STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2019AP000194CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

THOMAS A. NELSON, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE FAYE M. FLANCHER PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution/statutes

Issue presented

1. Where a nurse practitioner who did not conduct or participate in the "sexual abuse evaluation" of the alleged victim testified at trial as to the findings of the evaluation based on a review of the report of the non-testifying examiner, did the admission of such testimony violate Nelson's right to confrontation?

2. Did the admission of the non-testifying examiner's written report of her "sexual abuse evaluation" of the alleged victim violate Nelson's right to confrontation?

3. Did the prosecutor's remark during closing argument expressing her personal belief that Nelson committed the crimes, constitute reversible error?

Nelson did not raise the issues in the circuit court and raises them on appeal in the context of plain error.

Position on oral argument and publication

Counsel would welcome oral argument should this court determine that such argument would be helpful in addressing the issues presented in this brief. Counsel believes that publication will not be warranted as this appeal involves the application of well-established law to a specific set of facts.

Statement of the case

The State charged Nelson with second degree sexual assault, (Count One), strangulation (Count Two), false imprisonment (Count Three), and six counts of felony bailjumping (Counts Four through Nine).[1] Ap.100-105,3:1-4. The charges arose from a sexual encounter which occurred between Nelson and M.D. at Nelson's residence. Ap.100-105,1:1-5. After various pre-trial hearings, the case proceeded to a two day jury trial. The jury found Nelson guilty of Counts One, Three, Four,

[1] Habitual criminality allegations accompanied each charge. The State subsequently filed an amended information which omitted the enhancers. Ap.106-108, 20:1-3.

Five, Eight and Nine, and not guilty of Counts Two, Six and Seven. 39:179-181. At sentencing, the circuit court imposed terms of imprisonment consisting of 25 years initial confinement and 15 years extended supervision on Count One, 3 years confinement and 3 years extended supervision on Count Three, and 2 years confinement and 2 years extended supervision on Counts Four, Five, Eight and Nine. 40:27-28. The circuit court ordered that the sentences run consecutively. 40:28. Nelson timely filed a notice of intent to pursue postconviction relief, 22:1-2, pursuant to which the State Public Defender appointed the undersigned counsel to represent Nelson on postconviction matters. By and through counsel, Nelson filed a notice of appeal, 30:1, and these proceedings follow.

Statement of facts

Facts pertaining to the "sexual abuse evaluation" of M.D. by non-testifying nurse practitioner.

At trial, the State introduced testimony from Michael Cahill, a nurse practitioner at the Child Advocacy Center of Childrens Hospital of Wisconsin in Milwaukee. 38:191. Cahill testified that he was on a team of medical providers who provide medical assessments on children and adolescents who are referred for evaluations related to any concern of child abuse including physical abuse, sexual abuse, child neglect, human sex trafficking or drug affected infants. 38:194.

Cahill testified regarding an evaluation of M.D. conducted by another nurse practitioner, Dr. Rita Kadamian. 38:193.[2] Kadamian was not at trial because she was on medical leave. 38:194.

Cahill reviewed Kadamian's report. 38:194. Cahill identified Exhibit 49 as the report of the examination performed

[2] Cahill testified that Rita Kadamian had a doctorate in nursing. 38:193.

by Kadamian on February 2, 2017 at the Racine Child Advocacy Center. 38:195.[3]

Cahill testified that Kadamian saw M.D. 11 days after she had an initial SANE examination on January 21, 2017. 38:195. [4]Kadamian saw M.D. as a follow up to the initial examination. 38:196.

Cahill testified that Kadamian performed a physical examination of M.D.'s genitalia, inside and out. 38:196. Kadamian found injuries to M.D. 38:196. Cahill testified that "there were three things noted that I saw in the medical report." 38:196. Cahill testified that Kadamian noted that M.D. had what she termed a "healed transection" on the hymen at 3 o'clock. 38:197. A transaction is basically a rip or a tear. 38:197. Cahill testified that Kadamian also found a contusion or bruise at 3 o'clock and noted a transection at 6 o'clock. 38:197. Cahill testified that Kadamian noted in her report that the contusion at

[3] The State moved Exhibit 49 into evidence. 38:199. It appears in the record at 43:1-6.
[4] The State introduced evidence of this initial sexual assault examine through the testimony of G.L., the nurse examiner who conducted that examination. 38:139-169.

3 o'clock appeared to be acute. 38:198.[5] Acute meant that it was still very obvious or still very recent. 38:199. Cahill testified that Kadamian indicated in her report that the abnormalities she found were consistent with penetrating blunt force trauma. 38:198.

On cross-examination, Cahill testified that in talking about acute penetration, he was not saying whether the penetration was forced or consensual. 38:200. Cahill testified that under the category "review of symptoms", Kadamian noted that M.D. "bruises, bleeds easily." 38:200.

In the State's closing argument, the prosecutor stated the following regarding Kadamian's findings:

> And when (M.D.) went back to the CAC, approximately 10 to 12 days later, Dr. Kadamian, who wasn't able to be here, but her counterpart testified as to her findings, said that she had a contusion on her hymen that was consistent with blunt force trauma and was acute. She also said she had a transaction that was healing or healed of her hymen at 6 o'clock. The contusion was at 3 o'clock. 39:167-168.

[5] Kadamian's findings conflict with the findings of G.L.'s examination done 11 days prior where G.L. did not see any injury to the hymen. 38:159.

Facts pertaining to prosecutor's remark during closing argument expressing her personal belief that Nelson committed the crimes.

During closing statement, the State summarized the evidence and its case against Nelson. 39:142-151. At the end of the summation, the prosecutor stated as follows:

> You know, I don't know what else I can say about whether or not Thomas Nelson committed these crimes. *I firstly believe that he did*. I think the evidence absolutely—

Ap.114, 39:151. Italics added.

At such point, Nelson objected to the prosecutor's remark and the circuit court held a side-bar discussion. Ap.114, 38:151. At the side-bar, the circuit determined that it would "cure" the prosecutor's remark by instructing the jury that the opinions of the lawyers in closing arguments are not evidence. Ap.115, 38:176. In that regard, after closing arguments by each party, the circuit court began its closing instructions by instructing the jury as follows:

Ladies and gentlemen, consider carefully the closing arguments of the attorneys, but their arguments, conclusions and their opinions are not evidence. Draw your own conclusions from the evidence and decide upon your verdict according to the evidence under the instructions given to you by the Court.

39:169.

Trial counsel did not move for a mistrial or take further action in connection with the prosecutor's remark.

Counsel will relate additional facts as they apply to the arguments made below.

Argument

I. The admission of Cahill's testimony regarding the findings made by Kadamian during M.D.'s "sexual abuse evaluation," and the admission of Kadamian's report itself, violated Nelson's right to confrontation and constituted plain error. [6]

A. Standard of review.

Whether the admission of evidence violates a defendant's right to confrontation is a question of constitutional law subject

[6] Both the Sixth Amendment to the United States Constitution and the Wisconsin Constitution guarantee a criminal defendant the right to confront witnesses who testify against him at trial. See U.S. Const. amend. VI; Wis. Const. art. 1, §7. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…" Article I, Section 7 of the Wisconsin Constitution states: "In all criminal prosecutions the accused shall enjoy the right…to meet the witnesses face to face…"

to independent review. See *State v. Mattox*, 2017 WI 9 ,¶19, 343 Wis.2d 122, 890 N.W.2d 256.

B. Principles regarding plain error.

As discussed by the Supreme Court in *State v. Jorgensen*, 2008 WI 60, 310 Wis.2d 138, 747 N.W.2d 77 (2007), Wisconsin Stat. §901.03(4) recognizes the plain error doctrine. The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object. *Id.* at ¶21 citing *State v. Mayo,* 2007 WI 78, ¶ 29, 301 Wis.2d 642, 734 N.W.2d 115. Plain error is "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.'" *Id.* citing *State v. Sonnenberg,* 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984). The error, however, must be "obvious and substantial." *Id.* The Supreme Court has advised for example, that "where a basic constitutional right has not been extended to the accused,'" the plain error doctrine should be utilized. *Id.* citing *Virgil v. State,* 84 Wis.2d 166, 195, 267 N.W.2d

852 (1978). "Wisconsin courts have consistently used this constitutional error standard in determining whether to invoke the plain error rule." *State v. King,* 205 Wis. 2d 81, 91, 555 N.W.2d 189 (Ct.App.1996).

In particular, courts have found the violation of a defendant's right to confrontation to constitute plain error. See *State v. Jorgensen*, 2008 WI 60 at ¶39 and ¶54, and *Virgil v. State*, 84 Wis.2d at 192. Such is the case here. The error in admitting Cahill's testimony and Kadamian's report was fundamental, obvious and substantial, and requires a new trial.[7]

C. *Kadamian's statements, as introduced by Cahill, and her "sexual abuse evaluation" report, were testimonial, and Nelson had no prior opportunity to cross-examine her about them.*

Both the Sixth Amendment to the United States Constitution and the Wisconsin Constitution guarantee a criminal defendant the right to confront witnesses who testify

[7] Once a defendant shows that an unobjected to error is fundamental, obvious and substantial, the burden shifts to the state to show that the error was harmless. See *State v. Jorgenson*, 2008 WI 60 at ¶23 and *State v. King*, 205 Wis.2d at 93.

against him at trial. See U.S. Const. amend. VI; Wis. Const. art. 1, §7. Wisconsin courts generally apply United States Supreme Court precedent when interpreting these clauses. See *State v. Mattox*, 2017 WI 9 at ¶20.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that "[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." See *Crawford*, 541 U.S. at 59. The Supreme Court in *Crawford* did not define "testimonial" but it identified three formulations of testimonial statements:

> [E]x parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or *similar pre-trial statements that declarants would reasonably expect to be used prosecutorily*.
>
> ----
>
> [E]xtrajudicial statements …contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.
>
> ---

> [S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the *statement would be available for use at a later trial.*

Italics added. See *Crawford*, 541 U.S. at 51-52.

In subsequent decisions, the Supreme Court fleshed out with more particularity what it means for a statement to be "testimonial." In *Ohio v. Clark*, 135 S.Ct. 2173 (2015), the Supreme Court held that a statement is "testimonial" if it was given with the primary purpose of creating an out-of-court substitute for trial testimony. See *id.* at 2183. The court similarly couched the test as whether the statement was made with the primary purpose of "establishing," "gathering," or "creating" evidence for the defendant's prosecution. See *id.* at 2181-2183. Some factors relevant in the primary purpose analysis include: 1)the formality/informality of the situation producing the out-of-court statement; 2)whether the statement was given to a law enforcement or a non-law enforcement individual; 3)the age of the declarant; and 4)the context in which the statement was given. See *Ohio v. Clark*, 135 S.Ct. at 2180-2182.

Our state supreme court recently drew upon *Ohio v. Clark* in deciding *State v. Mattox*, supra. In *Mattox*, the court found that a toxicology report was not "testimonial" because its "primary purpose" was to assist the medical examiner in determining the cause of death rather than to create a substitute for out-of-court testimony or to gather evidence against the defendant for prosecution. See *State v. Mattox*, 2017 WI 9 at ¶37.

In this case, consideration of the *Ohio v. Clark* "factors," informs that the primary purpose of the "sexual abuse evaluation" and Kadamian's statements contained in it was to gather, collect, and create evidence to be used in a criminal prosecution.

First, the formal context of the circumstances from which the statements originate bears out such primary purpose. As discussed above, all the statements at issue stemmed from a "sexual abuse evaluation" of M.D. by Kadamian, and Kadamian's written report regarding such evaluation. In Wisconsin, "forensic nurses" or "sexual assault nurse examiners" are trained and

certified through the Wisconsin Department of Justice which operates a "Medical Forensics Program." Ap.116. The explicit and bold banner for the program's web site claims, "Working with crime labs to *collect physical evidence*." Ap.116. Italics added. Under the category of "What is a medical forensic examiner?" the first function noted by the DOJ is that "Sexual assault forensic examiners perform the medical forensic exam, gather information for the medical forensic history, collect and document forensic evidence, and document pertinent physical findings from patient." Ap.123. Of course, the DOJ notes that they also "testify in court, if needed." Ap.123. Indeed, they are specifically trained in "Courtroom testimony and Legal Considerations." Ap.124. Sexual assault nurse examiners are additionally trained that their role and purpose is to function as part of a "county based team," a "sexual assault response team," or "SART." Ap.118. Also on the team are a law enforcement representative and a prosecutor. Ap.118. Given the formal and official context of Kadamian's "sexual abuse evaluation" of M.D. and subsequent written report, this

court cannot fairly view the statements made pursuant to such evaluation as having any *primary* purpose other than to gather, collect, and create evidence to be used in a criminal prosecution. Any medical purpose of the evaluation was minimal and secondary.

Another factor to consider under *Ohio v. Clark*, is whether the statements were given to a law enforcement or a non-law enforcement individual. See *Ohio v. Clark*, 135 S.Ct. at 2182. Kadamian was not a law enforcement officer per se but she was an agent of law enforcement. In this regard, the report itself indicates that Kadamian was requested to conduct the evaluation by law enforcement, specifically, police officer Vannucci.[8] 43:1. As discussed earlier in this brief, sexual assault nurse examiners are trained that their role and purpose is to function as part of a "coordinated team," a "sexual assault response team," or "SART." Ap.118. Also on the team are a law enforcement representative and a prosecutor. Ap.118. As such, although Kadamian was not a peace officer, she was by formal training and protocol part of the law enforcement and prosecutorial team.

[8] Office Matthew Vannucci of the Village of Caledonia Police Department. 38:170.

She was also an agent of law enforcement by statute. In this regard, Wis. Stat. §949.20, "Sexual Assault Forensic Examination Compensation," provides a specific and explicit mechanism by which a "health care provider" is compensated by the state, through the Department of Justice, in exchange for collecting evidence for a law enforcement agency. §949.24(1) provides as follows:

> Any health care provider *who conducts an examination to gather evidence regarding a sex offense* may apply for an award under this subchapter. Italics added.

That the statute itself contemplates that the primary purpose of the examination is to "gather evidence" is evident by the fact that the statute uses the specific phrase, "gather evidence" repeatedly. See §§949.20(3), 949.26(1) and 949.24(1). Additionally, it is relevant to note that the statute also prohibits health care providers from billing patients or their insurers for the cost of the sexual assault forensic examination. See Wis. Stat. §949.26(2)(a) and (b).

For the above reasons, there can be no credible dispute that the statements generated in connection with M.D.'s "sexual abuse

evaluation" were statements made effectively to law enforcement. As such, this factor cuts in favor of a determination that the primary purpose of Kadamian's statements was to create an "out-of-court substitute for trial testimony."

So too does the "age of the declarant," *Ohio v. Clark*, 135 S.Ct. at 2181-2182. Unlike the declarant in *Ohio v. Clark* who was a three year old child who made statements to his pre-school teachers, the declarant here was an adult. Not only that, the declarant was, as already discussed in this brief, a professional who was formally and specifically trained to collect, document, and preserve evidence as the primary purpose of her examination of a sexual assault victim.

Additionally, the written report of the "sexual abuse evaluation" was a document created by Kadamian which she, as a sexual assault nurse examiner, would reasonably expect to be used prosecutorily, and which would be available for use at a later trial. So too were Kadamian's statements within such document. As such, the statements were "testimonial" not only

under the "primary purpose" test but under *Crawford* as well. After all, *Crawford* provides that testimonial statements include "*pre-trial statements that declarants would reasonably expect to be used prosecutorily*," and "[s]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the *statement would be available for use at a later trial."* See *Crawford*, 541 U.S. at 51-52. Italics added. The written report of the "sexual abuse evaluation" and all statements by Kadamian within such report plainly fell within these categories.

Of course, there is significant case law from other jurisdictions where courts have found, under the facts presented in those cases, a victim's statements to a SANE nurse to be testimonial. See for example *Hernandez v. State*, 946 So.2d 1270 (Fla. Dist. App. 2007); *Medina v. State*, 143 P.3d 471 (Nev. 2006); *People v. Stechly*, 870 N.E.2d 333 (Il. 2007); *State v. Bennington*, 264 P.3d 440 (Kan. 2011); *Green v. State*, 22 A.3d 941 (Md. Ct. Spec. App. 2011); *People v. Vargas*, 100 Cal. Rptr. 3d 578 (Cal. Ct.

App. 2009); *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008); *State v. Hooper*, 176 P.3d 911 (Idaho 2007); *State v. Romero*, 156 P.3d 694 (N.M. 2007); *U.S. v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005). While M.D.'s "sexual abuse evaluation" perhaps had some minimal medical purpose, its *primary purpose* was the collection of evidence. For this court to conclude otherwise would require the court to ignore the general role SANE examiners perform in Wisconsin as well as the specific role Kadamian played in interacting with M.D. and law enforcement. With the record before it, this court cannot reasonably do.

This case involves circumstances similar to those presented in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). In *Melendez-Diaz,* the defendant was charged with distributing and trafficking cocaine. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 at 308. At trial, the prosecution placed into evidence bags containing the purported cocaine along with certificates of analysis from the state

crime lab showing the results of the forensic analysis performed on the seized substances. *Id.* The certificates stated the purported weight of the bags of cocaine seized and that the bags "[h]a[ve] been examined with the following results: the substance was found to contain: Cocaine." *Id.* The analysts conducting the tests of the purported cocaine and drafting the certificates did not testify at trial. The Supreme Court concluded as follows:

> *In short, under our decision in* ***Crawford****, the analyst's affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that the petitioner had a prior opportunity to cross-examine them, petitioner was entitled to " 'be confronted with' " the analysts at trial.* ***Id.*** *at 311. (Internal citation omitted).*

Like the analysts' affidavits in *Melendez-Diaz*, Kadamian's written report of the "sexual abuse evaluation" was testimonial. Like the analysts, Kadamian also was a "witness" for purposes of the Sixth Amendment and Article I, Section 7.

Bullcoming is perhaps even more similar to this case in that it involved the admission of "surrogate" testimony as well as the admission of documentary evidence. In *Bullcoming*, the defendant

was charged with operating a motor vehicle while intoxicated. *Bullcoming v. New Mexico,* 564 U.S. at 651. At trial, the state introduced into evidence a forensic laboratory report showing the results of a gas chromatography test of the defendant's blood sample. *Id.* at 653-655. The state introduced the report through testimony of a scientist who did not sign the certification or perform or observe the test reported on the certification. *Id.* at 655. The Supreme Court concluded that the state's introduction of the non-testifying expert's certification violated the defendant's right to confrontation. *Id.* at 663. In rendering such holding, the Supreme Court indicated that statements made by the non-testifying expert regarding the receipt and condition of the sample, the nature of the testing procedures, and the documentation of the process, were ripe for cross-examination. *Id.* at 660. This was especially true given that the government had never asserted that the expert was "unavailable," but only conveyed that he was on uncompensated leave. *Id.* at 661-662. In this regard, the court recognized that with the expert on the stand, counsel for Bullcoming could have

asked questions designed to reveal whether incompetence, evasiveness or dishonesty accounted for his removal from his work station. *Id.* at 662.

Kadamian's absence from Nelson's trial takes on a similar stature. The State never asserted that Kadamian was "unavailable" and only offered through Cahill that she was on medical leave. 38:194. Additionally, Nelson never had an opportunity to cross-examine Kadamian. The deprivation was prejudicial given the evidentiary significance of Kadamian's findings and the fertile ground they provided for cross-examination.

In this regard, Kadamian's purported findings as to the alleged injuries to M.D.'s hymen ostensibly supported the State's theory that the encounter between M.D. was non-consensual and involved unwelcome physical force. But such findings were also ripe for cross-examination. First, Kadamian's characterizations of the alleged injuries as a "contusion" and "healed transaction" were subjective and dependent upon the

interpretation of the examiner. Second, Kadamian's findings of injury to the hymen were inconsistent with the findings of the initial SANE examiner, G.L., who testified to seeing no injury to the hymen. 38:159. Third, Kadamian's findings were made not immediately after the sexual encounter, or even within 24 hours of it, but 11 days later. Fourth, Kadamian's history of what M.D. told her about the encounter, 43:1-2, contained inconsistencies with M.D.'s trial testimony. In this regard, Kadamian's report notes that M.D. described going home after the encounter and disclosing the incident to her mother. 43:1. The report contains no reference to M.D.'s going to her boyfriend's residence and talking with him about being with Nelson as the trial testimony reflects. By virtue of Kadamian's absence from trial, Nelson lost all opportunity to probe these problematic aspects of her findings. While Nelson of course cross-examined Cahill, the fact that Cahill never examined, spoke with, or met M.D. precluded any meaningful cross-examination.

For the above reasons, the admission of Kadamian's statements and written report violated Nelson's right to confrontation under well-established authority. The error was obvious, substantial and fundamental, and this court should deem it to be plain error.

II. *The prosecutor's remark during closing argument expressing her personal belief that Nelson committed the crimes, constituted plain error.*

A. *Standard of review.*

Where a defendant alleges that a prosecutor's statements constituted misconduct, the test for plain error applied by the appellate court is whether the statements so infected the trial with unfairness as to make the resulting conviction a denial of due process. See *State v. Miller*, 2012 WI App 68, ¶19, 341 Wis.2d 737, 816 N.W.2d 331; *State v. Davidson,* 2000 WI 91, ¶88, 236 Wis.2d 537, 613 N.W.2d 606.

B. The prosecutor's remark that she believed Nelson committed the crimes was misconduct and reversible error.

It has long been established that it is highly improper for a prosecutor to express to a jury his or her personal belief in a defendant's guilt. See *Zeidler v. State*, 189 Wis.44, 45, 206 N.W. 872 (1926); and *Hofer v. State*, 130 Wis. 576, 583, 110 N.W. 391.

The Wisconsin Supreme Court has instructed that it is a violation of the lawyer's code of ethics for a lawyer to tell a jury what he or she believes is the truth of the case, unless it is clear that the lawyer's belief is merely a comment on the evidence before the jury. See *State v. Jackson*, 2007 WI App 145, ¶22, 302 Wis.2d 766, 735 N.W.2d 178. The court in *Jackson* specifically cited Supreme Court Rule 20:3.4:

> A lawyer shall not: …(e)in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt of innocence of an accused.

Id. at ¶22.

At the end the prosecutor's closing argument, she explicitly stated to the jury as follows:

> You know, I don't know what else I can say about whether or not Thomas Nelson committed these crimes. *I firstly believe that he did…*

Ap.114, 39:151.

Based on the foregoing authorities, the prosecutor's remark, as a personal expression of her belief in Nelson's guilt, was misconduct. More significantly, the remark was also prejudicial. It is well recognized that impermissible vouching is particularly dangerous when it is done by prosecutors:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

U.S. v. Brown, 508 F.3rd 1066, 1075 (D.C. Circuit 2007).

Beyond the above-referenced dangers, the prosecutor's remark in this case was prejudicial for other reasons.

First, the remark was not made as an ostensible response to any argument trial counsel may have made, especially regarding trial counsel's view of or belief about the evidence.

Indeed, at that time the prosecutor made the comment, trial counsel had not yet begun summation. The remark as such came as wholly unprovoked and without arguable justification.

Second, the prosecutor never retracted or withdrew the remark. As such, it was allowed to resonate within the consciousness of the jurors.

Third, the circuit court did not strike the prosecutor's remark or instruct the jury that it should not consider it. While the circuit court did instruct the jury that counsel's "arguments, conclusions and their opinions are not evidence," such instruction did not specifically address the prosecutor's particular remark. Such instruction also wholly failed to remedy the type of dangers expressed, in *U.S. v. Brown,* supra.

Fourth, the circuit did not admonish or rebuke the prosecutor in any respect. In this regard, the jury was not made aware of the gravity of the prosecutor's misconduct and the importance of not relying on it.

Finally, and most importantly, the State's case against Nelson was thinly circumstantial. As framed in trial counsel's opening statement, the defense was that the conduct between M.D. and Nelson was "consensual," 38:73, and that M.D. claimed it was non-consensual only after her then boyfriend learned that she had been with Nelson that night. 38:76. Given that the conduct occurred in private between M.D. and Nelson, there was no eyewitness. There was likewise no video or surveillance footage which depicted the events. There was no confession. The entire case boiled to down to a "he said, she said," type-situation.

Various aspects of M.D.'s own testimony, and inferences drawn from it, supported that the sexual encounter was consensual. At the time of the sexual encounter, M.D. was 17 years of age. 38:17. M.D. knew Nelson as he was her grandpa's nephew and he had been doing work on her car. 38:78. M.D. would go over to Nelson's house on lunch breaks from school and play video games. 38:79.

At around 9:41 p.m. on the day of the sexual encounter, Nelson sent M.D. a text inviting her to come over that night to do some drinking. 38:84,86. M.D. agreed to come over and arrived at Nelson's residence some time after 11:30 p.m. 38:85,87,88. On cross-examination, M.D. testified that before going to Nelson's she changed out the clothes that she had been wearing that evening and put on pajamas and socks. 38:108,116. When M.D. arrived, Nelson had two friends there. 38:88. M.D. drank a couple of beers, a few shots and some mixed drinks. 38:88.

At some point, M.D. went to the bathroom and threw up. 38:89. Nelson asked M.D. if she wanted to go lay down. 38:89. M.D. responded "yeah." 38:89. Nelson then carried M.D. into his room. 38:89. M.D. threw up some more, and laid down on the floor. 38:90. At the time, Nelson's mother was sleeping in the room across from Nelson's room. 38:92,97,124. Nelson's dad was sleeping on the couch. 38:124.[9]

[9] These facts are significant because on cross-examination, M.D. testified that she did not make any noise during the encounter. 38:127.

M.D. testified that while in Nelson's room, Nelson attempted to take her pants off. 38:91. M.D. testified that she told him to stop, and then went back downstairs to use the bathroom. 38:92. M.D. went with her. 38:92. They then returned upstairs to Nelson's room and Nelson asked her to lock the door. 38:92. M.D. did so. 38:93.

M.D. testified that Nelson then laid her down on the floor and took off her pants. 38:93. At that point, Nelson's clothes were off too. 38:93-94. Nelson then got on top of M.D., put his penis into her vagina and "just kept going." 38:94. M.D. testified that she was telling Nelson to get off of her and scratching him. 38:94. M.D. testified that Nelson picked her up, moved her to the bed, and continued. 38:94. M.D. testified that when Nelson moved her to the bed, she "pretty much gave up at that point." 38:94. M.D. testified that as she tried to push Nelson away, he "was like choking me…and putting his fingers in my mouth so I couldn't like make any noise." 38:94. M.D. also testified that Nelson told her to shut up, and "you know you want it." 38:94. M.D. testified

that Nelson was also biting her on her legs, arms, cheek and ears, and that it hurt. 38:97.

The encounter ended when at approximately 4:30 a.m., M.D.'s alarm went off. 38:97. M.D. told Nelson that she had to leave. 38:97. She had plans to meet a friend to go to a horse show that morning. 38:97. Before M.D. left, Nelson asked her if she would be his girlfriend. 38:97. M.D. told Nelson "sure," and then left. 38:98. M.D. testified that she told Nelson that she would be his girlfriend because she "was trying to get out of there." 38:98.

M.D. testified that after leaving Nelson's house, she was still really drunk, so she drove to a nearby parking lot where she fell asleep in her truck for a few hours. 38:98. When M.D. awoke, she went to her boyfriend's house. 38:98.

On cross-examination, M.D. testified that she did not drive to the police station or to a hospital. 38:130. M.D. testified that she got to her boyfriend's house at 9:00 or 9:30 a.m. 38:98. M.D. testified that she told her boyfriend what had happened and that

he did not believe her. 38:98. M.D.'s boyfriend told her that she was lying and making it up. 38:98.

As part of the defense case, Nelson called the boyfriend, J.G. as a witness. 39:100. J.G.'s testimony and inferences drawn from it show that M.D.'s version of her encounter with Nelson was not an accurate and reliable account. J.G. testified that when he got up on the morning of January 21, he saw photos on Snapchat which showed M.D. drinking in Nelson's garage. 39:101. J.G. also saw photos which showed M.D. "like next to a bed or by a bed." 39:101. After seeing the photos, J.G. tried getting a hold of M.D. to "see what was going on." 39:101. J.G. testified that he drove past Nelson's house and saw M.D.'s truck outside. 39:102. J.G. testified that he drove past Nelson's house around 8:30 a.m. 39:103. J.G. testified that he then drove home, and 30 minutes later, he received a phone call from M.D. 39:104.

J.G. testified that M.D. came over to his house. 39:104. In discussing M.D.'s being with Nelson, M.D. told him that she "was raped by Mr. Tom" and asked him what she should

do. 39:104. J.G. testified that M.D. told him that she left Nelson's house at 4:00 a.m., but he knew that was not true because he had seen her truck there (at 8:30 a.m.). 39:104. J.G. testified that he then sent Nelson some instant messages because he "didn't really think Thomas would do something like that." 39:105.

The results of M.D.'s initial sexual assault examine also undermined M.D.'s story that the encounter was non-consensual. In this regard, G.L, 38:139, a sexual assault nurse examiner, testified regarding her "head to toe" assessment of M.D. When asked by the prosecutor if G.L. noted any injuries to M.D., G.L. indicated only that she "found a marking on the inside of her left arm, four markings on her breasts, one on the right and three on the left, markings on the inner thigh and bi-lateral ear redness, then a red mark on her cheek." 38:152. G.L. also testified that she noted swelling with inflammation on the major labia along with what appeared to be either an abrasion or laceration. 38:158-159. G.L. did not see any injury to M.D.'s hymen. 38:159.

On cross-examination, G.L. testified that only two of the markings on M.D. were consistent with bite marks. 38:164-165. Those were a marking on the thigh, 38:153, and left arm. 38:165. G.L. testified that she did not note any evidence of petechiae or bruising on M.D.'s neck which would have been consistent with getting choked. 38:166-167. G.L. found no evidence of broken skin. 38:169.

As outlined above, the jury had evidence before it which supported the defense that the sexual encounter between Nelson and M.D. was consensual. As outlined above, the jury also had evidence before it which indicated that M.D.'s version of events was not accurate, and that she had a motive for mischaracterizing her encounter with Nelson. This is not a case where the State's evidence can fairly be described as overwhelming or even solid. To the contrary, it was weak. As a result, the prosecutor's remark about her personal belief that Nelson committed the crimes assumed greater significance than it perhaps would have had the case against Nelson truly involved

overwhelming evidence of guilt. Given the tenuous status of the evidence, the dangers contemplated in *US v. Brown*, supra, were more pronounced.

For all of the above reasons, this court should find that the prosecutor's remark so infected the proceeding with unfairness as to make the resulting conviction a denial of due process.

Conclusion

For the above reasons, this court should conclude that the admission of Cahill's testimony and Kadamian's report violated Nelson's right to confrontation and constituted plain error. It should also conclude the prosecutor's remark expressing her personal belief that Nelson committed the crimes, also constituted plain error. This court should vacate the judgment of conviction and remand the case for a new trial.

Respectfully submitted this _____day of May 2019.

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 5856 words.

Dated this ___day of May 2019.

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the final decision of the administrative agency.

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

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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