No. 17AP850

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

JOSEPH B. REINWAND,
DEFENDANT-APPELLANT

On Appeal From The Wood County Circuit Court,
The Honorable Gregory J. Potter, Presiding,
Case No. 13CF196B

RESPONSE BRIEF OF THE STATE OF WISCONSIN

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

SOPEN B. SHAH
Deputy Solicitor General
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
shahsb@doj.state.wi.us
(608) 261-8107

Attorneys for the State of Wisconsin

TABLE OF CONTENTS

ISSUES PRESENTED 1

INTRODUCTION 2

ORAL ARGUMENT AND PUBLICATION 3

STATEMENT OF THE CASE 3

A. Facts 3

B. Procedural History 5

STANDARDS OF REVIEW 13

SUMMARY OF ARGUMENT 14

ARGUMENT 18

I. Introduction Of Meister's Statements Did Not Violate The Confrontation Clause 18

A. Meister's Statements To His Relatives And Close Friends Are Non-Testimonial 18

B. Even If Meister's Statements Are Testimonial, Reinwand Forfeited His Confrontation Right By Wrongdoing 28

C. Even If The Court Erroneously Admitted Meister's Statements, Any Error Was Harmless 36

II. The Admission Of Other-Acts Evidence Did Not Violate Reinwand's Rights 38

A. The Trial Court Properly Admitted "Other Acts" Evidence 38

B. Even If The Court Improperly Admitted The Other-Acts Evidence, This Error Is Harmless 41

III. Reinwand's Counsel Was Not Ineffective 42

A. Reinwand's Counsel Did Not Perform Deficiently 43

B. Any Alleged Errors Did Not Prejudice Reinwand 46

CONCLUSION 48

TABLE OF AUTHORITIES

Cases

Bibbs v. Texas,
371 S.W.3d 564 (Tex. Ct. App. 2012) 34

Compan v. Colorado,
121 P.3d 876 (Colo. 2005) 22

Connecticut v. Rivera,
844 A.2d 191 (Conn. 2004) 24

Crawford v. Washington,
541 U.S. 36 (2004) ..... *passim*

Davis v. Washington,
547 U.S. 813 (2006) 19, 28

Giles v. California,
554 U.S. 353 (2008) ..... *passim*

Illinois v. Peterson,
106 N.E.3d 944 (Ill. 2017) 32, 34

Mattox v. United States,
156 U.S. 237 (1895) 28, 35

Michigan v. Bryant,
562 U.S. 344 (2011) 14, 19, 20, 22

Montana v. Mizenko,
127 P.3d 458 (Mont. 2006) 22

Nicholls v. Colorado,
396 P.3d 675 (Colo. 2017) 22

Ohio v. Clark,
135 S. Ct. 2173 (2015) ..... *passim*

Reynolds v. United States,
98 U.S. 145 (1878) 15, 28, 33, 35

Salinger v. United States,
272 U.S. 542 (1926) 28

State v. Breitzman,
2017 WI 100, 378 Wis. 2d 431,
904 N.W.2d 93 ..... 43, 44, 45, 46

State v. Deadwiller,
2013 WI 75, 350 Wis. 2d 138,
834 N.W.2d 362 ..... 36, 37, 38, 42

State v. Dorsey,
2018 WI 10, 379 Wis. 2d 386, 906 N.W.2d 158.....13

State v. Erickson,
227 Wis. 2d 758, 596 N.W.2d 749 (1999).....17, 43

State v. Hale,
2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637.....18

State v. Hunt,
2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771.....41

State v. Hurley,
2015 WI 35, 361 Wis. 2d 529, 861 N.W.2d 174.....38

State v. Jensen,
2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518.....20

State v. Maday,
2017 WI 28, 374 Wis. 2d 164, 892 N.W.2d 611.....43

State v. Maloney,
2005 WI 74, 281 Wis. 2d 595, 698 N.W.2d 583.....14

State v. Manuel,
2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811.....*passim*

State v. Marinez,
2011 WI 12, 331 Wis. 2d 568, 797 N.W.2d 399.....39, 41

State v. Mattox,
2017 WI 9, 373 Wis. 2d 122,
890 N.W.2d 256.....*passim*

State v. Muckerheide,
2007 WI 5, 298 Wis. 2d 553,
725 N.W.2d 930.....17, 39, 40

State v. Nieves,
2017 WI 69, 376 Wis. 2d 300, 897 N.W.2d 363.....*passim*

State v. Payano,
2009 WI 86, 320 Wis. 2d 348, 768 N.W.2d 832.....41

State v. Speer,
176 Wis. 2d 1101, 501 N.W.2d 429 (1993).....39, 40

State v. Thiel,
2003 WI 111, 264 Wis. 2d 571,
665 N.W.2d 305.....43, 46, 47

State v. Williams,
2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919.....13, 36

Strickland v. Washington,
466 U.S. 668 (1984) 42, 43, 44, 45

United States v. Dhinsa,
243 F.3d 635 (2d Cir. 2001) 29

United States v. Emery,
186 F.3d 921 (8th Cir. 1999) 30, 34

United States v. Gray,
405 F.3d 227 (4th Cir. 2005) 30, 31, 32

United States v. Houlihan,
92 F.3d 1271 (1st Cir. 1996) 30

United States v. Jackson,
706 F.3d 264 (4th Cir. 2013) 30, 34

United States v. Klemis,
859 F.3d 436 (7th Cir. 2017) 24

United States v. Manfre,
368 F.3d 832 (8th Cir. 2004) 24

United States v. Stewart,
485 F.3d 666 (2d Cir. 2007) 30, 31, 36

United States v. Summers,
414 F.3d 1287 (10th Cir. 2005) 20

Vasquez v. People,
173 P.3d 1099 (Colo. 2007) 29, 30

Statutes

Wis. Stat. § 904.04 39

Constitutional Provisions

U.S. Const. amend. VI 18, 42

Wis. Const. art. 1, § 7 18

Other Authorities

G. Gilbert, Law of Evidence (1756) 32

ISSUES PRESENTED

1. Whether the circuit court violated the Confrontation Clause by admitting statements the victim made to family members and friends.

The circuit court held that the statements were admissible, and the Court of Appeals certified this question to this Court.

2. Whether the circuit court erroneously admitted other-acts evidence related to prior burglaries.

The circuit court admitted the evidence and the Court of Appeals did not resolve this issue.

3. Whether trial counsel was ineffective for allowing the jury to hear the 2008 DNA result and for failing to present mitigating evidence at sentencing.

The circuit court answered no, and the Court of Appeals did not resolve this issue.

INTRODUCTION

Defendant-Appellant Joseph Reinwand killed, execution-style, his granddaughter's father, Dale Meister, in order to prevent him from testifying in future visitation or custody proceedings. After Meister sought and won visitation to Reinwand's grandchild, and Reinwand's daughter indicated that she might not comply with the visitation order, Reinwand repeatedly threatened Meister and then murdered him. Reinwand lied to police and, later, made several incriminating statements to his cellmate and others. Police also found a piece of Reinwand's gun and a bullet that matched the murder weapon.

Reinwand primarily argues that the circuit court violated his confrontation rights when it admitted statements Meister made to close friends and family members. The circuit court held that these statements were "testimonial" under the Confrontation Clause, but that Reinwand had forfeited his confrontation rights by killing Meister to make him unavailable in future visitation proceedings. Reinwand claims, among other things, that he did not forfeit his rights because there was no pending visitation proceeding.

This Court should reject Reinwand's Confrontation-Clause claim for three independently sufficient reasons. First, contrary to the circuit court's conclusion, Meister's informal, spontaneous statements to his close friends and family are non-testimonial under *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015). Second, even if those statements are

testimonial, the forfeiture-by-wrongdoing exception applies. The novel limitations to this doctrine that Reinwand urges would reward people who kill potential witnesses quickly, before proceedings are definitively scheduled. Third, any error was harmless. Meister's statements are duplicative of undisputedly proper evidence about Reinwand's threats, the State presented other powerful evidence of guilt, and Reinwand's defense was weak.

ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument for January 18, 2019, at 9:45 a.m.

STATEMENT OF THE CASE

A. Facts

Reinwand's daughter, Jolynn Reinwand, had a three-and-a-half-year relationship with Meister, during which they had a daughter, E. R.323:208, 247–48. Meister and Jolynn ended their relationship in late 2007, and Jolynn minimized contact between Meister and E. *See* R.319:24–25; 320:164–65; 323:208. In January 2008, Meister sought visitation of his daughter by requesting mediation in a Wood County family court. R.311:35–36, 38–39; 312:60. In late February, the mediator awarded Meister visitation every other weekend and on two partial days during the week. R.311:39–40. Jolynn was dissatisfied with this result. R.311:39–41; 319:37–38; 320:71, 306.

Leading up to the mediation, Reinwand repeatedly threatened to harm or kill Meister if he did not stay away from E. R.320:65–66, 69. Reinwand once showed up to Meister's trailer and choked and threatened him. R.320:196; 325:153–54. Meister, afraid for his life, told multiple relatives and close friends about these threats, before and after the mediation. *See, e.g.*, R.4:1–2; 320:71, 246; 322:166. After winning visitation, Meister became even more worried about Reinwand's threats. R.24:7. Reinwand asked Meister to meet with him after the mediation, and Meister agreed despite his fear. *See* R.320:70–72. Meister's cell phone activity stopped soon afterward, R.327:203, and he did not show up to get E. as arranged, R.324:28.

On March 4, 2008, a few days later, Meister's friend, Randy Winkels, discovered Meister's body in his trailer. R.319:158–59, 162–63. He died from three close-range gunshot wounds to the temple, left cheek, and chest. *See* R.319:212–15.

Subsequent police investigation led to Reinwand. When interviewed, Meister's family and friends told police that Meister was afraid that Reinwand would harm or kill him if he sought visitation or custody of E. R.24:6–7, 9–10. Police detectives confronted Reinwand with Meister's statements. R. 75:11; 322:166. Reinwand responded that he remembered "arguing" with Meister and that he must have killed Meister but could not remember it because of his "memory problems." R.59:5; 75:11–12. In support of his

claimed poor memory, Reinwand stated he could not remember two other crimes he committed: burglarizing his neighbor's home and stealing tools from another individual. R.156:9; 322:171–73.

B. Procedural History

1. The State charged Reinwand with first-degree intentional homicide in May 2013. R.24; 89.

At trial, the State presented overwhelming evidence of Reinwand's guilt. A witness saw a silver pickup truck matching Reinwand's near Meister's trailer and heard some loud conversation around February 28, 2008, the estimated time of Meister's death. R.327:24–31; 319:44. Meister's trailer showed no signs of forced entry, R.323:223, and the only spare key was in Jolynn's house, R.324:47, where Reinwand was staying, R.324:32; 319:52. The bullets recovered from Meister's body were fired from a .22 handgun, R.24:5; 319:59, "most likely" a Bryco-Jennings "pistol," R.24:5; 322:76–77, and Reinwand owned a .22 Bryco-Jennings pistol, R.324:9; *see* R.24:11. Police recovered an unspent .22-caliber bullet from Reinwand's garbage with characteristics matching bullets from Meister's body. R.24:6; 319:62; 322:94–96. Police found a "cut" piece of a gun grip from a Bryco-Jennings .22 in Reinwand's truck. R.319:65; 322:6, 33, 139–40. The gun appeared to be cut with a "band saw," R.322:37, and pictures showed a band saw in Jolynn's basement, where Reinwand stayed, R.322:200–02. Reinwand also told police

that he killed Meister but could not remember doing it. R.75:11; 319:67–68. He told his county jail cellmate that he would rather be in jail than have Meister "walking the street," R.324:251; 328:34, and "confessed to [another inmate]," R.327:91, 208. Reinwand's "friend" testified that Reinwand strongly disliked Meister and had once "choked" and threatened to kill him. R.324:143–44.

In addition to this evidence, the State introduced Meister's statements to close friends and family. Randy Winkels, a long-time friend, R.319:148, testified that Meister was afraid of Reinwand after Meister got visitation, R.319:158. Meister told Winkels that Reinwand once showed up at Meister's trailer, argued with him, and "threw him up against the trailer and began choking him." R.325:153–54. Todd Biadasz, another close friend, testified that Reinwand told Meister "he was going to shoot him in the temple and . . . get away with it." R.320:296, 308. Meister told Todd and his wife Jodi that if anything happened to Meister, they should tell Meister's older brother Ray that Reinwand did it. R.320:25, 28–29, 308–10. Jodi told Meister to "be careful," but did not consider going to the authorities. R.320:32. Ethan Bauer, Reinwand's son and Jolynn's half-brother, testified that Meister asked him to meet at Arby's to get Bauer's opinion on how concerned Meister should be about Reinwand's threats. R.320:240, 242–44, 246; 323:257. Bauer just told him to "be careful." R.320:245. Monica Mason, a long-time friend, R.320:180, testified that Reinwand had

shown up at Meister's mobile home and threatened him about visitation, R.320:196. Cynthia Fellowes, another friend, stated Meister told her at one of their morning coffees that "[Reinwand] said that he could kill [Meister] if he wanted to[;] [that] he had guns or he had marshal [sic] art[s] training, . . . and [Meister] should leave . . . Jolynn and the kids alone." R.325:173, 178–79. Fellowes provided "sisterly advice," but did not "advise him to go to the police." R.325:179. Meister told Martin Baur, his pastor, that "if he came up dead," Reinwand did it, and "the police should dig deeper because it would look staged." R.324:148, 158–59. Meister also told Baur that Jolynn was angry after Meister won visitation. *See* R.324:160.

Meister's family and the Steger family—Jolynn's grandmother, aunt, and her aunt's husband—testified to similar effect. Michelle Meister, Meister's sister-in-law, testified that Reinwand told Meister that he would get visitation "over his dead body" and "he would never . . . see [his daughter] again." R.320:65, 69. Meister told Michelle that Reinwand asked to meet him after the mediation and Meister thought Reinwand might kill him. *See* R.320:71–73. Michelle did not think to go to the authorities. *See* R.320:73. Walter Sosin, Meister's cousin, testified that Meister was afraid Reinwand was going to beat him up. R.320:127. Renee Steger, Jolynn's aunt, R.320:152, and Renee's husband Michael testified that Meister was afraid Reinwand was going to "come after" him because of his visitation requests,

R.320:167–69; 323:187, 191. Meister also told Michael via phone that Reinwand had stopped by his trailer. R.323:196–97. Michael suggested that Meister bring these issues up at mediation. R.323:191–92. Meister told Alice Conwell, Renee Steger's mother, that Reinwand stated Jolynn's children, including E., "belong[ed] to [him]." R.320:216, 218. "[I]f anything happened to [Meister], . . . [the Stegers] should look to [Reinwand]." R.320:217. Meister did not mention police. R.320:219.

Reinwand argued that the admission of Meister's statements to the twelve witnesses violated his confrontation rights, but the circuit court disagreed. App.115–22. Meister's statements about the visitation issues were "nontestimonial" and did not implicate the Confrontation Clause. App.117. Those statements were simple expressions of what was on Meister's mind, the kind "made by people all the time." App.117. The court held that the statements expressing "fear[ ] for his safety" and statements predicting Reinwand would be the cause of any harm were "testimonial" but admissible because Reinwand had forfeited his confrontation rights by wrongdoing. App.117–18. The forfeiture exception applies where "the State can prove by a preponderance" that the defendant "intend[ed] to keep the victim from testifying" at a future proceeding and "that the accused caused the absence of the witness." App.116. "[N]umerous witnesses" indicated that Reinwand wanted to "ensur[e]" that Meister could not "testify" in a future visitation or custody proceeding.

See App.118–19. A future proceeding was likely. App.118–19. The attorney who represented Meister in the mediation testified that, if a party violated the mediation order, litigation would follow and the aggrieved party would testify. R.311:35; 312:59–60, 63–64, 67–68.

The State also presented "other acts" evidence about Reinwand's prior burglary to show he did not have any memory problems, contrary to what he told police in 2008. R.59:5. The State introduced a letter Reinwand wrote to his granddaughter in 2012 admitting to burglarizing his neighbor's home. R.59:5. Reinwand objected, but the circuit court held that the other-acts evidence was not admitted to show Reinwand's propensity to commit other crimes. *See* R.335:4. The court noted that Reinwand raised the topic of his memory issues in the interrogation with police, R.335:3, and the letter showed that those statements were not credible. The statements were "relevant" because of those alleged memory issues, and "in this [first-degree murder] case," the "probative value" of the evidence was not outweighed by unfair prejudice. R.335:4.

Reinwand's defense argued that, despite "compelling" aspects of the State's case, there were deficiencies. R.328:173. The State could not conclude that Reinwand's DNA was on the gun grip, R.79:2; 330:26; 324:188, 193, 196, and seven items collected from the crime scene—a flashlight, battery, three cigarette butts, a fired cartridge, and a lamp—did not have Reinwand's DNA on them, R.324:203–15. The witness

who matched the truck near Meister's trailer around February 28, 2008, to Reinwand's later told police that the stopped truck might have had "rounder" taillights than Reinwand's truck. R.327:30. Counsel also pointed out that Meister did not tell some people that he was afraid of Reinwand, R.328:108, the police never asked Jolynn whether she killed Meister, R.328:124–25, Reinwand and Meister were friends, R.328:116, Reinwand's cellmate testified to benefit himself, R.328:125, Jolynn did not testify whether she noticed the spare key to Meister's trailer missing, R. 328:126, and Reinwand would have denied everything or utilized his right to remain silent if he were guilty, R.328:150.

2. The jury convicted Reinwand of first-degree murder, and the court sentenced him to life, the mandatory sentence, without parole. R.279; 284; 329:13. Defense counsel argued for parole eligibility starting as soon as possible, in 20 years. R.329:7–8. The circuit court consulted a recent Presentence Investigation report (PSI) about Reinwand from 2011, R.329:2, but ultimately relied on the objective facts of the instant offense to impose sentence. Meister's murder was a premeditated, "[a]lmost [ ] execution-type" killing, which showed Reinwand's "cold and depraved heart" presented an ongoing risk to the community. R.329:12–13. Any evidence that Reinwand loved his grandchildren was outweighed by the gravity of his crime.

Reinwand filed a postconviction motion alleging, relevant here, that his counsel was ineffective for (1) opening

the door to the 2008 gun-grip DNA results when cross-examining the State's DNA expert and (2) not presenting mitigating evidence at sentencing. R.286. The 2008 results indicated that Reinwand could have contributed to the DNA on the gun grip, and the "probability of randomly selecting an individual" whose DNA would match was 1 in 61,000. R.324:229. The court held a hearing, where defense counsel testified. Counsel stated that his cross-examination about the other seven items was designed to show that "no evidence" tied Reinwand to the crime. R.330:23. Moreover, he limited his questions to items with a single-source of DNA, not a mixture, because the updated guidelines applied only to mixture samples. R.330:26. He did not expect that the court would allow the mixture-sample evidence to come in based upon his questions about the single-source samples. R.330:26–27. Defense counsel also explained that they did not pursue a PSI or argue that Reinwand had memory issues because they knew that the judge had extensive knowledge of Reinwand's characteristics and history because he presided over two of Reinwand's "John Doe" matters and pre-trial litigation. *See* R.330:15–22. Counsel also believed a PSI would elicit harmful testimony from the victims. R.330:35.

The circuit court denied Reinwand's motion. It held that defense counsel's decision to ask the State's DNA expert about the other items was a "tactical decision" to "show that there was no [physical] evidence tying" Reinwand "to the crime" and to "throw suspicion off their client." App.107. In

addition, counsel did not perform deficiently at trial; they filed "various motions," "briefed and argued them," were "prepared for each stage of the trial," and called "a number of their own witnesses." App.106–07. Nor was Reinwand prejudiced by the introduction of the 2008 gun-grip test: defense counsel "artfully" showed on "redirect" that the 2014 DNA result was "better." App.108. And there was no "reasonable probability," absent the alleged error, of a different outcome. App. 108. The State presented "other evidence" about Reinwand's motive, "other acts of the defendant towards the victim," and "various statements made by the defendant to various people," including other inmates and police. App.108–09. As for sentencing, the court determined that counsel did not perform deficiently because the court "knew about the defendant" from pretrial and "other criminal matters [] dealing with the defendant." App.110–11. There was no truly "mitigating" evidence. App.112. "In this case," the defendant "recall[ed] things when it benefited him and claimed memory loss when it benefited him." App.112. And a good grandfather would not kill his granddaughter's father. App.112–13. Regardless, counsel's performance did not prejudice Reinwand. The court relied on the objective facts at sentencing: Reinwand "sho[t] another human being three times, two [times] at point-blank range" in the head. App.112–13.

Reinwand appealed, and the Court of Appeals certified a question to this Court: whether the circuit court properly

applied the forfeiture-by-wrongdoing doctrine to admit Meister's statements that (1) Reinwand had threatened him and he was afraid of Reinwand and (2) listeners should "look[ ] into" Reinwand if Meister died. App.100:C. The court questioned the circuit court's conclusion that these statements were testimonial in the first place but put that issue aside to address the forfeiture exception. App.100:D; *see* State's COA Br. 17–18. The court focused on the fact that, unlike the "typical" forfeiture-by-wrongdoing scenario, Reinwand intended to prevent the declarant from testifying in a proceeding other than the "proceeding in which the State sought to admit the out-of-court statements." App.100:B–C. The court discussed federal cases and a state supreme court case interpreting broadly the forfeiture exception, App.100:F–K, but asked this Court to clarify what effect *Giles v. California*, 554 U.S. 353 (2008), would have on these decisions, App.100:K. This Court granted the certification order and took jurisdiction over all of Reinwand's claims.

STANDARDS OF REVIEW

Whether the admission of evidence violates the defendant's confrontation rights is subject to *de novo* review. *See State v. Williams*, 2002 WI 58, ¶ 7, 253 Wis. 2d 99, 644 N.W.2d 919. Other decisions about admissibility of evidence are subject to the erroneous-exercise-of-discretion standard. *State v. Dorsey*, 2018 WI 10, ¶¶ 36–37, 379 Wis. 2d 386, 906 N.W.2d 158. On ineffective-assistance claims, this Court

reviews factual findings for clear error but the ultimate question of whether an attorney's performance is constitutionally deficient *de novo*. *State v. Maloney*, 2005 WI 74, ¶ 15, 281 Wis. 2d 595, 698 N.W.2d 583.

SUMMARY OF ARGUMENT

I. The introduction of Meister's statements to his close friends and family did not violate the Confrontation Clause.

A. Meister's statements to his close friends and family are non-testimonial. A statement is testimonial when, "in light of all the circumstances, viewed objectively, the 'primary purpose' of the [statement] was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark*, 135 S. Ct. at 2180 (citing *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)). Informal, spontaneous statements to laypeople in private locations are not testimonial, especially when no party mentions law enforcement. *Id.* at 2180, 2182. Here, all of Meister's statements were to laypeople, in informal, private locations. These spontaneous conversations took place in individuals' private homes, on private phone lines, in an office, and at an Arby's, and did not involve law enforcement.

B. Even if Meister's statements were testimonial, Reinwand forfeited his confrontation right as to Meister's statements by wrongdoing. A defendant forfeits his confrontation right when he engages in conduct designed to prevent a witness from testifying. *Giles*, 554 U.S. 353. Someone who murders a witness for some other reason—e.g.,

greed—does not forfeit his confrontation right. *Id.* at 361. Evidence that a defendant killed to make a witness unavailable includes "earlier abuse, or threats of abuse, intended to dissuade the victim [from participating in proceedings]" and "evidence of . . . proceedings at which the victim would have been expected to testify." *Id.* at 377. Once that requirement is met, the exception applies broadly to ensure individuals do not "take advantage of [their] own wrong[s]," *Reynolds v. United States*, 98 U.S. 145, 159 (1878), and that courts can "protect the integrity of their proceedings," *Giles*, 554 U.S. at 374. An individual who kills someone to prevent testimony forfeits confrontation rights even if the individual "intended to prevent the declarant from testifying in a different proceeding," App.100:C. *Giles*, 554 U.S. 374 n.6. It does not matter whether the other proceedings are civil or criminal, whether they have begun, or whether the murderer is a party.

Reinwand killed Meister to prevent him from testifying in future visitation or custody proceedings. Reinwand "abuse[d]" and "threat[ened]" Meister to "dissuade" him from seeking visitation and any type of custody. *Id.* at 377; R.328:43–44; 320:65–66, 69. And there was "evidence of . . . proceedings at which [Meister] would have been expected to testify." *Giles*, 554 U.S. at 377. Meister had already involved the courts to get visitation of his daughter. Although he prevailed, Jolynn indicated that she would not comply with the order, R.320:71, 76–77, so Meister would have had to seek

recourse in the courts, App.119–20. It makes no difference that Meister had not yet filed suit or that Reinwand would not have been a party to a future custody case. Any contrary conclusion would merely reward people willing to kill for indirect litigation benefits.

C. Even if the court erroneously admitted Meister's statements, any error was harmless. The State's case was strong even without the statements, and Reinwand's defense was weak. Reinwand admitted to police that he might have killed Meister, R.319:67–68, and made inculpatory statements to his cellmate and other citizen witnesses, R.328:34, 43–44. Reinwand lied to police about his relationship with Meister. R.328:86. Meister met with Reinwand right before he died, R.320:70–72, and a witness saw a pickup truck matching Reinwand's near Meister's trailer, R.319:44. Reinwand owned a gun and an unspent cartridge that matched the weapon "most likely" used in Meister's murder. R.24:5; 319:58–59, 62; R.322:6, 76–77, 139–40. Reinwand's defense was only that the State did not find Reinwand's DNA at the crime scene. R.79:2; 330:26; 324:193, 196, 203–15. Finally, Meister's statements about his fear of Reinwand and how Reinwand was to blame if he showed up dead duplicated untainted evidence. The jury knew from undisputedly non-testimonial statements about the conflict between Reinwand and Meister about E., Reinwand's threats, and his prior assault. R.320:22–23, 166–67; 328:42–44; App.117.

II. The trial court properly admitted evidence of Reinwand's other acts. The State introduced evidence that Reinwand remembered committing a burglary to undermine his assertion to police that he did not remember committing crimes, including Meister's murder; that is a legitimate legal purpose. *State v. Muckerheide*, 2007 WI 5, ¶ 23, 298 Wis. 2d 553, 725 N.W.2d 930. And even if the admission were error, it did not prejudice Reinwand. The jury is not more likely to punish Reinwand in a first-degree murder case because of a prior non-violent burglary.

III. Reinwand's counsel was not ineffective at trial or at sentencing. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). They did not perform below an objective standard of reasonableness. The circuit court concluded that trial counsel was prepared for every stage of trial, and counsel put forth all "mitigating" information about Reinwand at sentencing. Although counsel's cross-examination of the State's DNA expert allowed the State to introduce a single piece of slightly unfavorable DNA evidence, counsel had a valid strategic reason. App.107. In any event, any alleged errors did not prejudice Reinwand. Counsel cured any prejudice from the DNA evidence on re-cross examination. And the circuit court would not have changed its sentence based on anything counsel could have said.

ARGUMENT

I. Introduction Of Meister's Statements Did Not Violate The Confrontation Clause

Under the Supreme Court's caselaw, the Confrontation Clause of the Sixth Amendment bars the use of testimonial statements unless the witness is unavailable and the defendant had a prior opportunity for cross-examination, or another exception applies. *See Crawford v. Washington*, 541 U.S. 36, 54 (2004); U.S. Const. amend. VI ("right . . . to be confronted with the witnesses against him"). This Court "generally appl[ies] United States Supreme Court precedents when interpreting" the analogous confrontation right under Article I, Section 7 of the Wisconsin Constitution. *State v. Hale*, 2005 WI 7, ¶ 43, 277 Wis. 2d 593, 691 N.W.2d 637; *see* Wis. Const. art. 1, § 7 (criminal defendants have the right "to meet the witnesses face to face").

A. Meister's Statements To His Relatives And Close Friends Are Non-Testimonial

1. The Supreme Court has held that a statement is "testimonial" for purposes of the Confrontation Clause if, "in light of all the circumstances, viewed objectively, the primary purpose of the [statement] was to create an out-of-court substitute for trial testimony." *Clark*, 135 S. Ct. at 2180 (citation omitted).

The Supreme Court developed this primary-purpose test over a series of cases. In *Crawford*, the Court held that the Confrontation Clause "applies to witnesses against the

accused—in other words, those who bear testimony." 541 U.S. at 51 (citation omitted). For example, a declarant's "tape-recorded statement[ ] to police" describing a stabbing is testimonial. *Id.* at 38, 68–69. The Court listed some categories of "testimonial" statements in *Crawford*, but did not adopt a particular formulation of the test. *Id.* at 51–52. Next, in *Davis v. Washington*, the Court examined whether the "primary purpose" of a statement was "to establish or prove past events potentially relevant to later criminal prosecution," while taking care to note that it was not "attempting to produce an exhaustive classification" of testimonial statements. 547 U.S. 813, 822 (2006). The Court held that statements a woman made to police on a 911 call during a "domestic disturbance" about her assailant and the assault were non-testimonial, *id.* at 817, 829, but another woman's statements about a domestic assault, formalized in a signed affidavit with police, were testimonial, *id.* at 829–32, 834. In *Bryant*, the Court suggested that the "primary purpose" language from *Davis* established the outer bounds of testimonial statements, holding that "when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony," it does not implicate the Confrontation Clause. 562 U.S. at 358–59. In that case, a shooting victim told responding officers "what had happened, who had shot him, and where." *Id.* at 349. The Court held that these statements were non-testimonial; the shooting victim was not in a condition to be worried about future

prosecution, and the police were trying to "assess the situation" and gauge the threat to their safety, the victim's safety, and the public. *Id.* at 374–76. Finally, in *Clark*, the Court explicitly held that the "'primary purpose'" inquiry is the test for testimonial statements: "the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the [statement] was to 'creat[e] an out-of-court substitute for trial testimony.'" 135 S. Ct. at 2179–80 (quoting *Bryant*, 562 U.S. at 358). The *Clark* Court held that a student's statements to his teacher, who saw bruises on him and suspected abuse, were also nontestimonial because their primary purpose was to establish "whether it was safe to release [the child] to his guardian at the end of the day." *Id.* at 2181.

When this Court first engaged with the Supreme Court's "testimonial" framework, it adopted a broad understanding of statements covered by this doctrine, but that formulation is no longer good law. In *State v. Jensen*, this Court explained that: "'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.'" 2007 WI 26, ¶ 25, 299 Wis. 2d 267, 727 N.W.2d 518 (quoting *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005)). This formulation could apply to statements with a different primary purpose, so long as investigation or prosecution was foreseeable. *Jensen*'s formulation is no longer good law in

light of the Supreme Court's subsequent decisions, especially *Clark*. *Clark* held that the primary purpose test is the test for testimonial statements. A statement's "natural tendency" to result in prosecution is insufficient to make it testimonial. *Clark*, 135 S. Ct. at 2183.[1]

This Court has since emphasized *Clark*'s formulation and expounded upon it, without citing *Jensen*'s broad formulation. In *State v. Mattox*, this Court explained that *Clark* "guides" the testimonial review and then laid down four relevant considerations from *Clark*: "(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." 2017 WI 9, ¶ 32, 373 Wis. 2d 122, 890 N.W.2d 256.

Most relevant to the issues in dispute in this case, the identity of the listener or questioner is "highly relevant" to the primary purpose under *Clark*, 135 S. Ct. at 2182, and, under this Court's caselaw, statements to laypeople are "unlikely to be testimonial," *State v. Nieves*, 2017 WI 69, ¶ 44, 376 Wis. 2d 300, 897 N.W.2d 363; *Mattox*, 2017 WI 9, ¶ 35. "[T]he most important instances in which the Clause restricts . . . are

---

[1] The trial court in the *Jensen* case has now held that the very statements at issue in *Jensen*, 2007 WI 26, are not testimonial under *Clark*. Order, *State v. Jensen*, No. 2002-CF-314 (Kenosha Cty. Cir. Ct. Sept. 18, 2017). The State is currently litigating that issue in the Court of Appeals. *See State v. Jensen*, No. 18AP1952 (Ct. App.).

those in which *state actors* are involved in a *formal*, out-of-court interrogation of a witness to obtain evidence for trial." *Bryant*, 562 U.S. at 358 (emphasis added). "[A] person who makes a *casual* remark to an acquaintance does not" bear testimony. *Crawford*, 541 U.S. at 51 (emphasis added); *see Montana v. Mizenko*, 127 P.3d 458 (Mont. 2006) (declarant's conversation with neighbor); *see also Compan v. Colorado*, 121 P.3d 876, 880–81 (Colo. 2005), *overruled on other grounds by Nicholls v. Colorado*, 396 P.3d 675 (Colo. 2017) (victim's statement to an acquaintance); *State v. Manuel*, 2005 WI 75, ¶¶ 41–42, 53, 281 Wis. 2d 554, 697 N.W.2d 811.

The Supreme Court addressed for the first time in *Clark* whether statements to people other than law enforcement were testimonial. Teachers noticed that a young student had bodily injuries and asked him questions about who inflicted them. *Clark*, 135 S. Ct. at 2181. Although the teachers suspected child abuse and were required by law to report it, *id.* at 2182–83, the Court held that the student's statements were nontestimonial, *id.* at 2183. The "relevant circumstances," "viewed objectively," did not indicate that the primary purpose of the conversation was to "establish[ ] evidence for the prosecution." *Id.* at 2180, 2183. First, the "relationship between a student and his teacher is very different" than "a citizen and the police." *Id.* at 2182. Second, the conversation was "informal and spontaneous," taking place in a "lunchroom and classroom," unlike the "formal, station-house interrogation." *Id.* at 2181; *see also Nieves*,

2017 WI 69, ¶¶ 41–45. Third, no party to the conversation mentioned law enforcement involvement. *Clark*, 135 S. Ct. at 2181–82. Just because the teachers' questions and the student's statements "had the natural tendency to result in prosecution" did not make them testimonial. *Id.* at 2183. The Confrontation Clause does not "bar[ ] the introduction of all out-of-court statements that support the prosecution's case." *Id.*

This Court has held that a declarant's "statements to his girlfriend at their apartment" in "spontaneous, private conversation" were not testimonial, *Manuel*, 2005 WI 75, ¶¶ 41–42, 53, and that one inmate's statements to another during "casual conversation[ ]" in jail were "unequivocally nontestimonial," *Nieves*, 2017 WI 69, ¶¶ 46–48. In *Manuel*, the declarant had witnessed a shooting and later told his girlfriend that the defendant shot the victim in the neck. *Manuel*, 2005 WI 75, ¶ 1. The State argued that the primary purpose of the declarant's statements was not to create an out-of-court substitute for trial testimony; rather, he was "simply trying to tell his girlfriend what happened." *Id.* ¶ 33. This Court agreed. The statement was made to a loved one, it was confidential, and there was no indication of a purpose to develop testimony for trial. *Id.* ¶ 53. In *Nieves*, a jailhouse informant testified at trial about a fellow inmate's statements inculpating a defendant. This Court noted that the witness's identity, the location, and the context all indicated that the statements were non-testimonial. *Nieves*, 2017 WI 69, ¶¶ 46–

48. The statements were made in "casual conversation[ ]" between two inmates in an "[in]formal setting," jail. *Id.* ¶ 47.

Federal courts and state courts of last resort have also consistently held that statements to lay witnesses are usually non-testimonial. In *United States v. Klemis*, a witness testified the defendant stole jewelry from her "and told her that he did so because he was afraid something would happen to him if he couldn't pay [a debtor] back." 859 F.3d 436, 444 (7th Cir. 2017). Another witness testified the defendant asked to borrow money to pay his debtor back. *Id.* The Seventh Circuit held that the defendant's statements to the witnesses "reflect[ed] spontaneous" conversations with "friends . . . , not efforts to create an out-of-court substitute for trial testimony." *Id.*; *see United States v. Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004) (comments "to loved ones or acquaintances [ ] are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks"); *Connecticut v. Rivera*, 844 A.2d 191 (Conn. 2004) (defendant confided in his nephew that he committed a burglary).

2. In this case, Meister's statements to the twelve witnesses are non-testimonial.

All of Meister's conversations were with laypeople, not law enforcement. *Clark*, 135 S. Ct. at 2180–82; *Mattox*, 2017 WI 9, ¶¶ 32, 34; *see* Opening Br. 4. Five of the twelve witnesses are Meister's long-time, close friends. R.319:148 (Winkels); R.320:291 (Todd); R.320:8 (Jodi); R.320:180 (Mason); R.325:168–69 (Fellowes). Two are Meister's

relatives, including his cousin, R.320:120, and sister-in-law, R.320:57. Four are Reinwand's relatives whom Meister knew as friends from his relationship with Jolynn, including Reinwand's son, R.320:226–27, 229, Reinwand's former mother-in-law, R.320:203, her daughter, R.320:149, and her daughter's husband, R.323:180–81. The twelfth individual is Meister's parish pastor, a friend and religious confidante. R.324:148.

Meister's statements to these witnesses were "informal," "spontaneous," and "private." *Clark*, 135 S. Ct. at 2182; *Mattox*, 2017 WI 9, ¶ 34; *Manuel*, 2005 WI 75, ¶¶ 41–42, 53; *Nieves*, 2017 WI 69, ¶¶ 41–45. Meister regularly had conversations with these individuals, R.320:234 (Bauer); R.325:169–73 (Fellowes); R.320:121 (Sosin); R.319:148–49 (Winkels), and multiple witnesses stated that his visits and calls were "spontaneous," R.324:150, 152 (Baur); R.320:58, 61 (Meister); R.320:8 (Jodi); R.320:296 (Todd). All but one of the conversations occurred in "informal" locations: people's living rooms, dining rooms, or kitchens. *Clark*, 135 S. Ct. at 2181; R.319:153 (Winkels); R.320:296 (Todd); R.320:8, 24 (Jodi); R.320:65, 69–71 (Michelle Meister); R.320:121–23 (Sosin); R.320:167–69 (Renee); R.323:183–84 (Michael); R.320:215 (Conwell); R.320:240 (Bauer); R.320:185 (Mason); R.325:173, 178–79 (Fellowes). Even Meister's conversations with Baur, which took place in his office at church, were so frequent as to be informal. *See* R.324:152 ("pop in[to]" his office), 157.

The "context in which the[se] statements were given," *Mattox*, 2017 WI 9, ¶¶ 32, 35, indicates that Meister was not "creating an out-of-court substitute" for trial testimony. Meister was merely updating those close to him on his life. *Manuel*, 2005 WI 75, ¶ 33. Meister's demeanor during these conversations—agitated, nervous, afraid, stressed—indicates he was expressing genuine concern and emotion, as one often does with close friends and family. R.319:158 (Winkels); R.320:24 (Jodi); R.320:66, 68 (Michelle); R.320:167–169 (Renee); R.320:239 (Bauer); R.320:185 (Mason); R.325:179 (Fellowes). The possibility that Reinwand might harm Meister came up organically in these conversations about Meister's daughter and the ongoing visitation dispute. R.319:153, 158 (Winkels); R.320:299, 305–06 (Todd); R.320:17, 32 (Jodi); R.320:62–65 (Michelle); R.320:126–27 (Sosin); R.320:163 (Renee); R.323:183–85 (Michael); R.325:172–73 (Fellowes); R.324:152–53, 157 (Baur). Most people in Meister's position would tell their family, friends, and religious confidantes about those events. Meister did not tell any of these witnesses to go to police; rather, he told two people that they should go to his older brother Ray if something happened to him. R.320:308–10 (Todd); R.320:25, 42 (Jodi). Although Meister mentioned the police in a conversation with Baur, that fact alone is insufficient to make his statements testimonial given their informality. R.324:158–60.

Given these considerations, the circuit court's holding that Meister's statements expressing fear of Reinwand were testimonial was incorrect as a matter of law. *See* App.118. Meister was not speaking to law enforcement, and statements to laypeople are "unlikely" to be testimonial. *Clark*, 135 S. Ct. at 2182; *Nieves*, 2017 WI 69, ¶ 44. In addition, the statements occurred in informal locations and in the context of typical "life update" conversations about Meister's daughter and the custody dispute. *Clark*, 135 S. Ct. at 2182; R.319:153 (Winkels); R.320:296 (Todd); R.320:8, 24 (Jodi); R.320:65, 69–71 (Michelle); R.320:121–23 (Sosin); R.320:167–69 (Renee); R.323:183–84 (Michael); R.320:215 (Conwell); R.320:240 (Bauer); R.320:185 (Mason); R.325:173, 178–79 (Fellowes). The witnesses testified that they had been hearing about Jolynn and Meister's daughter for years. R.320:17 (Jodi); R.320:299, 305–06 (Todd); R.319:148–49, 156–57 (Winkels). And Meister's affect during these conversations indicates he was expressing genuine emotion, rather than creating a formal out-of-court substitute for trial testimony. R.319:158 (Winkels); R.320:24 (Jodi); R.320:66, 68 (Michelle); R.320:167–69 (Renee); R.320:239 (Bauer); R.320:185 (Mason); R.325:179 (Fellowes).

Nor are Meister's statements to relatives, friends, and confidantes that they should "look toward Mr. Reinwand" if something happened to Meister testimonial. *See* App.117–18. Again, these statements to laypeople occurred spontaneously, in informal locations, as part of regular life updates that

Meister provided to his social circle. *Clark*, 135 S. Ct. at 2182; *Manuel*, 2005 WI 75, ¶¶ 41–42, 53; R.319:153 (Winkels); R.320:296 (Todd); R.320:8, 24 (Jodi); R.320:65, 69–71 (Michelle); R.320:121–23 (Sosin); R.320:167–69 (Renee); R.323:183–84 (Michael); R.320:215 (Conwell); R.320:240 (Bauer); R.320:185 (Mason); R.325:173, 178–79 (Fellowes). Meister did not direct any witness to go to law enforcement. R.320:308–10 (Todd); R.320:25, 42 (Jodi).

B. Even If Meister's Statements Are Testimonial, Reinwand Forfeited His Confrontation Right By Wrongdoing

1. A defendant forfeits his confrontation right when he engages in conduct designed to prevent a witness from testifying. *Giles*, 554 U.S. at 358–61; *see Crawford*, 541 U.S. at 62. This "forfeiture by wrongdoing" exception dates back to the "founding-era." *Giles*, 554 U.S. at 357–58; *Reynolds*, 98 U.S. at 159; *see Mattox v. United States*, 156 U.S. 237, 243–44 (1895). The doctrine has its "roots in the 1666 decision in Lord Morley's Case," where judges concluded that unconfronted testimony from a "coroner's inquest" could be admitted because the defendant had "detained" the witness. *Giles*, 554 U.S. at 359. "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong." *Reynolds*, 98 U.S. at 159; *see also Mattox*, 156 U.S. at 242; *Salinger v. United States*, 272 U.S. 542, 548 (1926). It is also "grounded in 'the ability of courts to protect the integrity of their proceedings.'" *Giles*, 554 U.S. at 374 (quoting *Davis*,

547 U.S. at 834). In *Giles*, the United States Supreme Court examined "[c]ases and treatises" from the 19th century to conclude that the exception requires "a showing that the defendant intended to prevent a witness from testifying." *Id.* at 360–62. Said differently, the exception would not apply in a "typical murder case," where "the defendant had caused a person to be absent, but [not] to prevent the person from testifying." *Id.* at 361.

Forfeiture can apply to admit unconfronted statements in a murder case where the defendant killed the victim—the unavailable declarant—to ensure his unavailability in a different proceeding. *See Giles*, 554 U.S. at 377; *see United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001); *Vasquez v. People*, 173 P.3d 1099, 1103 (Colo. 2007). Said differently, an individual who kills someone to prevent their testimony forfeits their confrontation rights as to that victim's statements in *all* proceedings. *See generally Giles*, 554 U.S. at 374 n.6.

In order to prevail under the forfeiture doctrine, the State must put forth "evidence [to] support a finding that the crime expressed the intent to isolate the victim and to stop" him from seeking out the authorities or testifying in other proceedings. *Giles*, 554 U.S. at 377. That evidence can include "[e]arlier abuse, or threats of abuse, intended to dissuade the victim" from involving the "authorities" or participating in proceedings, and "evidence of . . . proceedings at which the victim would have been expected to testify." *Id.*

at 377. For example, a victim's statement that the defendant "threatened her" for allegedly cooperating with law enforcement and the fact that she died "a few days later" showed that the defendant's "motive" was to stop her cooperation with the ATF. *United States v. Emery*, 186 F.3d 921, 925–26 (8th Cir. 1999); *see United States v. Jackson*, 706 F.3d 264 (4th Cir. 2013); *see also Vasquez*, 173 P.3d at 1102 (husband's statement at crime scene that his wife "set him up" shows that he killed wife to silence her as a witness in future proceeding).

The forfeiture-by-wrongdoing exception applies to admit unconfronted statements even if the murder occurs before the other proceeding had begun. *United States v. Stewart*, 485 F.3d 666, 672 (2d Cir. 2007); *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996); *Vasquez*, 173 P.3d at 1101–02.[2] In *Stewart*, the defendant shot Ragga, a competing drug dealer, in 1999. 485 F.3d at 669. Ragga survived and told family and friends that Stewart was his assailant. *Id.* Stewart sent multiple messages to Ragga "urging him not to . . . testify against him." *Id.* In July 2000, one of Stewart's associates shot and killed Ragga. *Id.* The

[2] Some of these federal cases, including *Stewart*, were decided under the Federal Rules of Evidence's forfeiture-by-wrongdoing exception, not the Confrontation Clause directly. *Stewart*, 485 F.3d at 670–71; *see generally United States v. Gray*, 405 F.3d 227, 240–41 (4th Cir. 2005); *compare Houlihan*, 92 F.3d. at 1279; *Emery*, 186 F.3d at 926; *Jackson*, 706 F.3d at 267–68. That Rule "codifies" the Confrontation Clause's forfeiture doctrine. *Giles*, 554 U.S. at 367.

Federal Government charged Stewart with the 1999 shooting, among other things, and admitted Ragga's statements to his family and friends. *Id.* The Second Circuit held that the admission of those statements did not violate the Confrontation Clause "even though Stewart's efforts" were not focused on preventing him from testifying "in the present federal case (which had not yet been initiated)." *Id.* at 672. It referenced the "equitable" purpose, *id.* at 670 (quoting *Crawford*, 541 U.S. at 62), behind the forfeiture-by-wrongdoing exception to hold that "the forfeiture principle applies even to situations where there was no ongoing proceeding in which the declarant was scheduled to testify." *Id.* at 672 (citations omitted). Indeed, a "contrary rule would serve as a prod to the unscrupulous to [kill] suspected snitches sooner rather than later." *Id.* (citation omitted).

Courts have held that the exception applies "without regard to the nature of the charges at the trial in which the declarant's statements are offered." *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). In *Gray*, a court admitted a husband's statements during the three months leading up to his death in his wife's trial for murder. Although the wife intended to make the husband unavailable in a different proceeding for assault, *id.* at 241, the Fourth Circuit relied upon the "purpose[s]" behind the exception—protecting the justice system and preventing defendants from profiting from their own misconduct—to hold that "[a] defendant who wrongfully and intentionally renders a declarant unavailable

as a witness in any proceeding forfeits the right to exclude, on hearsay grounds, the declarant's statements at that proceeding and any subsequent proceeding." *Id.* at 241–43. The Illinois Supreme Court agreed in *Illinois v. Peterson*, 106 N.E.3d 944, 964 (Ill. 2017), where it held that the defendant's ex-wife's statements were admissible in his trial for her murder because he killed her to prevent her from testifying at a "bifurcated divorce" proceeding involving custody and other "financial issues." *Id.* at 952, 963. That court made the requisite "intent" finding under *Giles* because the State presented evidence about their "acrimonious divorce" and because "custody of the couple's two sons remained a contested issue." *Id.* at 961–62. The ex-wife "was passionate about not relinquishing custody to defendant." *Id.* at 962. Because the ex-wife was a "party opponent" in the bifurcated litigation, the "inference" that the defendant murdered his ex-wife to prevent her from testifying was "much stronger in this case" than another where the victim was a "minor witness." *Id.*

There is no requirement that the defendant be a party to the other proceeding as long as he "benefits" from the witness's unavailability and acted with intent to procure it. *See Giles*, 554 U.S. at 365 (citing G. Gilbert, Law of Evidence 140–141 (1756)). As discussed above, many courts have applied the exception in circumstances where proceedings had not yet begun; and there are no parties to uninitiated proceedings. In addition, the equitable underpinnings of the

exception support its broad application. The forfeiture-by-wrongdoing doctrine "protect[s] the integrity of [court] proceedings" by keeping more potential witnesses alive. *Giles*, 554 U.S. at 374. A contrary rule would "permit[ ]" those willing to kill for even indirect benefits "to take advantage of [their] wrong[s]." *Reynolds*, 98 U.S. at 159; *see also Mattox*, 156 U.S. at 242.

2. In this case, Reinwand engaged in conduct—murder—designed to prevent Meister from testifying at future proceedings involving Reinwand's granddaughter. *Giles*, 554 U.S. 353. Evidence supports "a finding that [Reinwand's] crime expressed the intent to . . . stop" Meister from testifying in custody proceedings. *See id.* at 377. There was "[e]arlier abuse," when Reinwand showed up at Meister's trailer home and assaulted him while making threats about the visitation dispute. *Id.*; R.320:196; 323:196–97; 325:153–54. Reinwand made multiple "threats of abuse" directly related to Meister's involvement in visitation and custody proceedings. *Giles*, U.S. at 377. For example, Reinwand told Meister that if he tried to see his daughter, it would be the last time he ever saw her. R.320:65, 69. Reinwand also told Meister that he would see his daughter "over his dead body." R.320:65, 69. There was "evidence of . . . proceedings at which the victim would have been expected to testify." *Giles*, 554 U.S. at 377. Meister had already sought mediation from Wood County courts to get visitation of his daughter. R.320:238. Although he prevailed, Jolynn indicated she would not comply

with the order. R.320:71; *Peterson*, 106 N.E.3d at 962. When one party does not comply with a mediation order, the other party can seek recourse from the courts. App.119. Meister was preparing to do so; he did internet research with others to identify visitation and custody options. *See* R.323:185–86 (Michael); 320:215 (Conwell). Finally, the timing of Meister's death indicates Reinwand killed Meister to prevent his testimony in future proceedings. *See Emery*, 186 F.3d at 925–26. Reinwand killed Meister almost immediately after Jolynn became upset that the mediator granted him visitation. R.319:40–43.

3. Reinwand argues that the trial court "failed to make a finding" that preventing Meister from testifying was a "substantial reason" for the murder, but that is wrong. Opening Br. 21. The trial court found that Reinwand killed Meister "for the purpose of" making him unavailable to testify. App.118–20. "[N]umerous witnesses" indicated that an on-going custody dispute between Reinwand's daughter and Meister was likely to result in litigation. App.118–19. The court noted that Reinwand "was ensuring" that Meister would be unavailable to testify at that litigation by killing him. App.119. There was no other motive for Meister's murder. *Compare Bibbs v. Texas*, 371 S.W.3d 564, 570 (Tex. Ct. App. 2012) ("evidence" that defendant shot his ex-girlfriend because he was "obsess[ed] with [her] after she decided to terminate their relationship"); *Jackson*, 706 F.3d at 267, 269–70 (timing of murder indicated that defendant

murdered declarant to prevent him from testifying, although defendant "had additional reasons" for killing a competing drug dealer).

Reinwand also argues the forfeiture exception should not apply because he would not be a party to future mediation or custody proceedings. Opening Br. 22–23 (citing *Giles*). But Reinwand provides no reason why this Court should so limit the forfeiture exception. *Giles* does not provide that limit. *Giles*' main concern was that a murder victim's statements would be admissible in nearly *every* murder case because the defendant's act caused the victim's unavailability. *Giles*, 554 U.S. at 374. The Court sought to limit the application of the forfeiture doctrine to cases where individuals kill specifically to prevent someone from testifying. Here, the evidence indicated that Reinwand killed Meister to prevent him from testifying in visitation and custody proceedings. And a requirement that the defendant be a party to the other proceeding would "permit[ ]" those willing to kill for even indirect benefits "to take advantage of [their] wrong[s]." *Reynolds*, 98 U.S. at 159; *see also Mattox*, 156 U.S. at 242–43.

Reinwand claims that the exception should not apply because there was no pending custody proceeding. Opening Br. 22–23. But courts have repeatedly applied the forfeiture exception even when no proceedings are currently pending. *See supra* pp. 30–31. Any contrary rule would reward "unscrupulous" defendants who kill potential witnesses

"sooner rather than later." *Stewart*, 485 F.3d at 672 (citation omitted).

C. Even If The Court Erroneously Admitted Meister's Statements, Any Error Was Harmless

1. A Confrontation-Clause violation is subject to harmless-error analysis. *Williams*, 2002 WI 118, ¶ 2. The State must prove beyond a reasonable doubt that the error "did not contribute to the verdict obtained." *State v. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362 (citation omitted). Relevant factors include the "importance of the erroneously admitted evidence," "whether [it] duplicates untainted evidence," the "nature" and strength "of the defense," and the "nature" and "strength" of the State's case. *Id.*

2. Meister's statements about how he feared that Reinwand might kill him and how Reinwand was to blame if he showed up dead "did not contribute to the verdict obtained" beyond a reasonable doubt. *Id.*

The State presented powerful, unquestionably admissible evidence of Reinwand's guilt. Reinwand confessed to police that he might have killed Meister, but could not remember anything but arguing with him. R.75:11. He told his county-jail cellmate in the summer of 2008 that he would rather be in jail than have Meister "walking the street," R.324:251; 328:34, and "confessed" to another inmate, R.327:91, 208. Reinwand's friend testified that Reinwand had

"choked" Meister and threatened him on a prior occasion, R.324:143, and that Reinwand strongly disliked Meister, R.324:144, although Reinwand told police that he did not have any "disagreements about custody" with Meister, R.75:11; 328:86. Meister met with Reinwand right before he died, R.320:71–72, and a witness saw a pickup truck matching Reinwand's and heard an argument at Meister's trailer around the time that Meister died, R.327:24–31; 319:43–44. Reinwand had easy access to the only spare key to Meister's trailer. R.323:223; 324:32, 47; 319:52. Reinwand owned a gun and threw out an unspent bullet which matched the bullet recovered from Meister's body. R.24:5, 6, 11; 322:76–77, 94–96; 324:9. Police found a "cut" piece of a gun grip matching the potential murder weapon in Reinwand's truck. R.319:65; 322:6, 33, 139–40.

Reinwand's defense was weak. *Deadwiller*, 2013 WI 75, ¶ 41. His only evidence was that, under current standards, the DNA on the gun grip from his truck was "inconclusive," R.79:2; 330:26; 324:193–96, and seven other items collected from the crime scene did not have Reinwand's DNA on them, R.324:203–15. He also pointed out that the witness who said that the truck near Meister's trailer matched Reinwand's later told police that the truck near the trailer might have had "rounder" taillights. R.327:30. But the lack of Reinwand's DNA on seven isolated items and a single witness's uncertainty about a small detail did not counter his incriminating statements to police and other inmates, his

access to Meister's trailer, the fact that he had a gun, a gun grip, and an unspent bullet similar to the murder weapon, and the State's undisputedly non-testimonial evidence that Reinwand was interfering in Meister's efforts to get visitation.

Excluding Meister's statements about his fear of Reinwand and how Reinwand was to blame if he showed up dead also would not have made a difference because those statements effectively "duplicate[d] untainted evidence." *Deadwiller*, 2013 WI 75, ¶ 41. The jury knew of Reinwand's motive to kill Meister from Meister's undisputedly non-testimonial statements about Reinwand's involvement in the visitation dispute between him and Jolynn. R.320:22–23 (Jodi); R.320:166 (Renee). The jury also knew Reinwand had assaulted and threatened to kill Meister. R.324:143–44; 325:153–54; 328:42; 44. The fact that Meister was afraid of Reinwand or suspected that Reinwand would be responsible for any harm did not add new information. *Deadwiller*, 2013 WI 75, ¶ 41.

II. The Admission Of Other-Acts Evidence Did Not Violate Reinwand's Rights

A. The Trial Court Properly Admitted "Other Acts" Evidence

1. Evidence of other wrongful acts is admissible if: (1) it is offered for a permissible purpose, (2) it is relevant, and (3) its probative value is not substantially outweighed by the risk of unfair prejudice. *State v. Hurley*, 2015 WI 35, ¶ 57, 361 Wis. 2d 529, 861 N.W.2d 174. Permissible purposes include

motive, intent, knowledge, *see* Wis. Stat. § 904.04(2)(a), and "provid[ing] a full presentation" or "context" of the case, *Muckerheide*, 2007 WI 5, ¶ 23. The State needs only one of the "almost infinite" permissible purposes. *State v. Marinez*, 2011 WI 12, ¶ 25, 331 Wis. 2d 568, 797 N.W.2d 399; *State v. Speer*, 176 Wis. 2d 1101, 1113–14, 501 N.W.2d 429 (1993). Other-acts evidence is "relevant" if it relates to a fact or proposition that is of consequence to the determination of the action. *Marinez*, 2011 WI 12, ¶ 33. "Even dissimilar events or events that do not occur near in time may still be relevant to one another." *Id.* Evidence is unfairly prejudicial when "it appeals to the jury's sympathies, arouses its sense of horror, [or] provokes its instinct to punish." *Muckerheide*, 2007 WI 5, ¶ 33.

2. Here, the circuit court properly admitted the other-acts evidence about Reinwand's prior burglaries. The State introduced the evidence for a legitimate legal purpose: to give a "full presentation" of the case. *Id.* ¶ 23. When police interviewed Reinwand about Meister's murder, he stated that he "killed [Meister]" and was not "really arguing about that" but could not remember because of his memory issues. R.75:11. The State introduced evidence at trial that Reinwand had claimed "memory issues" for other crimes in those same interviews but later revealed that he remembered them. R.335:4; *see* Wis. Stat. § 904.04. Specifically, Reinwand admitted to one of those crimes in a subsequent letter to his granddaughter, undermining his memory

problems. The State did not introduce the other-acts evidence for an improper purpose: i.e., to show Reinwand murdered the father of his grandchild because he had burglarized his neighbor. *See Speer*, 176 Wis. 2d at 1113–14. This other-acts evidence was relevant because it indicated Reinwand's claimed memory issues were a tactic to avoid responsibility for Meister's murder. *See Muckerheide*, 2007 WI 5, ¶ 23. This other-acts evidence was not unfairly prejudicial. *Id.* ¶ 33. Burglary of an unoccupied home is not a violent crime that would appeal to the jury's sympathies or "arouse[ ] its sense of horror." *Id.* Nor would the burglary make the jury more likely to punish in a trial for an execution-style first-degree murder. *Id.*

3. Reinwand argues that the evidence about how he could not recall the burglaries was not relevant to his "consciousness of guilt" for Meister's murder because the burglaries occurred before Meister's murder. Opening Br. 28. As an initial matter, his claim that he could not recall the burglaries because of his memory issues occurred *after* Meister's murder, in the same interviews with police. R.75:11. And even if the other-acts evidence was not relevant to "consciousness of guilt," the State needs only one permissible purpose, which it had here: giving the jury a "full presentation" of the case. *Muckerheide*, 2007 WI 5, ¶ 23.

Reinwand argues that the "other acts" need to be close in time, place, and circumstance to the instant offense to be relevant. Opening Br. 27–29. That is legally wrong. *See*

Marinez, 2011 WI 12, ¶ 25. Although "nearness in time, place and circumstance[ ] to the alleged crime" can affect the probative value of other-acts evidence, "similarity and nearness are not talismans." *State v. Payano*, 2009 WI 86, ¶ 70, 320 Wis. 2d 348, 768 N.W.2d 832. The events might be "connect[ed]" by other factors. *Id.* For example, in *Marinez*, this Court allowed the State to introduce, in a sexual-abuse trial, a prior instance where the defendant had burned the victim's hands at a different time and location because it provided "a more complete" background for a video of the victim's statement. 2011 WI 12, ¶¶ 9, 24, 26–27, 42. And even if such similarities were necessary, the burglary was close in time, place, and circumstance to the instant offense. The offenses happened in Wood County around 2007 and 2008. R.42:1; 59:5; 322:194. Also, Reinwand blamed his memory issues for the burglaries and the murder at the same time, in the very same police interview. R.75:11; *see also Marinez*, 2011 WI 12, ¶ 42. And the linking "circumstance" is that—for all of the crimes—Reinwand blamed his inability to recall them on his memory issues.

B. Even If The Court Improperly Admitted The Other-Acts Evidence, This Error Is Harmless

The admission of other-acts evidence is subject to a harmless-error analysis. *State v. Hunt*, 2003 WI 81, ¶ 76, 263 Wis. 2d 1, 666 N.W.2d 771. As discussed *supra* Part I.C, the State must prove beyond a reasonable doubt that the evidence

did not contribute to the verdict obtained. Relevant factors include the "importance of the erroneously admitted evidence," "whether [it] duplicates untainted evidence," the "nature of the defense," and the "nature" and "strength" of the State's case. *Deadwiller*, 2013 WI 75, ¶ 41.

The other-acts evidence did not contribute to the verdict obtained. The State's case was strong, including evidence Reinwand had a gun and an unspent bullet matching the murder weapon; Reinwand had access to Meister's spare key; Reinwand lied to police about his relationship with Meister, but made incriminating statements to police, his cellmate, and other witnesses; a truck matching Reinwand's was near Meister's trailer around the time of the murder; and Reinwand had motive to kill Meister because of the visitation issues. *Supra* pp. 5–6. Moreover, Reinwand's "defense" did not rely heavily on his memory issues, *supra* pp. 9–10; R.328:100–74, so the State's effort to undermine them likely did not affect the jury's assessment of his case.

III. Reinwand's Counsel Was Not Ineffective

The Sixth Amendment of the United States Constitution guarantees a criminal defendant's right to "the Assistance of Counsel for his defence." U.S. Const. amend. VI. A defendant is entitled to "constitutionally effective assistance." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant who claims counsel was constitutionally ineffective must show both that (1) his counsel's

representation was deficient and (2) "this deficiency prejudiced him so that there is a 'probability sufficient to undermine the confidence in the outcome' of the case." *Erickson*, 227 Wis. 2d at 768 (quoting *Strickland*, 466 U.S. at 694). Reinwand's counsel did not perform deficiently at trial or at sentencing, and, even if they did, any alleged errors do not undermine confidence in the guilty verdict or Reinwand's sentence.

A. Reinwand's Counsel Did Not Perform Deficiently

1. Counsel's performance is deficient if it falls "below an objective standard of reasonableness." *State v. Maday*, 2017 WI 28, ¶ 54, 374 Wis. 2d 164, 892 N.W.2d 611. When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689. "Counsel 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 (citation omitted). "This [C]ourt will not second-guess a reasonable trial strategy," and a lower court's determination that trial counsel had a reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." *State v. Breitzman*, 2017 WI 100, ¶ 65, 378 Wis. 2d 431, 904 N.W.2d 93 (citation omitted).

2. Here, defense counsel's performance was objectively reasonable. The circuit court concluded that trial counsel "had a reasonable trial strategy," *id.*; briefed, filed, and

argued "various motions"; were "prepared for each stage of the trial"; and called "a number of their own witnesses." App.106–07.

Counsel performed reasonably while cross-examining the State's DNA expert. R.324:197–215. The State's expert admitted that Reinwand's DNA profile was excluded from a cigarette butt found on the floor of Meister's living room, R.324:204–06, a fired cartridge from Meister's sofa, R.324:209–10, a flashlight and battery from Meister's living room floor, R.324:210, two cigarette butts in Meister's driveway, R.324:210–13, and a lamp in Meister's home, R.324:213–15. This was part of counsel's trial strategy to show "there was no [physical] evidence tying" Reinwand to the crime and to "throw suspicion off their client." App.107. The chance the trial court would hold that asking about these items "opened the door" for the State to admit evidence about another item, the gun grip, R.324:216–23, is visible only in "hindsight." *Strickland*, 466 U.S. at 689.

Defense counsel performed reasonably during sentencing. Counsel argued for parole eligibility starting as soon as possible, in 20 years. R.329:8. Counsel decided against a PSI for strategic reasons. R.330:35; *Breitzman*, 2017 WI 100, ¶ 65. Counsel knew the circuit court was already familiar with the defendant's characteristics from two "John Doe" investigations, R.330:15–22, and decided that the PSI would likely elicit unfavorable testimony from the victims of Reinwand's crime, App.110.

3. Reinwand makes three counterarguments, but none has merit.

First, he argues that defense counsel's questions to the State's DNA expert had no "discernible benefit to the defense." Opening Br. 31. But, as discussed above, defense counsel's questions showed that DNA testing of seven items from the crime scene excluded Reinwand as a contributor. App.107.

Second, he contends that defense counsel's questions about the seven items "opened the door" for the State to introduce an older DNA-test result about the gun grip. Opening Br. 30. That older result showed that there was a 1 in 61,000 chance that a randomly selected person's DNA would match the DNA on the gun grip, as opposed to an inconclusive result. R.319:65; 322:6, 139–40; 324:229–31. But defense counsel had a strategic reason to ask about the other DNA results: to show that they all excluded Reinwand. App.107; *Breitzman*, 2017 WI 100, ¶ 65. And it was not entirely foreseeable the circuit court would hold that defense counsel's questions opened the door. *Strickland*, 466 U.S. at 689 ("hindsight"). Defense counsel did not ask about the gun grip on cross-examination, nor did he ask about any other mixed-source samples. R.324:221–24.

Third, Reinwand contends that counsel did not ask for a PSI or present mitigating evidence to the sentencing court. Opening Br. 32. However, there was no need for a PSI. The court had a PSI from an older burglary, and Reinwand had

been mostly incarcerated since that time. R.329:2. And, as the circuit court recognized, there was no mitigating evidence to present. App.112–13.

B. Any Alleged Errors Did Not Prejudice Reinwand

To demonstrate prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Thiel*, 2003 WI 111, ¶ 20. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* This Court focuses not on the "outcome of the trial," but rather on the reliability of the proceedings. *Id.* Counsel and the court can cure some alleged errors so that they do not result in unfair prejudice through, for example, a limiting instruction. *See Breitzman*, 2017 WI 100, ¶¶ 78–79.

Counsel's alleged errors did not affect the "reliability of the [trial]." *Thiel*, 2003 WI 111, ¶ 20. As a result of counsel's alleged error, the jury heard that the chance of randomly choosing someone whose DNA matched the gun grip, as Reinwand's did, was 1 in 61,000. R.324:229–30. But Reinwand's counsel quickly cured any confusion by getting the State to admit that a newer, "better" DNA test was inconclusive as to whether Reinwand's DNA was on the gun grip. R.324:225, 237–38; Opening Br. 30; *Breitzman*, 2017 WI 100, ¶ 65. And that DNA evidence was not important relative to other parts of the State's case. *Thiel*, 2003 WI 111, ¶ 20.

Indeed, the State was fully prepared to try the case without it. App.123–26.

Defense counsel's alleged errors did not affect the only discretionary portion of Reinwand's sentence, his eligibility for parole beginning at 20 years. *Thiel*, 2003 WI 111, ¶ 20. The circuit court stated that Reinwand would have received life without parole no matter what defense counsel would have argued. The sentencing court relied on the objective facts of the premeditated, "execution-type" murder, which showed that Reinwand's "cold and depraved heart" presented an ongoing risk to the community. R.329:12–13.

Reinwand argues that his counsel should have presented "mitigating" evidence about his love for his grandchildren and his "memory issues." Opening Br. 33. The sentencing court considered evidence about Reinwand's love of his grandchildren, R.329:11, but found it insufficient to overcome the gravity of his crime: executing the father of his granddaughter in cold blood. Additional evidence about Reinwand's alleged memory issues would not have changed Reinwand's sentence. *Thiel*, 2003 WI 111, ¶ 20. The court considered evidence about his memory issues and determined it was "contradicted" by the evidence that Reinwand remembered his burglary. The court believed Reinwand was using his memory issues as an excuse, "recall[ing] things when it benefited him and claim[ing] memory loss when it benefited him." App.112. Further presentation would not have helped his case.

CONCLUSION

This Court should affirm the circuit court's decision.

Dated: November 21, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

SOPEN B. SHAH
Deputy Solicitor General
State Bar #1105013
Counsel of Record

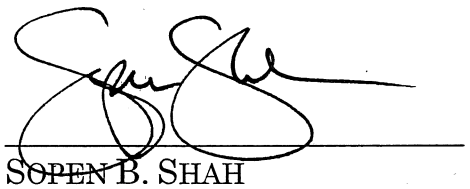
Wisconsin Department of Justice
17 W. Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8107
shahsb@doj.state.wi.us

Attorneys for the State of Wisconsin

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 10,942 words.

Dated: November 21, 2018.



SOPEN B. SHAH
Deputy Solicitor 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: November 21, 2018.

SOPEN B. SHAH
Deputy Solicitor General