on Meister's life. (R. 320:243–44.) He asked Bauer, "Do you think your dad would kill me"? (R. 320:246.)

Cynthia Fellows, who met Meister through one of his older sisters while growing up, maintained a social relationship with Meister. (R. 325:169–70.) During the late summer and early fall of 2007, she and Meister would talk about two or three times a week. (R. 325:173.) She was aware of Meister's relationship with JR and that the relationship was breaking up. (R. 325:172–73.) In October 2007, JR was withholding Meister's visitation with E. (R. 325:177.) Meister was also concerned that Reinwand was meddling in his and JR's affairs. (R. 325:177.) Meister was determined to see E as much as he could. (R. 325:177–78.) Reinwand said he would keep Meister and E apart; he could kill Meister if he wanted to. (R. 325:177–178.) Reinwand said he had guns and Meister should leave JR and the kids alone. (R. 325:178.) Fellows never expected it to amount to anything. (R. 325:179.)

Martin Baur was the pastor at St. Paul's Lutheran Church, where Meister attended. (R. 324:147–48.) At the time of his death, Meister was attending a men's group and receiving counseling from Pastor Baur. (R. 324:150, 152–53.) Meister was concerned about Reinwand and JR's response to his pushing for visitation. (R. 324:158.) During conversations, Meister told Baur that he felt his life was in danger. (R. 324:158.) He told Baur that if he was found dead, you should dig deeper because it would look staged and Reinwand would be behind it. (R. 324:158–59.) Immediately after the mediation, Meister met with Baur and expressed concern that JR was angry with him over the visitation issue. (R. 324:160.) He again expressed apprehension for his life from Reinwand. (R. 324:160.)

The jury found Reinwand guilty. (R. 279.) The court sentenced him to life imprisonment without the possibility of parole. (R. 284; 329:13.)

Reinwand filed a postconviction motion claiming ineffective assistance of counsel for opening the door to the 2008 DNA test result on the pistol grip, for not requesting a

PSI prior to sentencing, and for failing to present mitigating facts. (R. 286.) At a postconviction hearing, Nielsen testified that his line of questioning of the DNA analyst, Jennifer Honkanen, was designed to "show that there was no evidence tying Joe Reinwand to this crime." (R. 330:23.) He did not believe he was opening the door to, "the old protocols on low level mixture DNA samples, which is what . . . the gun grip was characterized as." (R. 330:25.) Nielsen testified that he filed the motion to exclude the results of "low level mixture DNA samples." (R. 330:26–27.) As Nielsen understood the Court's ruling, "if some sample was obtained from a piece of evidence that was a single source sample, that would have not been applicable to my motion or to the Court's ruling because those protocols weren't the ones at issue. Those weren't the ones that were changed or modified or clarified over the years." (R. 330:26.)

Nielsen testified that he and his co-counsel, David Dickmann, discussed proceeding to sentencing shortly after the verdict. (R. 330:15.) He testified that the court knew about Reinwand from the John Doe investigation and the pretrial litigation. (R. 330:16.) He did not mention Reinwand's post-traumatic stress disorder, his memory issues, or his lack of criminal history prior to 2010 because he knew the court was aware of all of that. (R. 330:17–18.) He acknowledged that the judge had been a John Doe judge for both Meister's and Pam Reinwand's homicides. (R. 330:20.) In addition, Reinwand had been charged with Pam Reinwand's homicide, had pled guilty to arson, lying to the public defender's office, and burglary. (R. 330:21.) Nielsen expected the court to sentence Reinwand to life without the possibility of parole. (R. 330:29.)

David Dickmann testified he distinctly recalled discussing the PSI with Reinwand. (R. 330:34.) Reinwand said he would leave the PSI up to Nielsen and Dickmann. (R. 330:34–35.) Dickmann remembered they advised Reinwand a PSI would be brutal. (R. 330:35.) It would not

advance Reinwand's cause. (R. 330:35.) He believed if there was any possibility of a parole date, the best strategy was to have the judge hear no more than he already had heard. (R. 330:37.)

STANDARD OF REVIEW

Whether the admission of Meister's statements violates Reinwand's Sixth Amendment right to confrontation is a question of constitutional law. *State v. Mattox*, 2017 WI 9, ¶ 19, 373 Wis. 2d 122, 890 N.W.2d 256. Appellate courts review the circuit court's findings of historical fact under the clearly erroneous standard but review the application of the historical facts to constitutional principles independently. *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560. This standard also applies to ineffective-assistance-of-counsel claims. *State v. Lepsch*, 2017 WI 27, ¶¶ 13–14, 374 Wis. 2d 98, 892 N.W.2d 682.

Wisconsin appellate courts review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *State v. Ford*, 2007 WI 138, ¶ 30, 306 Wis. 2d 1, 742 N.W.2d 61.

ARGUMENT

I. The circuit court correctly held that Meister's statements to his friends and pastor, except those actually accusing Reinwand of a crime, were not testimonial.

A. The law governing testimonial statements.

Generally, the Confrontation Clause of the Sixth Amendment bars the use of "testimonial" hearsay statements unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 54 (2004). The *Crawford* Court noted that the Confrontation Clause "most naturally read[s]

as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* at 54.

Crawford did not provide a comprehensive definition of "testimonial." Rather, it concluded that, "at a minimum," "testimonial" statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations" because these are the types of evidence "at which the Confrontation Clause was directed." *Id.* at 68; *see also State v. Mattox*, 2017 WI 9, ¶ 24, 373 Wis. 2d 122, 890 N.W.2d 256. The statements at issue in *Crawford* involved a witness interrogated as a possible suspect while in police custody after having been given *Miranda*[2] warnings. *Crawford*, 541 U.S. at 38.

Since, *Crawford*, the Supreme Court has "labored to flesh out what it means for a statement to be 'testimonial.'" *Ohio v. Clark*, 576 U.S. ___, 135 S. Ct. 2173, 2179 (2015). In *Davis v. Washington*, 547 U.S. 813 (2006), the Court said police interrogations produce testimonial statements where no ongoing emergency exists and the "primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. In contrast, statements are non-testimonial "when made in the course of police interrogation[s] under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.*

In *Michigan v. Bryant*, 562 U.S. 344 (2011), the Court observed, "[w]hen, . . . the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." *Id.* at 358. The inquiry of whether a

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

statement is testimonial must consider all of the relevant circumstances. *Id.* at 369.

But "an ongoing emergency is not the touchstone of the testimonial inquiry." *Id.* at 374. "[W]hether an ongoing emergency exists is simply one factor . . . ." *Id.* at 366. The Court went on to observe that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* at 358. In this regard, the Court acknowledged that a statement can have more than one purpose. If, after considering all of the relevant circumstances, the primary purpose of a statement is something other than a desire to create a record for trial, the statement is non-testimonial, *id.* at 358, and "the admissibility of [the] statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.* at 359.

Crawford, *Davis*, and *Bryant* all involved statements to police officers. *Davis* and *Bryant* specifically reserved the question of whether and when statements to someone other than law enforcement are testimonial. *Davis*, 547 U.S. at 823, n.2; *Bryant*, 562 U.S. at 357 n.3. The Court finally confronted that question in *Ohio v. Clark*, 576 U.S. ___, 135 S. Ct. 2173 (2015). *Clark* is the only case in which the United States Supreme Court has addressed whether statements a victim made to someone other than a law enforcement officer may violate the Confrontation Clause. *Id.* at 2180.

In *Clark*, the Court recognized "at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns." *Id.* at 2181. Therefore, the Court "decline[d] to adopt a categorical rule excluding [statements made to non-law enforcement officers] from the Sixth Amendment's reach." *Id.* The Court also affirmed that determinations as to whether such

statements are testimonial turn on the primary-purpose test enunciated in *Davis* and *Bryant*. *Id.*

In *State v. Mattox*, the Wisconsin Supreme Court set out the factors this Court should consider in deciding whether the primary purpose of Meister's statements was a desire to create a record for trial; the factors include: "(1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant and (4) the context in which the statement was given." *Mattox*, 373 Wis. 2d 122, ¶ 32 (footnote omitted) (citing *Clark*, 135 S. Ct. at 2180–82).

B. Meister's statements regarding custody/ visitation are not testimonial.

The circuit court held that Meister's statements addressing his battle with JR over custody/visitation rights with E were non-testimonial. (R. 313:5.) It held the accusatory statements "if anything happens to me look to Reinwand," or similar statements were testimonial. (R. 313:5–6.) The circuit court did not separately address Meister's statements that he feared Reinwand would harm or kill him. It did reference those statements in holding the accusatory statements to be testimonial. (R. 313:6.) In the State's view, these statements regarding Meister's fear of Reinwand were also non-testimonial.

The *Mattox* factors lead to the conclusion that the statements regarding custody/visitation and Meister's fear of Reinwand are non-testimonial. The first three factors easily mitigate toward non-testimonial statements. Both sets of statements occurred in informal settings and were made to close friends or relatives. Jodi and Todd Biadasz, Monica Mason, and Cynthia Fellows were Meister's life-long friends. (R. 320:8, 180, 290; 324:169.) Michelle Meister was Meister's sister-in-law. (R. 320:56.) Renee and Michael Steger were

JR's aunt and uncle, Ethan Bauer was JR's half-brother, and Alice Conwell was JR's grandmother. (R. 320:149, 203, 227; 323:179.) The statements arose in the course of casual, albeit somewhat confidential conversations. Everyone experiences such interactions almost daily. The statement to Pastor Baur was only slightly more formal and more confidential as a part of religious/life counseling. (R. 324:150, 152–53.)

None of the statements involve law enforcement. Statements to non-law enforcement individuals "are much less likely to be testimonial than statements to law enforcement officers." *Clark*, 135 S. Ct. at 2181.

The age factor is not applicable here.

Not only did Meister not intend to create a record of his statements about his visitation attempts for the only trial he envisioned, the custody trial, but at the time he made the statements it is difficult to formulate a theory on which those statements would be admissible in the custody battle. From both Meister's perspective and the witnesses' perspective, there was no thought that the statements would be a substitute for testimony at any trial.

The statements about Meister's visitation/custody matter are non-testimonial. Reinwand does not argue that they are.

C. Meister's statements regarding his fear of Reinwand are not testimonial.

In the State's view, the statements expressing Reinwand's threats and Meister's fear of Reinwand are also non-testimonial. In *Giles v. California*, 554 U.S. 353 (2008), the Court, in addressing the dissent's criticism of the adopted forfeiture by wrongdoing rule, observed "[s]tatements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules." *Id.* at 376.

The Court's reference to the rules of hearsay confirms that statements about abuse and intimidation would not be testimonial and thus not subject to exclusion on confrontation grounds. *See Bryant*, 562 U.S. at 359. The reference to physicians in the course of treatment would also cover the statements to Pastor Baur in the course of counseling.

The context of all of these statements was without any regard to criminal proceedings or investigation. The *Mattox* court observed that at the time of the request for the toxicology report at issue in that case, "no charges were pending or contemplated against Mattox." *Mattox*, 373 Wis. 2d 122, ¶ 33. The same is true here. At the time Meister made his statements, there was no evidence a crime had even been committed. And this group of statements did not contemplate a future crime. Whether Meister's fear was well-founded was still in doubt. Lastly, Meister did not even tell his listeners to contact police. (R. 311:163, 173, 199, 223, 230, 247, 249; 312:29; 320:32, 219.)

Reinwand presents no argument claiming the circuit court erred in admitting Reinwand's threats to harm or kill Meister. His entire argument on confrontation focuses on *Giles* and forfeiture by wrongdoing, (Reinwand's Br. 11–16), with the exception of his opposition to harmless error (Reinwand's Br. 16–17).

II. The circuit court correctly held that the doctrine of forfeiture by wrongdoing applied to Meister's statements actually accusing Reinwand of harming or killing him.

The circuit court determined that Meister's statements of Reinwand's threats that actually accused Reinwand of committing Meister's murder were testimonial. (R. 313:5.) The prosecutor did not argue to the contrary below. The State does not concede the circuit court was correct but it assumes

for the purpose of this argument that Meister's statements were testimonial.

As the State stated above, *Crawford*, generally bars "testimonial" hearsay statements. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The *Crawford* Court noted that the Confrontation Clause "most naturally read[s] as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* at 54. *Crawford* recognized two exceptions admitted at the time of the founding: dying declarations, *see id.* at 56 n.6 ("The existence of [the dying declaration] exception as a general rule of criminal hearsay law cannot be disputed."); and forfeiture by wrongdoing, *see id.* at 62 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . . .").

In *Davis v. Washington*, 547 U.S. 813 (2006), the Court observed, "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. . . . [O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Id.* at 833. The Court observed that Federal Rule of Evidence 804(b)(6) codifies the forfeiture doctrine. *Id.*

In *Giles v. California*, 554 U.S. 353 (2008), the United States Supreme Court specifically addressed the contours of the forfeiture by wrongdoing exception. At the time of the founding "the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Id.* at 359. The Court again referenced the federal forfeiture by wrongdoing rule of evidence "which applies only when the defendant 'engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.'" Fed. R. Evid. 804(b)(6); *Giles*, 554 U.S. at 367.

In order to admit an absent witness's testimonial statements, the State has the obligation of proving that the defendant caused the witness's absence by a preponderance of the evidence. *State v. Jensen* (*Jensen I)*, 2007 WI 26, ¶ 57, 299 Wis. 2d 267, 727 N.W.2d 518; *State v. Rodriguez*, 2007 WI App 252, ¶ 14, 306 Wis. 2d 129, 743 N.W.2d 460. The intent to prevent a witness from testifying need not be the sole motivation for a defendant's actions. The State meets its burden by proving the defendant's conduct was a substantial factor in causing the witness's absence. *Rodriguez*, 306 Wis. 2d 129, ¶ 15. "[I]t is sufficient . . . to show that the evildoer was motivated *in part* by a desire to silence the witness; the intent to deprive the prosecution of testimony need not be the actor's *sole* motivation." *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996). *Accord United States v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 2001); *United States v. Johnson*, 219 F.3d 349, 356 (4th Cir. 2000).

Here, the circuit court found by a preponderance of the evidence that Meister "was made unavailable for the purpose of not testifying." (R. 313:6.) The circuit court made the following findings of fact.

> Meister and [JR], had a daughter together; that . . . Meister was seeking additional visitation and placement; that they had gone through mediation; that mediation resulted in an order being rendered; that [JR] indicated that she was not going to comply with the mediation order; and [Leon] Schmidt, who was representing one of the parties, indicated that the next step in that process if mediation was not successful or if it was not being complied with meant that it would have to be heard by one of the -- by the trial court and that would result in litigation. The litigation obviously would require the testimony of each of the parties and therefore by having the homicide take place, . . . Reinwand was ensuring that . . . Meister would not be available to testify at that type of hearing.

(R. 313:6–7.)

The record supports the circuit court's findings. Todd Wetterau identified Wood County Case No. 2006PA12. (R. 311:35.) He testified Meister petitioned for custody in 2008 and, after a hearing, the mediator awarded Meister custody/visitation. (R. 311:16–17, 39–40.) Numerous witnesses testified both at the forfeiture hearing and at trial that Meister and JR had a daughter, that Meister sought custody/visitation rights through mediation, the mediator has awarded visitation, and that JR was backing out or not going to comply with the mediation award. (R. 311:168, 171, 198, 212, 227, 250; 312:28, 31, 35, 46, 50–51; 320:21–22, 65, 163, 165–66, 188–89, 215, 217, 301, 306; 323:185, 194; 324:158; 325:172, 177.) Leon Schmidt's testimony supports the court's findings that Meister would have been a witness had the custody/visitation matter proceeded to completion. (R. 312:63–68.)

Reinwand argues that there was insufficient evidence from which the circuit court could find that Reinwand intended to prevent Meister from being a witness in the custody matter. (Reinwand's Br. 15.) The State disagrees. The evidence the circuit court recited, which finds ample support in the record, strongly implies that the custody dispute would have gone to an evidentiary trial save Meister's death. There was evidence to support the finding that JR would not abide by the mediation award and that Meister would have pressed for her compliance. It is true that he had two alternative options. (R. 312:63–64.) But Schmidt testified that if a party continually refuses, the court would conduct a trial. (R. 312:67.) So either way, the likelihood that Meister would be a witness was "close to 100%." (R. 312:68.)

Given the circuit court's finding, its holding raises a legal question *Giles* did not address. Does Reinwand's specific intent to keep Meister from being a witness in the paternity action, satisfy the intent element of the forfeiture by wrongdoing doctrine? Stated differently, is the intent element

limited to intent to prevent the person kept away from being a witness in the criminal trial at issue?

As noted, the Supreme Court indicated in both *Davis* and *Giles* that Fed. R. Evid. 804(b)(6) codifies the forfeiture by wrongdoing doctrine. *Davis*, 547 U.S. at 833; *Giles*, 554 U.S. at 367. Cases decided under Fed. R. Evid. 804(b)(6) are thus informative on the scope of the *Giles*' forfeiture doctrine. These cases apply the doctrine when a defendant such as Reinwand has the purpose to prevent a witness from testifying in a different proceeding.

United States v. Lentz, 524 F.3d 501 (4th Cir. 2008), presented a fact pattern very similar to the facts in this case. Lentz killed his ex-wife to avoid the consequences of a contentious state-court divorce action. *See id.* at 507–10. The Fourth Circuit held her statements were admissible at Lentz's federal criminal trial for interstate kidnapping resulting in death. *Id.* at 527. *Lentz* supports the proposition that Meister's statements, even if they were testimonial, were admissible if Reinwand killed him to avoid the consequences of the pending custody/visitation action, a motive similar to that underlying Lentz's kidnapping and murder of his ex-wife.

In *United States v. Stewart*, 485 F.3d 666 (2d Cir. 2007), a gang (the Crew) including Stewart, engaged in drug trafficking in Brooklyn, New York. *Id.* at 668. In 1999, Stewart found out that a person named Ragga was selling marijuana in competition to the Crew. Stewart shot Ragga, but he survived. *Id.* at 669. Stewart sent Ragga several messages urging him not to identify Stewart, but Ragga told police that Stewart shot him and refused to agree not to testify against Stewart. *Id.* In July 2000 another Crew member murdered Ragga. *Id.* Stewart was eventually tried on federal charges involving the 1999 attempted murder of Ragga. The district court allowed the government to introduce evidence that in 1999, Ragga told police Stewart shot him. *Id.*

The Second Circuit (in a panel including now Justice Sotomayor) held that the forfeiture by wrongdoing principle applied to Ragga's statements even though Stewart had murdered Ragga to prevent him from testifying in a state assault trial, not the federal charges at issue. *Id.* at 672. The court stated, "The text of Rule 804(b)(6) requires only that the defendant intend to render the declarant unavailable 'as a witness.' The text does not require that the declarant would otherwise be a witness at any *particular* trial. . . ." *Id.* The court concluded, "A defendant who wrongfully and intentionally renders a declarant unavailable as a witness in any proceeding forfeits the right to exclude, . . . the declarant's statements at that proceeding and any subsequent proceeding." *Id.*; *see also United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005) ("Rule 804(b)(6) applies whenever the defendant's wrongdoing was intended to, and did, render the declarant unavailable as a witness against the defendant, without regard to the nature of the charges at the trial in which the declarant's statements are offered.").

And in *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007), the Eighth Circuit applied the rule to a defendant who sought to prevent a witness's testimony against someone else (which would necessarily be a different proceeding). The court held that Rule 804(b)(6) allowed the admission of hearsay against Johnson, although she had aided the murder of the declarants to prevent them from testifying against her boyfriend in his criminal trial. The court reasoned that "Johnson's conduct was no less abhorrent and no less offensive to 'the heart of the system of justice itself' because she procured the unavailability of witnesses against [her boyfriend] rather than against herself." *Id.* at 972.

The Second Circuit has determined that *Stewart* and *United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001) survive *Giles*. In *United States v. Vallee*, 304 F. App'x 916 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2887 (2009), the court explained

that the Supreme Court's invitation to explore Giles's intent on remand suggests that forfeiture applies not only at the earlier proceeding from which the defendant intended to prevent the witness from testifying but also at the defendant's trial for murdering her. *Id.* at 920 n.3. Thus, the finding Vallee killed Carter to prevent his testimony in Vallee's Canadian drug prosecution was sufficient to admit Carter's statements in Vallee's federal criminal trial.

Reinwand relies on the series of cases involving Mark Jensen: the Wisconsin Supreme Court decision in *State v. Jensen (Jensen I)*, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518; this Court's decision after Jensen's trial, *State v. Jensen (Jensen II)*, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482; and *Jensen v. Clements (Jensen III)*, 800 F.3d 892 (7th Cir.), *reh'g denied* (7th Cir. 2015). (Reinwand's Br. 13–14.) In *Jensen I*, the Wisconsin Supreme Court used this formulation for testimonial statements: "[A] statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *Jensen I*, 299 Wis. 2d 267, ¶ 25 (quoting *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005)). But *Jensen* was decided before *Bryant* and *Clark*. The test in *Jensen I* differs from the primary purpose test. *Bryant* and *Clark* emphasized that *Davis*' primary purpose test is the proper standard for determining testimonial statements. And in *Mattox*, the Wisconsin Supreme Court made clear that "the dispositive 'question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the [out-of-court statement] was to creat[e] an out-of-court substitute for trial testimony.'" *Mattox*, 373 Wis. 2d 122, ¶ 32 (alterations in original) (quoting *Clark*, 135 S. Ct. at 2185.).

The analysis in *Jensen I* is also flawed because it does not consider "all of the relevant circumstances." *Bryant*, 562 U.S. at 369. For instance, *Jensen I* declares "it does not matter

if a crime has already been committed or not." *Jensen I*, 299 Wis. 2d 267, ¶ 28. Yet where, as here, no criminal prosecution is pending or contemplated, it is much less likely that the purpose of Meister's statements was to create a substitute for trial testimony.

Reinwand also ignores the fact that even under the *Jensen I* court's more expansive definition of "testimonial," it found Julie's statements to Wojt (her neighbor) and DeFazio (her son's teacher) non-testimonial. *Id.* ¶ 31–33. The court observed Julie's statements were "wholly consistent with the statements of a person in fear for her life." *Id.* ¶ 32. Meister's statements to his friends and pastor are more comparable to the statements to Julie's neighbor and her child's teacher than to Julie's letter and voicemail to Officer Kosman.

Jensen II is inapposite here for two reasons. First, this Court used the same Wisconsin Supreme Court definition of testimonial. *Jensen II*, 331 Wis. 2d 440, ¶ 27. Second, this Court decided Jensen's appeal on harmless error. *Jensen II*, 331 Wis. 2d 440, ¶¶ 30–73. The Seventh Circuit also addressed only harmless error. *Jensen III*, 800 F.3d at 901–908.

Reinwand also argues that no motion necessitating an evidentiary hearing was pending. (Reinwand's Br. 15.) The federal courts of appeals have also held that the doctrine of forfeiture by wrongdoing applies even though there is no pending proceeding at the time a defendant procures a witness's silence.

In *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996), Houlihan and Fitzgerald ran a drug ring. They imposed a strict code of silence and dealt severely with persons who seemed inclined to talk. Joseph Nardone, a professional assassin, acted as the principal enforcer. *Id.* at 1277. George Sargent served as a distributor for the organization. The police arrested him twice during 1992 on drug-trafficking

charges. Both times, Sargent made voluntary statements that inculpated Fitzgerald and Houlihan in a drug conspiracy and tended to link them with several murders. Within a month after he gave the second statement, Sargent was ambushed outside his dwelling and was shot several times, probably by Nardone. He died as a result. *Id.* at 1278. The district court admitted, over objection, portions of Sargent's hearsay statements on the theory that Sargent's murder constituted a forfeiture of the right to confrontation. *Id.*

Houlihan argued that the forfeiture doctrine did not apply because Sargent was not an actual witness. No charges had been brought at the time of his murder. *Id.* at 1279. The court rejected this argument. "[W]e can discern no principled reason why the [forfeiture] doctrine should not apply with equal force if a defendant intentionally silences a *potential* witness." *Id.* The court specifically referred to police investigations. "[W]hen a defendant murders . . . a witness . . . in order to prevent him from assisting an ongoing criminal investigation, he is denying the government the benefit of the witness's live testimony at a future trial." *Id.* at 1280.

In *United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001), the Second Circuit "extended [the forfeiture doctrine] to situations where 'there was [no] ongoing proceeding in which the declarant was scheduled to testify.'" *Id.* at 652 (second alteration in original) (citation omitted). *See also United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997) ("We have no hesitation in finding, in league with all circuits to have considered the matter, that a defendant who wrongfully procures the absence of a witness *or potential witness* may not assert confrontation rights as to that witness.") (emphasis added); *United States v. Emery*, 186 F.3d 921, 924, 926 (8th Cir. 1999) (Emery murdered a woman, Elkins, who was cooperating with federal officials in an investigation of Emery's drug trafficking activities.).

The forfeiture by wrongdoing doctrine applies to this case. Reinwand forfeited his right to confront Meister when he murdered Meister to prevent him from testifying in the custody/visitation action.

III. The circuit court did not misuse its discretion in admitting "other acts" evidence.

The State moved to admit evidence concerning the burglary of Terry Pelot's home and the theft of tools from the Varga brothers. The circuit court admitted the evidence.

When reviewing an evidentiary decision, the question on appeal is not whether the appellate court would have admitted the evidence, but whether the circuit court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. *State v. Doss*, 2008 WI 93, ¶ 19, 312 Wis. 2d 570, 754 N.W.2d 150; *State v. Manuel*, 2005 WI 75, ¶ 24, 281 Wis. 2d 554, 697 N.W.2d 811. A proper exercise of discretion requires that the circuit court rely on facts of record, the applicable law, and, using a demonstrable rational process, reach a reasonable decision. *Doss*, *id.*; *Manuel*, *id.*

The evidentiary bar of Wis. Stat. § 904.04 applies to [e]vidence of a person's *character or a trait of the person's character* [offered] for the purpose of proving that the person acted in conformity therewith on a particular occasion." Wis. Stat. § 904.04(1); *State v. Sullivan*, 216 Wis. 2d 768, 782, 576 N.W.2d 30 (1998). The problem evidentiary issues such as these present is that proof of the specific acts appears the same whether offered to prove a character trait or to prove something else. That is why Professor Blinka observes that one must pay "close attention . . . to how the evidence is being used." 7 Daniel D. Blinka, *Wisconsin Practice Series*: *Wisconsin Evidence* § 404.01 (3d ed. 2008). Use is important because the statute does not bar the evidence if it is not

offered to prove character or a character trait. Wis. Stat. § 904.04(1), (2). If the evidence is not offered to prove character, Wis. Stat. § 904.04(1), or a character trait, Wis. Stat. § 904.04(2), section 904.04 plays no part in the admissibility equation.[3] The examples the statute lists are not exclusive. *State v. Carter*, 2010 WI App 37, ¶ 33, 324 Wis. 2d 208,781 N.W.2d 527. The list of prohibited purposes consists of one—proving a character trait.

The circuit court properly exercised its discretion. First, the court correctly concluded the evidence of the other crimes was necessary for the "panorama" of the interview. Certainly, the burglary and theft, brought up by Reinwand himself, explains many of the loss-of-memory statements in the interview. The State notes that Reinwand's current charge did not include the Pelot burglary or Verga theft, but a homicide. There was no similarity between the "other acts" and the homicide. Thus, evidence of that behavior (burglary and theft) could not be used to prove that Reinwand had a propensity to kill. Instead, the evidence was offered for the permissible purposes of providing context for the interview. *See State v. Jensen (Jensen II)*, 2011 WI App 3, ¶ 84, 331 Wis. 2d 440, 794 N.W.2d 482. "[Evidence] of other acts for the purpose of providing the background or context of a case is not prohibited by [Wis. Stat.] § 904.04(2)." *State v. Hereford*, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995).

Second, the circuit court recognized that the evidence impeached Reinwand's claim that he could not remember killing Meister. Impeachment is an acceptable purpose because it does not attempt to reason through character to an act in conformity with that character. Moreover, evidence of criminal acts of an accused which are intended to obstruct

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[3] It is true that *Sullivan* sets forth a three part test. *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998). But the second and third steps are merely an application of Wis. Stat. §§ 904.02 and 904.03, which apply to all evidence.

justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge. *State v. Bettinger*, 100 Wis. 2d 691, 698, 303 N.W.2d 585, *modified*, 100 Wis. 2d 691, 699a, 305 N.W.2d 57 (1981). *See also State v. Neuser*, 191 Wis. 2d 131, 144, 528 N.W.2d 49 (Ct. App. 1995).

Reinwand argues that the timing of the burglary and thefts, prior to Meister's death, bring them within the prohibited "other acts" purview. But events that are dissimilar or that do not occur near in time may still be relevant to one another. *State v. Payano*, 2009 WI 86, ¶ 70, 320 Wis. 2d 348, 768 N.W.2d 832. "There is no precise point at which a prior act is considered too remote, and remoteness must be considered on a case-by-case basis." *State v. Hurley*, 2015 WI 35, ¶ 80, 361 Wis. 2d 529, 861 N.W.2d 174 (quoting *State v. Hunt*, 2003 WI 81, ¶ 64, 263 Wis. 2d 1, 666 N.W.2d 771).

The circuit court did not misuse its discretion in admitting the burglary and theft evidence.

IV. Reinwand's trial attorney did not provide ineffective assistance of counsel.

To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The standard for determining deficient performance is whether counsel's representation fell below objective standards of reasonableness. *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* ¶ 37 (citation omitted).

An attorney performs deficiently if he or she performs outside the range of professionally competent assistance,

meaning the attorney's acts or omissions were not the result of reasonable professional judgment. *Strickland*, 466 U.S. at 690. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight . . . and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Counsel's performance "need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305.

A defendant satisfies his burden of proving the prejudice prong by showing that the attorney made errors of such magnitude that there is a reasonable probability that, absent the errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine the court's confidence in the outcome of the trial. *Id*. "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" *Thiel*, 264 Wis. 2d 571, ¶ 20 (citation omitted).

A reviewing court may dispose of a claim of ineffective assistance of counsel on either deficient performance or prejudice. *Strickland*, 466 U.S. at 697.

A. Reinwand failed to prove Nielsen was ineffective in his cross examination of the DNA expert.

Reinwand first claims that Nielsen was ineffective when he cross-examined the State's DNA expert on the 2008 results for items other than the pistol grip. Nielsen testified that he believed the circuit court's order in response to his motion to exclude the 2008 results on the pistol grip did not cover the single sample results on the other objects. (R. 330:26.) While his interpretation of the court's ruling may have been mistaken, it was a reasonable interpretation. His

motion concentrated on the pistol grip, which presented a mixed sample. All the items he cross-examined on were single samples. An attorney exercising reasonable professional judgment could believe that the court had only excluded the 2008 results on mixed samples. Moreover, his purpose of demonstrating Reinwand's DNA did not appear in any of the other samples was a reasonable cross-examination tactic.

Reinwand has also failed to prove prejudice. First, Reinwand's contention that Nielsen's "error, coupled with the [other] errors outlined . . . provides further support" for his claim, finds no support in the case law. Reinwand attempts to combine his claim of counsel error with claims of judicial error he also raises. He cites no case for this proposition and the State is unaware of any.

Second, this Court's confidence in the outcome of the trial should not be shaken by Nielsen's opening the door to the 2008 pistol grip DNA result. Nielsen rehabilitated any error by asking the expert which set of protocols interpreting low-level DNA mixtures was more accurate to which the expert replied "the ones today." (R. 324:237–38.) Moreover, the DNA evidence did no more than raise the possibility that Reinwand had possession of the murder weapon. But other, stronger evidence established Reinwand's possession of that weapon. The partial pistol grip was found in Reinwand's truck. (R. 322:21–22.) His daughter, JR, also testified Reinwand gave her that pistol but she had returned it. (R. 323:224–26.) Given this evidence, the jury would most probably have concluded Reinwand possessed the murder weapon absent the DNA "mistake."

B. Reinwand failed to prove Nielsen was ineffective at sentencing.

Reinwand also claims Nielsen was ineffective for not requesting a PSI and for not arguing certain mitigating facts.

Reinwand cannot establish deficient performance based on counsel's failure to request a PSI. Reinwand agreed with his attorneys not to request a PSI. The rule is well-settled that a lawyer's rational strategic decision will not support a claim of ineffective assistance of counsel. *State v. Elm*, 201 Wis. 2d 452, 464–65, 549 N.W.2d 471 (Ct. App. 1996). And a defendant who acquiesces to trial counsel's strategic choice is bound by that decision. *State v. McDonald*, 50 Wis. 2d 534, 538–39, 184 N.W.2d 886 (1971); *see also Shawn B.N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (appellate court will not review error invited by appellant).

Reinwand cannot establish prejudice from not presenting mitigating facts either. He now claims that Nielsen could have brought to the court's attention "potentially favorable information." (Reinwand's Br. 24.) Reinwand mentions his love of his grandchild. (Reinwand's Br. 25.) But in Nielson's words, "that would have been a little bit odd in light of the conviction and the motive established by the State." (R. 330:18.) In light of the conviction for killing his grandchild's father and the John Doe evidence and charges that he also killed his daughter's mother, arguing his love of family would have been odd indeed. In addition, the circuit court observed that Reinwand was apparently a good father to JR. (R. 329:11.)

Reinwand also mentions his memory issues. But Reinwand's memory issues were in dispute. The circuit court admitted other acts evidence because it went to credibility on the issue of Reinwand's memory.

Lastly, the circuit court did consider some favorable character evidence. (R. 329:11–12.) The court balanced it against the facts of this crime and the need to protect the public. (R. 329:12–13.) This Court should have confidence that the circuit court would have declined to set a parole eligibility date given the magnitude of this crime and Reinwand's other convictions along with a second pending

homicide even if Nielsen had made the arguments Reinwand now claims he should have made.

CONCLUSION

For the reasons given above, this Court should affirm Reinwand's judgment of conviction and the order denying his motion for postconviction relief.

Dated at Madison, Wisconsin, this 26th day of October, 2017.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 9,828 words.

Dated this 26th day of October, 2017.

_____
WARREN D. WEINSTEIN
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 26th day of October, 2017.

_____
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