STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1021-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DELANO MAURICE WADE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. MCADAMS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
rosenowse@doj.state.wi.us

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ISSUES PRESENTED

1. Did Delano Wade forfeit his hearsay arguments and his claim that he had a right to be present when the circuit court sent exhibits to the jury room?

The circuit court did not address this issue.

This Court should answer "yes."

2. Alternatively, were the alleged hearsay evidence and the alleged violation of Wade's right to be present harmless errors?

The circuit court did not address this issue.

This Court should answer "yes" if it reaches this issue.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

Wade was convicted of sexual assault and false imprisonment after he beat and sexually assaulted his live-in girlfriend, A.C., in their apartment. He seeks a new trial on three grounds, all of which relate to a police officer's brief testimony about A.C.'s statements describing her injuries. Wade forfeited all of those claims by failing to preserve them in the circuit court.

In any event, all of those alleged errors are harmless. The officer's brief hearsay testimony added nothing because it was cumulative with A.C.'s own testimony, which gave much more detail about the assault and her injuries.

Whether the jury believed the officer's brief hearsay hinged entirely on whether it believed A.C.'s testimony. Further, the State's case was strong and corroborated much of A.C.'s testimony.

STATEMENT OF THE CASE

Wade, who had no job, moved into the apartment of his then-girlfriend, A.C. (R. 42:69–71.) On November 25, 2015, Wade got home around 2:00 a.m. (R. 42:73.) Wade accused A.C. of spending too much money with his food-stamp card when she went grocery shopping days earlier at his request. (R. 42:74–75.) Wade then said that A.C. owed him $5,000 because she had broken the rules. (R. 42:75.)

Wade started kicking A.C. (R. 42:76.) A.C. got up from the couch and ran toward the door, but Wade grabbed her and told her she was not going anywhere. (R. 42:77.) Wade started hitting her with a liquor bottle. (R. 42:77.) He then had her lie down in a corner of the living room while he stomped her, kicked her, and burned her with cigarettes. (R. 42:77.) Wade threw things at her, including a candle holder that they had been using as an ash tray. (R. 42:78.) The candle holder was full of cigarette butts when he threw it at her. (R. 42:78.)

Wade told A.C. to go into their bedroom and lie on the bed, so she did. (R. 42:80.) He lied down next to her and kept kicking her every time she closed her eyes and tried to go to sleep. (R. 42:80.) After a while he told her to perform oral sex on him. (R. 42:80.) She cried for a while because she did not want to do so. (R. 42:80.) Wade grabbed her by the hair and neck and said that he would break her jaw if she did not perform oral sex on him and "swallow everything." (R. 42:81; *see also* R. 43:8.) Wade then put his penis in A.C.'s mouth while he kept grabbing her neck. (R. 42:82–83.)

Wade and A.C. left the house later that day to go to a grocery store. (R. 43:14.) On the way there, Wade drove A.C. around and asked men if they would "purchase [A.C.] for sex" because Wade claimed that she owed him money. (R. 43:12.) Wade and A.C. arrived at a grocery store in the evening. (R. 43:15.) While Wade was distracted by his cell phone, A.C. started signaling to other customers to call 9-1-1. (R. 43:15–16.) Some customers started following Wade and A.C. around the store and appeared to call the police. (R. 43:17.)

After checking out, Wade and A.C. got into Wade's car. (R. 43:17–18.) A crowd of customers and a loss prevention officer followed Wade and A.C. outside. (R. 43:18.) Two customers stopped Wade's car and asked, "Are you okay?" (R. 43:20–21.) Wade told them that he was fine. (R. 43:21.) The two customers said that they were worried about A.C., so Wade "pressed the gas" as A.C. opened her car door and jumped out. (R. 43:21.) Wade drove away and people helped A.C. back into the store. (R. 43:21; 44:74.)

An ambulance came and took A.C. to a hospital. (R. 43:22.) Police talked to A.C. there and photographed her injuries. (R. 43:23, 39; 44:42.)

Police escorted A.C. back to her apartment and searched it with her consent and took photographs. (R. 43:39.) This was A.C.'s first time at her apartment since Wade assaulted her. (R. 43:46.) Police photographed the candle holder ash tray on the floor near cigarette butts. (R. 43:45.) Another photo showed a liquor bottle, which Wade had used to hit A.C., on a ledge in the living room. (R. 44:40–41.)

Two days after the assault, A.C. quit her job and used a Greyhound bus to move to Florida, where her mother and brother lived. (R. 43:11, 47.) A.C. left most of her belongings

in Milwaukee. (R. 43:47–48.) She moved to get away from Wade. (R. 43:47.)

In December 2015, the State charged Wade with second-degree sexual assault and false imprisonment, both with a domestic abuse enhancer. (R. 1.) Wade had a jury trial in April 2016. (R. 41–46.)

A.C. testified about many of the facts discussed above. She testified at length about Wade's assault and her resulting injuries. (R. 42:76–84; 43:6–10, 12, 26–38.) The jury saw photographs of A.C.'s injuries: bruises on her face, arm, leg, back, and shoulder, as well as a scratch on her chest. (R. 43:26–38.) During trial, A.C. revealed a scar on her arm, which Wade had caused by burning her with a cigarette. (R. 44:60.)

A doctor testified at trial that he had treated A.C. on November 25, 2015. (R. 43:52–53.) He testified that he saw several bruises on A.C.'s body. (R. 43:55.) A medical report indicated that A.C. had a burn on her arm. (R. 44:59.)

The jury also heard from a loss prevention officer who worked at the grocery store where A.C. had escaped from Wade. The officer testified that a store manager called police because A.C. was signaling for customers to help her or call 9-1-1. (R. 44:69–70.) The officer followed Wade and A.C. to their car to get its license plate number for police, and Wade confronted the officer and said to stop following them. (R. 44:71–72.) The officer further testified that A.C. was "[e]xtremely frightened" when she got back into the store after fleeing from Wade's car. (R. 44:74.)

The State's final witness was a Milwaukee police officer who interviewed A.C. in the hospital and brought A.C. back to her apartment. (R. 44:82–83, 85.) Defense counsel "object[ed] to hearsay" when the officer began testifying that A.C. had said that she returned home around midnight on November 25. (R. 44:83–84.) The prosecutor

said that the testimony was admissible as a prior consistent statement. (R. 44:84.) The attorneys and court had a discussion off the record. (R. 44:84.) The court did not rule on the hearsay objection on the record. (R. 44:84.)

The officer then testified briefly about the injuries that A.C. had reported receiving from Wade. (R. 44:84.) The officer also testified that she had personally seen redness on A.C.'s face and arm. (R. 44:85.) The officer did not see other injuries because A.C. was no longer in a hospital gown by the time the officer arrived. (R. 44:85.) The officer also testified about seeing a candle holder ash tray and cigarette butts on the living room floor at A.C.'s apartment. (R. 44:85–86.) The prosecutor then asked several questions about other things that A.C. had said to the officer, but the court sustained hearsay objections. (R. 44:86–88.)

The prosecutor then asked the officer about exhibit 25, a "Milwaukee Police Department domestic violence supplement form." (R. 44:88.) The prosecutor asked the officer whether the report reflects a victim's demeanor when it is filled out. (R. 44:89.) The officer said yes. (R. 44:89.) Defense counsel said, "I'm going to object to the next question as hearsay." (R. 44:89.) When the prosecutor said that the objection was premature, defense counsel said, "I can wait." (R. 44:89–90.)

Defense counsel next objected when the prosecutor moved to introduce exhibit 25 into evidence. (R. 44:90.) Defense counsel said that he was "object[ing] on foundation grounds." (R. 44:90.) The court asked for more specificity. (R. 44:90.) Defense counsel said that "it's not clear who put together which parts and who was the source for the different parts." (R. 44:90–91.) The prosecutor said that the police officer filled out the report and recognized it as a business record. (R. 44:91.) The court overruled the objection. (R. 44:91.)

During closing argument, the prosecutor said that Wade's "defense is that [A.C.] is lying." (R. 45:29.) Defense counsel agreed during his closing argument that A.C.'s credibility was "probably the biggest question in this case." (R. 45:35–36.) He argued that much of the evidence in the case—the police officer's testimony, evidence about what happened at the grocery store, and part of the doctor's testimony—hinged on whether A.C. was telling the truth. (R. 45:36.)

The circuit court later asked the prosecutor and defense counsel which exhibits they thought should go to the jury. (R. 45:69.) Defense counsel thought that the jury should not see the police report because it contained a hearsay reference to a gun. (R. 45:69.) The court decided not to send any exhibits to the jury at that time. (R. 45:70.) It instead waited to see which exhibits the jury would request. (R. 45:70.) The court then took a recess. (R. 45:70.) The court later recalled the case because the jury had asked to see about 27 exhibits. (R. 45:70.) Defense counsel objected only to the jury seeing an exhibit that had the content of a 9-1-1 phone call. (R. 45:70–71.) He said it would "be fine" to let the jury see all of the other exhibits. (R. 45:71.) The court asked defense counsel if Wade was "on board with what we're doing here[.]" (R. 45:71.) Defense counsel said, "Well, I didn't have chance to run it by him, but I—from my discussions with him, that is consistent with his wishes." (R. 45:71–72.)

The jury found Wade guilty of both counts charged. (R. 46:3.) In July 2016, the circuit court imposed a concurrent sentence on each count of seven years of initial confinement and three years of extended supervision. (R. 49:33–34.)

Wade appeals his judgment of conviction. (R. 31.)

SUMMARY OF ARGUMENT

I. Wade forfeited all three of his claims by failing to preserve them in the circuit court.

A. Wade forfeited his objection to a police officer's testimony about A.C.'s statements describing her injuries because Wade did not get the circuit court to rule on that objection on the record.

B. Wade forfeited his claim that A.C.'s statements about her injuries, as reflected in a police report, were inadmissible hearsay. At trial, Wade argued that the *report itself* was hearsay, not that *A.C.'s statements* in the report were a second level of hearsay. Because he did not specifically raise a "double hearsay" objection to A.C.'s statements in the report, he may not raise that objection for the first time on appeal.

C. Wade forfeited his claim that he had a right to be present when the circuit court sent exhibits to the jury room because he did not raise that claim in the circuit court. Because the relevant facts are disputed, this Court should not overlook Wade's forfeiture.

II. Further, all of the alleged errors were harmless.

A. The two pieces of alleged hearsay were harmless. Both pieces of alleged hearsay involved a police officer's brief testimony about A.C.'s statements describing her injuries. But A.C. herself gave much more detailed testimony about the nature and cause of her injuries. If the jury did not believe A.C.'s testimony, it would have rejected the hearsay as well. Further, the State's case was strong and had plenty of evidence that corroborated A.C.'s testimony—including crime-scene photographs, photographs of A.C.'s injuries, and a doctor's testimony about A.C.'s injuries.

B. Wade's absence when the circuit court sent exhibits to the jury was also harmless. Had Wade been present then, he at most would have stopped the court from sending the police report to the jury. But because any error in admitting that report into evidence was harmless, any error in sending that report to the jury was also harmless.

STANDARD OF REVIEW

This Court reviews *de novo* whether an objection to evidence adequately preserved the issue for appeal. *State v. Kutz*, 2003 WI App 205, ¶ 27, 267 Wis. 2d 531, 671 N.W.2d 660. It also reviews *de novo* whether an alleged error was harmless. *State v. King*, 2005 WI App 224, ¶ 22, 287 Wis. 2d 756, 706 N.W.2d 181.

ARGUMENT

I. Wade forfeited all three of his claims by failing to preserve them in the circuit court.

A. Wade forfeited his hearsay objection to a police officer's testimony about A.C.'s statement because Wade did not get an on-the-record ruling on this objection.

"[A] specific, contemporaneous objection is required to preserve error." *State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490 (citation omitted). Wade forfeited his first hearsay argument on appeal by not raising it at trial. Wade asserts multiple times on appeal that "[t]he state elicited testimony from [a police officer] concerning AC's statements about her injuries made shortly after the incident. Wade objected on hearsay grounds." (Wade Br. 4, 11.) He argues that this testimony by the officer was inadmissible hearsay. (*Id.* at 4–5, 11–15.) But Wade did not object at trial to the officer's testimony about A.C.'s statements *concerning her injuries*. He instead objected on hearsay grounds when the officer testified that A.C. had said

that she returned home around midnight on November 25. (R. 44:83–84.) After an unrecorded sidebar conference, the officer briefly testified about A.C.'s statement concerning her injuries. (R. 44:84.) Wade did not object to that testimony. (R. 44:84.) He thus forfeited his objection to that testimony.

Further, even if Wade had objected to that testimony in advance during the sidebar, his objection is not preserved on appeal because it was off the record. "Counsel who rely on unrecorded sidebar conferences do so at their own peril." *State v. Wedgeworth*, 100 Wis. 2d 514, 528, 302 N.W.2d 810 (1981). In *State v. Gilles*, for example, the defendant forfeited an issue by not having the circuit court rule on the issue on the record. *State v. Gilles*, 173 Wis. 2d 101, 115, 496 N.W.2d 133 (Ct. App. 1992). The prosecutor in *Gilles* objected to one of Gilles's cross-examination questions at trial, and then "an unreported side bar conference took place between the court and counsel." *Id.* Back on the record, Gilles's questions "went off on a different track. Gilles never asked the court to rule on the state's objection." *Id.* This Court concluded that Gilles had thereby forfeited the issue. *Id.*

Wade similarly forfeited his objection to the police officer's testimony about her interview with A.C. Wade's trial counsel "object[ed] to hearsay" when a police officer began testifying that A.C. had said that she returned home around midnight on November 25. (R. 44:83–84.) The prosecutor argued that the testimony was admissible as a prior consistent statement. (R. 44:84.) The attorneys and court had a discussion off the record. (R. 44:84.) The court did not rule on the hearsay objection on the record. (R. 44:84.) Wade forfeited this objection by not asking the court to rule on it on the record.

B. Wade forfeited his hearsay objection to A.C.'s statements contained in a police report because he did not specifically object to those statements.

Again, "a specific, contemporaneous objection is required to preserve error." *Delgado*, 250 Wis. 2d 689, ¶ 12 (citation omitted). "An objection or motion is sufficient to preserve an issue for appeal if it apprises the court of the specific grounds upon which it is based." *State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998) (citation omitted). "To be sufficiently specific, an objection must reasonably advise the court of the basis for the objection." *Id.* (citation omitted).

This Court declines to consider a specific hearsay objection if a defendant "did not obtain a definitive ruling" on it. *See Kutz*, 267 Wis. 2d 531, ¶ 31. The reason why is because "the admissibility of evidence involves a trial court's discretion, and an objection serves the purpose of allowing the trial court and the other party to correct any evidentiary error during the trial." *Id.* (citation omitted).

Wisconsin Stat. § 908.03(6) allows admission of "business records if a foundation is laid, even though the record is hearsay." *Cobb State Bank v. Nelson*, 141 Wis. 2d 1, 8, 413 N.W.2d 644 (Ct. App. 1987). This "so-called business records exception" to the rule against hearsay allows the introduction of "police reports." *Gilles*, 173 Wis. 2d at 113 (citation omitted). But if a business record contains a statement by someone who was not part of the organization that made the record, then that person's statement is "an additional level of hearsay" and is inadmissible unless it fits a hearsay exception. *Id.* (citations omitted).

On appeal, Wade argues that a police officer gave inadmissible hearsay evidence by testifying what a police report said about A.C.'s statements concerning her injuries. (Wade Br. 17–19.) Wade seems to concede that the police

report itself was admissible under Wis. Stat. § 908.03(6) as a business record. (*Id.* at 18–19.) He instead argues that *A.C.'s statements* in the report were an inadmissible second level of hearsay. (*Id.* at 17–19.)

Wade forfeited that argument because he did not raise it at trial. At trial, Wade's counsel made a premature hearsay objection when the prosecutor was asking the police officer about the police report. (R. 44:89–90.) Defense counsel said that his objection could wait. (R. 44:89–90.) He later "object[ed] on foundation grounds" when the prosecutor moved to introduce the report into evidence. (R. 44:90.) The court asked for more specificity. (R. 44:90.) Defense counsel said that "it's not clear who put together which parts and who was the source for the different parts." (R. 44:90–91.) The prosecutor said that the police officer filled out the report and recognized it as a business record. (R. 44:91.) The court overruled the objection. (R. 44:91.)

That exchange shows that Wade's trial counsel argued only that *the report itself* was hearsay, not that *A.C.'s statements* in the report were a second level of hearsay. By objecting to the report on foundation grounds, he meant that the State did not establish that the report met the business records exception. Indeed, Wade acknowledges that his foundation objection "evidently mean[t] that the state had not established a foundation that *the record* fell under any exception to the hearsay rule." (Wade Br. 17 (emphasis added).) Because Wade did not specifically object on the grounds that *A.C.'s statements* in the report were a second level of hearsay, he may not raise that claim on appeal.

C. Wade forfeited his right-to-be-present claim by not raising it in circuit court.

"It is the often-repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal." *State v. Bodoh*, 226

Wis. 2d 718, 737, 595 N.W.2d 330 (1999) (citation omitted). A defendant thus forfeits a right-to-be-present claim by not raising it in circuit court. *See State v. Boshcka*, 178 Wis. 2d 628, 642–43, 496 N.W.2d 627 (Ct. App. 1992).

Except for sufficiency of the evidence or issues previously raised, a defendant may not raise an issue on appeal without first raising it in a postconviction motion. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677–78, 556 N.W.2d 136 (Ct. App. 1996) (per curiam). A postconviction motion is necessary because a circuit court might need to make factual findings on the issue. *See State v. Romero-Georgana*, 2014 WI 83, ¶¶ 36, 64, 360 Wis. 2d 522, 849 N.W.2d 668.

However, this Court has "been willing to review issues not raised first in the circuit court 'where the issue is one of law, the facts are not disputed, the issue has been thoroughly briefed by both sides and the question is one of sufficient interest to merit a decision.'" *State v. Kaczmarski*, 2009 WI App 117, ¶ 9, 320 Wis. 2d 811, 772 N.W.2d 702 (quoting *City News & Novelty, Inc. v. City of Waukesha*, 170 Wis. 2d 14, 20–21, 487 N.W.2d 316 (Ct. App. 1992)).

Wade forfeited his claim that he had a right to be present when the circuit court sent exhibits to the jury room. He did not raise that claim during the trial or in a postconviction motion.

And this Court should not overlook the forfeiture because this issue involves disputed facts. At trial, defense counsel initially thought that the jury should not see the police report because it contained a hearsay reference to a gun. (R. 45:69.) But defense counsel later objected only to the jury seeing an exhibit that had the content of a 9-1-1 phone call. (R. 45:70–71.) He said it would "be fine" to let the jury see all of the other exhibits. (R. 45:71.) The court asked defense counsel if Wade was "on board with what we're

doing here[.]" (R. 45:71.) Defense counsel said, "Well, I didn't have chance to run it by him, but I—from my discussions with him, that is consistent with his wishes." (R. 45:71–72.)

Yet Wade now suggests that he could have told his lawyer that he did not want the jury seeing the domestic-violence police report. (Wade Br. 20.) He argues that "defense counsel's statement to the judge was misleading. This new defense position was not at all consistent with what Wade previously believed the defense position to be concerning [the police report]." (*Id.* at 23.)

But the record is unclear as to what Wade's position—or even what trial counsel's final position—was as to whether the jury should see the police report. Because the facts are in dispute, this Court should decline to consider Wade's forfeited right-to-be-present claim.

In sum, Wade forfeited all of his claims by failing to preserve them in the circuit court.

II. Further, the alleged hearsay and Wade's absence were harmless.

A. Inadmissible evidence and a violation of a defendant's right to be present can be harmless.

A violation of a defendant's right to be present is subject to harmless-error analysis. *State v. Peterson*, 220 Wis. 2d 474, 489, 584 N.W.2d 144 (Ct. App. 1998). So, too, is an erroneous admission of evidence. *State v. Britt*, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996).

"To determine whether an error is harmless, this court inquires whether the State can prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[]." *State v. Jorgensen*, 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77 (alteration in *Jorgensen*) (citation omitted). "The harmless error test has

also been stated as follows: '[T]he error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* ¶ 23 n.5 (alteration in *Jorgensen*) (citation omitted).

A court considers "the totality of the circumstances" to determine whether an error was harmless. *State v. Hunt*, 2014 WI 102, ¶ 29, 360 Wis. 2d 576, 851 N.W.2d 434. In doing so, a court may consider several non-exhaustive factors, including "the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." *Id.* ¶ 27 (citation omitted).

Courts have considered errors harmless in situations virtually identical to the one here. In *State v. Huntington*, a nurse practitioner gave inadmissible "double hearsay" testimony when she testified that the victim's mother had said that the victim had said that Huntington sexually abused her. *State v. Huntington*, 216 Wis. 2d 671, 695, 575 N.W.2d 268 (1998). The supreme court held that the nurse practitioner's hearsay testimony was harmless because the victim and her mother "repeated essentially the same allegations." *Id.*

This Court reached a similar conclusion in *State v. Mainiero*, 189 Wis. 2d 80, 103–04, 525 N.W.2d 304 (Ct. App. 1994). In *Mainiero*, the victim's mother testified that the victim had told her that Mainiero had sexually assaulted her, and she briefly described what her daughter had said. *Id.* at 101. This Court held that the mother's hearsay testimony was harmless. *Id.* at 103–04. It rejected Mainiero's argument that this testimony substantially bolstered the victim's credibility. *Id.* at 104. This Court reasoned that "[t]he outcome of this case hinged on who the

jury ultimately believed—Mainiero or the complainant." *Id.* at 103. "The testimony in question was merely a brief summary of the complainant's allegations and not nearly as detailed as the complainant's direct testimony. In fact, the complainant's mother testified that her daughter did not give her many details." *Id.* at 104.

B. Both pieces of alleged hearsay were harmless.

The State assumes for the sake of argument that both pieces of hearsay evidence at issue were inadmissible. But they do not entitle Wade to relief because they were harmless. They both concern a police officer's testimony about A.C.'s description of her injuries. The first piece of hearsay concerns the officer's testimony about what A.C. had said to her, while the second piece concerns the officer's testimony about A.C.'s statements as reflected in a police report. (*See* Wade Br. 4–5, 11–12, 14–15, 17–19.) Both pieces of hearsay were harmless because they were cumulative with A.C.'s own testimony, which provided much more detail about the cause and nature of her injuries. (*Compare* R. 42:76–84; 43:6–10, 12, 26–38 (A.C.'s testimony about her injuries); *with* R. 44:84, 91–92 (the officer's hearsay testimony about A.C.'s injuries).)

The nature of Wade's defense further shows that the hearsay was harmless. During closing argument, the prosecutor said that Wade's "defense is that [A.C.] is lying." (R. 45:29.) Defense counsel agreed that A.C.'s credibility was "probably the biggest question in this case." (R. 45:35–36.) He argued that much of the evidence—including the police officer's hearsay testimony—hinged on whether A.C. was telling the truth. (R. 45:36.) Thus, like the hearsay in *Huntington* and *Mainiero*, the police officer's hearsay in Wade's case added nothing because it hinged entirely on whether the jury believed A.C. If the jury rejected A.C.'s

testimony, it would have also rejected the officer's hearsay testimony about A.C.'s out-of-court statements.

The strength of the State's case further shows that the hearsay evidence was harmless for three reasons. First, admissible evidence corroborated A.C.'s account of her injuries. A doctor testified that he had seen several bruises on A.C.'s body. (R. 43:55.) A police officer testified that she had seen redness on A.C.'s face and arm. (R. 44:85.) The jury even saw A.C.'s injuries for itself. It saw photographs of A.C.'s injuries: bruises on her face, arm, leg, back, and shoulder, as well as a scratch on her chest. (R. 43:26–38.) A.C. also revealed a scar on her arm during trial, which Wade had caused by burning her with a cigarette. (R. 44:60.)

Second, evidence corroborated A.C.'s account of the assault and crime scene. A.C. testified that Wade had thrown a candle holder full of cigarettes at her while she was sitting on her living room floor. (R. 42:78.) The jury learned that a police officer saw and photographed a candle holder and nearby cigarettes on the living room floor when she escorted A.C. home after the assault. (R. 43:45; 44:85–86.) A.C. further testified that Wade had struck her with a liquor bottle in her living room. (R. 42:77.) The jury learned that a police officer had photographed a liquor bottle on a ledge in the living room when she brought A.C. home after the assault. (R. 44:40–41.)

Third, evidence of A.C.'s behavior shortly after the assault corroborated that she was a victim of a serious crime. A grocery store employee corroborated that A.C. had signaled for customers to call 9-1-1 and that she had looked "[e]xtremely frightened." (R. 44:69–70, 74.) A.C. testified that two days after the assault, she quit her job, moved to Florida on a Greyhound bus, and left most of her belongings behind. (R. 43:11, 47.) She said that she moved to get away from Wade. (R. 43:47.) She took a Greyhound bus back to Milwaukee so she could testify at Wade's trial. (R. 43:48.)

Her behavior was consistent with being a victim of Wade's assault. The State's case was strong without the police officer's brief hearsay testimony, which added nothing.

In sum, the hearsay evidence was harmless.

C. Wade's absence when the circuit court sent exhibits to the jury was harmless.

The State further assumes for the sake of argument that Wade had a right to be present when the circuit court and the attorneys decided which exhibits to send to the jury room. Wade's absence, however, was harmless. This issue concerns the allegedly inadmissible police report in which A.C. described her injuries. (*See* Wade Br. 5–6, 19–23.) Wade suggests that had he been present, he would have told his attorney that he did not want the jury to see the police report. (*See id.*) But when the erroneous admission of a report is harmless, any error in sending the report to the jury room is also harmless. *See Gibson v. State*, 55 Wis. 2d 110, 117–18, 197 N.W.2d 813 (1972). A.C.'s hearsay statements in the police report were harmless, as explained above. Thus, Wade's inability to stop the report from going to the jury room, due to his absence, was also harmless.

In sum, Wade forfeited all of his claims, and all of the alleged errors were harmless.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm Wade's judgment of conviction.

Dated this 9th day of October, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
rosenowse@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4974 words.

_____
SCOTT E. ROSENOW
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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.

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Dated this 9th day of October, 2017.

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SCOTT E. ROSENOW
Assistant Attorney General