STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP194-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS A. NELSON,

Defendant-Appellant.

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

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

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ISSUES PRESENTED

1. Did the admission of a nurse practitioner's testimony about a medical evaluation and a report prepared by his colleague who was not available to testify violate Thomas A. Nelson's right to confrontation?

The circuit court did not answer this question because Nelson did not object to the admission of the testimony or the report at trial.

This Court should answer: No.

2. Was the prosecutor's remark during closing argument reversible error?

The circuit court did not answer this question.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication, because the issues presented can be decided by this Court based on well-settled law, the record in this case, and the briefs of the parties.

INTRODUCTION

Thirty-year-old Nelson provided 17-year-old M.D. with alcohol, sexually assaulted her, and held her against her will at his house. A jury convicted him of second-degree sexual assault and false imprisonment. On appeal, Nelson claims that the admission of a report and testimony by a nurse practitioner about the report—which was written by another nurse practitioner to document her medical evaluation of M.D. 11 days after the assault—violated his right of confrontation because the nurse practitioner who wrote the report was not available to testify.

Nelson cannot show the admission of the testimony and report violated his confrontation rights and was plain error. The evidence is not testimonial because its primary purpose was for medical assessment of the victim for disease and pregnancy and for child protection, not to gather evidence. Alternatively, any error was harmless because the evidence was not necessary for the jury's guilty verdict.

Nelson also claims that the prosecutor's comment during her closing argument that she "believe[d]" that the evidence showed that Nelson was guilty was reversible error. It was not. After Nelson's counsel objected, the court restated the jury instructions that opinions of counsel are not evidence and the defense did not seek a mistrial. The prosecutor's statement about Nelson's guilt was not improper because it was based on the evidence; moreover, the court properly instructed the jury and Nelson was not prejudiced. Nelson is not entitled to relief.

SUPPLEMENTAL STATEMENT OF THE CASE

While out on conditions of bond in two felony criminal cases, Nelson provided alcohol to and then sexually assaulted 17-year-old M.D. While not allowing her to leave his locked bedroom, he had sexual intercourse with her without her consent multiple times during a 3-hour period, bit her, and choked her. (R. 1:4–6, A-App. 100–103.) The State charged Nelson with second-degree sexual assault, strangulation and suffocation, false imprisonment, and six counts of felony bail jumping, all as a repeater. (R: 1:1–4, A-App. 100–103; 20:1–3, A-App. 106–108.)

Jury trial – victim testimony. At the two-day jury trial (R. 38; 39), M.D. described that Nelson had raped her at his home on January 21, 2017, when she was 17 years old (R. 38:77–78). M.D. went to Nelson's house where, after she drank alcohol and then threw up, Nelson took her to his

bedroom. (R. 38:89.) After telling her to lock the door, Nelson sexually assaulted M.D. while she scratched him, pushed him, and told him to get off of her. (R. 38:92–94.) Nelson choked her and put his fingers in her mouth so she couldn't make noise. (R. 38:94–95.) Nelson also bit M.D. on her legs, arms, cheeks and ears. (R. 38:97.) After several hours, the assault ended when her alarm went off at 4:30 a.m. (R. 38:97.)

After M.D. left Nelson's house, she drove her truck to a parking lot where she fell asleep for a few hours, went to her boyfriend Justin's house, and at 9:00 a.m. went home and told her mom what happened. (R. 38:98–99.) They called the police and went to the hospital. (R. 38:107; 133.) At the hospital, M.D. talked to both a nurse and Detective Thomas from the Caledonia Police Department. (R. 38:135–136.)

SANE nurse testimony. Gillian Greene Lackey testified that she was a registered nurse who worked at the Kenosha County Public Health Department, in the emergency department and as a trained sexual assault nurse examiner. (R. 38:139.) On January 21, 2017, she conducted a sexual assault nurse examination of M.D. (R. 38:141.) M.D. told Lackey about the assault, while both a victim advocate and a police investigator, Detective Thomas, were present. (R. 38:142.) Based on the information provided by M.D., Lackey prepared a written report of the assault. (R. 138:142–43.) Lackey also obtained urine and blood samples from M.D. and evidence, including DNA, using a sealed evidence kit. (R. 138:143–44.)

Lackey collected the clothing M.D. was wearing when she left Nelson's house and prevented it from contamination. (R. 138:144–45.) During a physical examination of M.D., she found red marks on M.D.'s face and bruising on her breasts, the inside of her left arm, and inner thigh. (R. 38:148–49.) Lackey identified M.D.'s injuries in photographs that she took, including markings on her left arm, breasts, inner thigh,

bilateral ear redness, and a red mark on her cheek. (R. 38:151–52.) Some of the injuries on M.D.'s body that Lackey identified were consistent with bite marks. (R. 38:153–54.)

Lackey also collected swabs from M.D.'s mouth, flossed her teeth and swabbed her neck, hands, fingertips, fingernails, and the injuries on her breasts, arm and inner thigh. (R. 38:155–56.) Lackey assessed M.D.'s external genitalia and collected evidence from her cervix and vagina. She found injury on M.D.'s labia but could not determine if it was a laceration or an abrasion because of swelling and inflammation and because M.D. was bleeding and having her menstrual cycle. (R. 38:157–58.) Lackey sealed all the evidence she had collected, including the clothing and swabs, in the evidence box, then gave it to a police officer. She testified that then, "[i]t ultimately goes to the crime lab." (R. 38:160.) Lackey also collected swabs from Nelson and placed them in a sealed evidence box. (R. 38:161–62.)

On cross-examination, Lackey testified that she did not find any physical indications of choking, although those are not always present "depending on the strength" or the amount of "pressure that is placed into the tissue of the neck" and "the duration of time that it is held at that pressure." (R. 38:166–68.) Lackey also stated that although a menstrual cycle can cause some swelling, it is "not usually common to have that intense of inflammation and swelling." (R. 38:167–68.)

Child Advocacy Center nurse testimony and report. Michael Cahill, a nurse practitioner at Children's Hospital of Wisconsin in the Child Advocacy Center in Milwaukee who specializes in pediatrics, testified that he worked with Rita Kadamian, another nurse practitioner at the Child Advocacy Center. (R. 38:191–93.) Both Cahill and Kadamian performed medical assessments on children and adolescents who have been referred to the Child Advocacy

Center because of concerns of child abuse or maltreatment. (R. 38:193–94.) Kadamian, who was assigned to Racine and Kenosha, performed the evaluation of 17-year-old M.D. but was on medical leave and could not testify at trial. (R. 38:194.)

Cahill reviewed Kadamian's report that she prepared after conducting the assessment of M.D. on February 2, 2017, 11 days after the assault, at the Racine Child Advocacy Center. (R. 38:194–95; 43.) According to the report, Kadamian obtained M.D.'s records, including the "SANE nurse's examination" by the sexual assault nurse examiner Lackey on the day of the assault. Cahill explained that M.D. had seen the SANE nurse 11 days earlier for the initial sexual assault evaluation, which included "a complete head to toe physical medical examination" and "a more specialized detailed look at the genital area." (R. 38:195.) The evaluation by Kadamian at the Child Advocacy Center 11 days after the assault was "routine standard protocol to medically follow up" when a child is assaulted for "further testing for any specific infections that might have been contracted through that initial contact" and for pregnancy. (R.38:195–96.)

Cahill testified that Kadamian's report indicated that M.D. had a healed transection, or tear, and a contusion, or bruise, on her hymen. (R. 38:196–97; 43:4, R-App. 118.) Kadamian's report stated that the abnormalities that she found were consistent with penetrating blunt force trauma and that the contusion was "acute" meaning that it was "still very present" and "obvious." (R. 38:198–99; 43:5, R-App. 119.) Cahill testified that it was not possible to determine the date that M.D. received the transection or the contusion. (R. 38:199.) On cross-examination, Cahill testified that he could not determine based on the report "whether the penetration was forced or consensual." (R. 38:200.)

DNA testimony. Debra Kaurala, a forensic scientist in the DNA analysis unit at the Wisconsin State Crime Laboratory, performed a DNA analysis and prepared a report in this case. (R. 39:10–11, 20.) Using the numerous evidence swabs that were collected from M.D. by the SANE nurse Lackey, Kaurala screened for and confirmed the presence of semen on M.D.'s external labia swabs, the vaginal swab and smear and the cervical swab and smear. (R. 39:21–26.) Kaurala performed a DNA extraction to isolate DNA from the semen. After performing DNA analysis, obtaining a DNA profile, and comparing that profile to the buccal swabs from M.D. and Nelson, Kaurala determined that Nelson was the "sole source" of the DNA found in that semen. (R. 39:26–27.) Kaurala concluded that there was a single source of DNA on M.D.'s vaginal and external labial swabs "[a]nd that source was Thomas Nelson." (R. 39:36.)

Police testimony. Officer Matthew Vannucci assisted Detective Thomas in interviewing M.D., took photographs of M.D.'s injuries, and took photographs of Nelson. (R. 38:170–71.) Vannucci took photos of M.D.'s injuries both at the hospital and the next day at her house because a bruising injury is often more apparent after the blood comes to the surface of the skin. (R. 38:173.) Vannucci's photographs depicted M.D.'s injuries on her arm and upper left leg, as well as bruising to her right cheek, left jaw, and left cheek. (R. 38:174–76.) Vannucci was present while the SANE nurse (Lackey) examined M.D. and collected DNA evidence, which was bagged and given to police. (R. 38:177.) Vannucci secured the evidence collected by the SANE nurse in an evidence storage room. (R. 38:178.) Vannucci also took photographs of Nelson on the day after the assault, showing scratch marks in multiple directions on his upper back to his lower back and on his wrists. (R. 38:178–81.)

As part of the investigation of M.D.'s assault, Lieutenant Gary Allen Larsen obtained a search warrant and searched Nelson's cellphone. (R. 39:53–55.) He found Facebook messages between Nelson and Justin Gardner, who was M.D.'s boyfriend at the time of the assault. (R. 39:56.) In the messages, Nelson repeatedly denied having sex with M.D. (R. 39:58–62.)

Detective Lakentric Thomas testified that he interviewed M.D., who told him that she went over to Nelson's house and that she consumed alcohol while she was there before he assaulted her. (R. 39:67–69.) Detective Thomas executed a search warrant at Nelson's home and seized evidence. (R. 39:69–75.) Thomas also listened to phone calls between Nelson and his mother, in which Nelson denied having sex with M.D. (R. 39:78.) Despite the DNA confirmation, Nelson continued to deny that he had sex with M.D. (R. 39:79–82.)

Jury instructions, closing arguments, conviction and appeal. In its jury instructions, the court told the jury that "[t]he remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion." (R. 39:128, R-App. 102.)

During closing arguments, the prosecutor ADA Maureen Martinez extensively reviewed the trial evidence. (R. 39:142–148.) Based on this evidence, she argued that "[t]he evidence tells me that Thomas Nelson raped [M.D.] against her will. He kept her in that room. He wouldn't let her leave and he strangled her in an effort to keep her quiet by grabbing her neck and by sticking his fingers in her throat. She was a 17 year old who couldn't think her way out of the situation, because 17 year olds don't often think beyond the next moment." (R. 39:148, R-App. 109.) After discussing Nelson's defense witnesses (R. 39:149–50, R-App. 110–11), Martinez stated, "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 –" Defense counsel Richard Hart objected and the court held a side bar. (R. 39:151, R-App. 112.) Martinez continued: "The evidence in this case shows us that he did commit that sexual assault. Her body shows it, his body shows it. The evidence in this case shows us that he committed that strangulation. Her body shows that with the bruises on her face and her evidence—her testimony is all evidence. That proves it as well. The evidence shows us that he imprisoned her falsely in that room based on that evidence[.]" (R. 39:151, R-App. 112.)

At the conclusion of closing arguments, the court re-instructed the jury to "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." (R. 39:169, R-App. 114.) After the jury was excused for deliberations, the court made a record of the sidebar reflecting Attorney Hart's objection during Martinez's closing argument. The court stated that "to cure it," the court "reiterate[d] the instruction on opinions;" specifically, the court instructed the jury that "the opinions of lawyers in closing arguments are not evidence[.]" (R. 39:176, A-App. 115.)

The jury found Nelson guilty of six counts: second-degree sexual assault, use of force; false imprisonment; and four counts of felony bail jumping. The jury returned not guilty verdicts on three counts: strangulation/suffocation and two counts of felony bail jumping. (R. 17; 39:179–81.) The court sentenced Nelson to 25 years of initial confinement and 15 years of extended supervision on the second-degree sexual assault count, to be served consecutively to a sentence of three years of initial confinement and three years of extended supervision for the false imprisonment count, and four sentences of two years of initial confinement and two years of

extended supervision for each of the bail jumping counts. (R. 40:27–28.) The court entered a judgment of conviction reflecting the sentence. (R. 23:1–4, A-App. 109–112) The court also entered a Judgment of Dismissal/Acquittal, reflecting the not-guilty verdicts on the strangulation/suffocation count and the two bail jumping counts. (R. 26.)

Nelson appeals from the judgment of conviction. (R. 30.)

ARGUMENT

I. The admission of Cahill's testimony and Kadamian's report about the follow-up sexual assault evaluation of M.D. did not violate Nelson's confrontation rights.

A. Relevant legal principles

1. Confrontation Clause

Both the United States Constitution and the Wisconsin Constitution guarantee a criminal defendant the right "to be confronted with witnesses against him." U.S. Const. amend. VI; Wis. Const. art. I, § 7 ("In all criminal prosecutions, the accused shall enjoy the right . . . to meet witnesses face to face"). "[A] defendant's right to confrontation is violated if the trial court receives into evidence out-of-court statements by someone who does not testify at the trial if those statements are 'testimonial' and the defendant has not had 'a prior opportunity' to cross-examine the out-of-court declarant." *State v. Mattox*, 2017 WI 9, ¶ 24, 373 Wis. 2d 122, 890 N.W.2d 256, *cert. denied Mattox v. Wisconsin,* 138 S. Ct. 355 (Oct. 16, 2017) (No. 16-9167)) (quoting *Crawford v. Washington*, 541 U.S. 36, 68 (2004)).

Importantly, "nontestimonial statements are *not* excluded by the Confrontation Clause." *State v. Jensen*, 2011 WI App 3, ¶ 23, 331 Wis. 2d 440, 794 N.W. 2d 482; *see Mattox,* 373 Wis. 2d 122 ¶ 24. A statement is testimonial if "the

primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *State v. Rodriguez*, 2006 WI App 163, ¶ 18, 295 Wis. 2d 801, 722 N.W. 2d 136 (quoting *Davis v. Washington*, 547 U.S. 813, 822-23 (2006)). If, after considering all of the relevant circumstances, the "primary purpose" of a statement is something other than a desire to create a record for trial, the statement is non-testimonial and "is not within the scope of the [Confrontation] clause." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011).

In *Mattox*, the Wisconsin Supreme Court held that the admission of a toxicology report prepared by a non-testifying individual—and which was testified about and relied on by the medical examiner who performed the autopsy to determine the cause of death—did not violate the Confrontation Clause. The report was not "testimonial" because its "primary purpose" was to identify the concentration of tested substances in biological samples sent by the medical examiner, not to gather evidence. *Mattox*, 373 Wis. 2d 122, ¶¶ 3–4, 37. *Mattox* set out the factors this Court should consider in deciding whether the primary purpose of an out of court statement was a desire to create a record for trial: "(1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant; and (4) the context in which the statement was given." *Mattox*, 373 Wis. 2d 122, ¶ 32 (citation and footnote omitted).

The Supreme Court has repeatedly indicated that statements made for purposes of medical treatment are nontestimonial. *See e.g. Bryant*, 562 U.S. at 362 n.9 (listing statements for purposes of medical diagnosis or treatment as an example of statements that are "by their nature, made for a purpose other than use in a prosecution"); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2 (2009) ("[M]edical

reports created for treatment purposes . . . would not be testimonial under our decision today.").

"While 'a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violated a defendant's right of confrontation is a question of law subject to independent appellate review.'" *State v. Griep*, 2015 WI 40, ¶ 17, 361 Wis. 2d 657, 863 N.W.2d 567 (quoting *State v. Deadwiller*, 2013 WI 75, ¶ 17, 350 Wis. 2d 138, 834 N.W.2d 362).

2. Plain error

Because Nelson did not object to Cahill's testimony or Kadamian's report at trial, he raises his confrontation clause claim on appeal as plain error. (Nelson's Br. 2.) The plain-error doctrine permits this Court to review certain errors otherwise forfeited by a party's failure to timely object. *See State v. Cameron*, 2016 WI App 54, ¶ 11, 370 Wis. 2d 661, 885 N.W. 2d 611; Wis. Stat. § 901.03(4). Plain errors are fundamental, obvious and substantial. *State v. Jorgensen,* 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W. 2d 77. This Court uses its plain-error reversal power sparingly. *Id.* If the defendant demonstrates "that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless." *Id.* ¶ 23.

B. The admission of Cahill's testimony and the report did not violate Nelson's confrontation rights because the evidence was non-testimonial: its primary purpose was a medical assessment of a child victim, not to gather evidence to prosecute Nelson.

Nelson claims that the admission of Cahill's testimony about the medical assessment and the report prepared by his colleague Kadamian, who was unavailable to testify at trial, was plain error because it violated his confrontation rights.

(Nelson's Br. 11–25.) The report described a follow-up evaluation of M.D., 11 days after the assault, which Cahill testified was done according to "protocol" in child sexual abuse cases to medically assess the victim for sexually transmitted disease and pregnancy. (R. 38:195–96.) Nelson did not object to the testimony or to the admission of the report. Nelson has failed to show that the admission of Cahill's testimony about Kadamian's report and the report itself into evidence was plain error because the evidence was not testimonial and thus not a Confrontation Clause violation.

The law is well-established that the Confrontation Clause is only implicated by the admission of "testimonial" out-of-court statements and that the primary purpose test provides the standard by which courts determine whether a statement is testimonial. *Mattox,* 373 Wis. 2d 122, ¶ 32. Kadamian's report of her medical assessment of M.D. was not testimonial because the primary purpose of the report was to follow the protocol for child sexual abuse victims such as M.D. As Cahill testified, the purpose of Kadamian's evaluation of M.D. and report was to provide treatment to her as a child sexual assault victim: it was "routine standard protocol to medically follow up" after the initial SANE nurse examination for "further testing for any specific infections that might have been contracted through that initial contact" and for pregnancy. (R. 38:195–96.)

Thus, the primary purpose of Kadamian's evaluation of M.D. was to medically diagnose and treat the traumatized child victim, not to gather evidence against Nelson. Like the toxicology reports that the medical examiner testified about at trial in *Mattox*, Cahill's testimony about and Kadamian's report of her medical assessment of M.D. were admissible because they were not generated primarily for the purpose of furthering a criminal prosecution. *See Mattox,* 373 Wis. 2d 122, ¶¶ 3–4, 37 (toxicology report relied on by the medical

examiner who performed the autopsy was not "testimonial" because "primary purpose" was to identify the concentration of tested substances in biological samples sent by the medical examiner, not to gather evidence); *compare State v. Williams,* 2002 WI 58, ¶ 41, 253 Wis. 2d 99, 644 N.W.2d 919 ("State crime lab reports . . . are prepared primarily to aid in the prosecution of criminal suspects."). Nelson had no basis for a Confrontation Clause objection to Cahill's testimony and Kadamian's report because this evidence was not "testimonial." The admission of this evidence was not plain error.

Nelson fails to satisfy any of the factors the *Mattox* court described as pertinent to whether the report had a primary purpose of creating a record for trial. *See Mattox*, 373 Wis. 2d 122, ¶ 32. Nelson argues that the follow-up assessment and report "indicates that Kadamian was requested to conduct the evaluation by law enforcement, specifically, police officer Vannucci" and that "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.'" (Nelson's Br. 16.) Nelson's arguments are unavailing. He ignores Cahill's testimony that the evaluation was "protocol" for child sexual assault victims and that Kadamian's assessment was to "medically follow-up" for child protection purposes. (R. 38:195–96.) Nelson points to no evidence in the record that Kadamian's evaluation and report were done to gather evidence to prosecute Nelson.

Nelson misunderstands that Kadamian's assessment of M.D.'s condition 11 days after the assault was not the equivalent to the examination by the SANE nurse who collected evidence including swabs for DNA testing. Lackey's SANE nurse examination and collection of evidence for DNA analysis was to gather evidence for the State's prosecution of Nelson. In contrast, the follow-up assessment by Kadamian, the Child Advocacy Center nurse practitioner, was done

according to protocol for child sexual assault victims and not to collect evidence for the prosecution. Nelson obfuscates that Kadamian's medical assessment and report were distinct from the initial sexual assault nurse examination of M.D. by the SANE nurse Lackey, which she performed at the hospital immediately after the assault.

As Lackey succinctly testified in great detail, the evidence she collected as the SANE nurse during her examination of M.D. immediately after the assault was meticulously preserved in sealed evidence boxes and transferred to the police and then to the state crime lab for DNA analysis. (R. 38:139–62.) Kadamian's evaluation of M.D. did not collect evidence. Kadamian assessed M.D. not as a trained SANE nurse examiner, but as a nurse practitioner with the Child Advocacy Center to follow up on 17-year-old M.D.'s well-being almost two weeks after suffering through a horrendous assault.

Thus, the primary purpose of Kadamian's evaluation and report was not to gather evidence for trial. Instead, it was for follow-up medical treatment to M.D. as a child sexual assault victim. That Kadamian's evaluation of M.D. occurred after the intervention of child welfare authorities and at the referral of Officer Vannucci is insignificant. Nelson's criminal prosecution does not retrospectively change the protocol of providing a follow-up medical evaluation of M.D. as a child sexual assault victim, to assess her for not only injury but also to screen her for sexually transmitted diseases and pregnancy.

For all these reasons, Kadamian's report was not prepared to aid in Nelson's prosecution. Like in *Mattox*, the "primary purpose" of the report was not testimonial. The admissibility of Cahill's testimony about Kadamian's report, and the report itself, is unquestionable. Nelson's right to confrontation was not violated by Cahill's testimony explaining the report in Kadamian's absence, or by the

admission of the report into evidence. Nelson has failed to show a substantial or obvious Confrontation Clause violation; thus, his claim that plain error requires reversal fails.

C. Even assuming a confrontation violation, any error is harmless.

"A Confrontation Clause violation . . . is subject to harmless error analysis." *Deadwiller,* 350 Wis. 2d 138, ¶ 41 (citations omitted). An error is harmless when the party benefitting from the error shows that "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* Several factors guide this Court's analysis: "the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence; the nature of the defense, the nature of the State's case, and the overall strength of the State's case." *Id.* (citation omitted.)

Where testimony and evidence were "unnecessary" to a conviction, the erroneous admission of that evidence is harmless. *State v. McDougle*, 2013 WI App 43, ¶ 17, 347 Wis. 2d 302, 830 N.W. 2d 243; *see also State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.).

Cahill's testimony and Kadamian's report were unnecessary to convict Nelson of sexual assault or false imprisonment and unimportant to any disputed issue at trial. The jury would have found Nelson guilty even without this testimony or the admission of Kadamian's report of her follow-up medical assessment of M.D. The critical evidence to convict Nelson came in through the SANE nurse testimony by

Lackey, the DNA analysis testimony, and testimony of law enforcement.

Specifically, during her SANE nurse examination on the day of the assault, Lackey gathered the definitive evidence from M.D. that the DNA analyst confirmed was Nelson's semen. (R. 38:155–162; 39:26–27, 36.) The SANE nurse examination also noted injuries to M.D.'s genitalia, including a laceration or abrasion, and inflammation beyond what was normal during a menstrual cycle. (R. 38:157–58, 167–68.) Other evidence that corroborated M.D.'s testimony that she was violently assaulted were the photographs of her injuries taken both by Lackey and by Officer Vannucci, depicting injuries consistent with M.D.'s account of the assault, including markings, bruises, and bite marks. (R. 38:151–54, 174–76.) Thus, while Kadamian's report indicated that M.D. had a healing injury, it was not necessary to prove her injuries. Moreover, Cahill testified that Kadamian's report did not conclude when M.D.'s injuries occurred or whether they were the result of consensual or nonconsensual sex. (R. 38:199–200.) Cahill's testimony and the report itself did not support the elements of sexual assault or false imprisonment. Thus, they did not impact Nelson's conviction for these counts.

The State's case against Nelson was primarily based on the 17-year-old victim's testimony, which the jury found credible. M.D. testified convincingly at trial that Nelson restrained her and forced her to have intercourse with him without her consent. (R. 38:91–97.) Her testimony, in conjunction with Lackey's SANE nurse testimony (R. 38:139–169) and Kaurala's DNA testimony (R. 39:10–36), was pivotal for the State to meet its burden of proof on the elements of second-degree sexual assault and false imprisonment beyond a reasonable doubt. The testimony of Lackey about her SANE nurse examination of M.D. and the evidence she obtained

established M.D.'s injuries and corroborated M.D.'s account of her sexual assault by Nelson. (R. 38:144–62.)

Moreover, after the State's DNA evidence confirmed unequivocally that Nelson had sexual intercourse with M.D. (R. 39:26–27, 36), Nelson's original insistence that he never had sex with M.D., demonstrated by testimony from multiple witnesses that Nelson repeatedly denied having sex with M.D. (R. 39:58–62, 79–82), was completely discredited. Thus, the strength of the State's evidence—M.D.'s compelling and graphic testimony naming Nelson as her assailant, the DNA, the photographs, and the testimony and evidence gathered by Lackey during her SANE nurse examination—would not have been diminished by excluding Kadamian's report or by requiring Kadamian's testimony and cross-examination for its admission.

Hence, it is clear beyond a reasonable doubt that the jury would have arrived at the same verdict without the admission of Cahill's testimony about Kadamian's report or the report itself. Any error in the admission of this evidence is harmless. Nelson is not entitled to any relief.

II. The prosecutor's comment during closing argument was not reversible error.

A. Relevant legal principles

A prosecutor's improper argument may rise to the level that the defendant is denied his or her due process right to a fair trial. *See State v. Wolff,* 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). "During closing arguments, a prosecutor is entitled to comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." *Cameron*, 370 Wis. 2d 661, ¶ 19 (citation omitted.) A prosecutor's statement regarding the defendant's guilt is not improper if the prosecutor states that it is based on the

evidence. *See Embry v. State*, 46 Wis. 2d 151, 160–61, 174 N.W.2d 521 (1970) (counsel may argue that evidence convinces him of defendant's guilt and should convince the jury as long as when expressing their opinion, it is clear that it is based upon the evidence in the case).

Even if the prosecutor's comment regarding a defendant's guilt is considered improper, in order to be misconduct entitling the defendant to a new trial, the comment must have "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Mayo*, 2007 WI 78, ¶ 43, 301 Wis. 2d 642, 734 N.W. 2d 115 (quoting *State v. Davidson*, 2000 WI 91, ¶ 88, 236 Wis. 2d 537, 613 N.W.2d 606 (additional citation omitted)). "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements . . . must be viewed in context." *Wolff*, 171 Wis. 2d at 168 (citation omitted).

In other words, the statements must be examined in light of the entire trial. *Davidson*, 236 Wis. 2d 537, ¶ 88. "There is a fine distinction between what is and is not permitted concerning the lawyer's personal opinion. Even if there are improper statements by a prosecutor, the statements alone will not be cause to overturn a conviction. Rather, the statements must be looked at in the context of the entire trial." *Mayo,* 301 Wis. 2d 642, ¶ 43. In deciding whether an improper argument was prejudicial, this court must consider several factors, including the character of the remarks in light of their context, any curative instruction and its probable effect, the strength of the evidence against the defendant, and all other facts that bear on the effect the remarks had on the jury. *See State v. Spring*, 48 Wis. 2d 333, 340, 179 N.W.2d 841 (1970).

Closing argument is the opportunity for the prosecutor to tell the jury how he or she views the evidence. *See State v. Adams,* 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). Counsel is given considerable latitude in closing argument. *See State v. Draize,* 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him or her and should convince the jurors." *State v. Nielsen,* 2001 WI App 192, ¶ 46, 247 Wis. 2d 466, 634 N.W.2d 325. "The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." *Draize*, 88 Wis. 2d at 454.

B. The prosecutor's comment was proper because it was based on the evidence. Even if it was error, the court cured it with the jury instruction and Nelson was not prejudiced because the evidence supported his convictions.

Nelson argues that the prosecutor Martinez improperly remarked during closing argument that "she believed Nelson committed the crimes," and that was both "misconduct and reversible error" under the code of ethics and relevant case law. (Nelson's Br. 26–27.) This Court should reject his claim. When viewed in context, the challenged statement was a proper comment based on all the trial evidence and Martinez made clear that she was arguing Nelson's guilt based on that evidence.

Nelson fails to examine Martinez's statement in light of her entire closing argument. Before making the statement to which Nelson objects, Martinez extensively reviewed the evidence showing that Nelson had sexual intercourse with M.D. without her consent. (R. 39:142–51, R-App. 103–112.) In

particular, Martinez highlighted Nelson's insistence that he did not "touch that girl," until after the DNA evidence revealed the presence of his semen in M.D., when Nelson's defense changed to that "they had consensual sex." (R. 39:142–43, R-App. 103–104.) The overwhelming trial evidence refuted Nelson's claim that the sex was consensual: M.D.'s testimony that she did not consent, that Nelson choked her, bit her, and told her to shut up as she tried to fight him off by scratching him all over (R. 38:93–97), Officer Vannucci's testimony that Nelson had scratches in multiple directions on his upper back to his lower back and on his wrists (R. 38:178–81), and the SANE nurse testimony that M.D. had bruises on her face and a bite mark on her arm (R. 38:148–54).

During her closing argument, Martinez reviewed all of this evidence: M.D. testified that she "tried to fight him off as hard as she could," she gave Nelson "scratches all over his back going in every direction," and he violently "grabbed her face" and "told her to shut up." (R. 39:143–44, R-App. 104–105.) Martinez also discussed the evidence supporting false imprisonment: M.D. testified that he restrained her using "the weight of his body," "intimidating her into locking the door," and "grabbing her face and neck." (R. 39:145, R-App. 106.) Martinez argued that M.D. was credible as her testimony was "very forthcoming," admitting that she went to Nelson's home to drink alcohol and that she got drunk and vomited, before Nelson "escorted her upstairs" where he sexually assaulted her. (R. 39:145–46, R-App. 106–107.) Thus, Martinez argued based on the evidence: "[t]he evidence tells me that Thomas Nelson raped [M.D.] against her will" and "kept her in that room." (R. 39:148, R-App. 109.)

After this extensive discussion of the trial evidence, Martinez made the following remark; the portions to which Nelson objects are italicized:

> [MS. MARTINEZ]: 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 –
>
> MR. HART: Objection, your Honor. Can we approach?
>
> THE COURT: Yes.
>
> (SIDE-BAR DISCUSSION)
>
> MS. MARTINEZ: The evidence in this case shows us that he did commit that sexual assault. Her body shows it, his body shows it. The evidence in this case shows us that he committed that strangulation. Her body shows that with the bruises on her face and her evidence – her testimony is all evidence. That proves it as well. The evidence shows us that he imprisoned her falsely in that room based on the evidence that [M.D.] told you about.

(R. 39:150, R-App. 111 (emphasis added).)

In his brief and appendix, Nelson entirely omits the context of Martinez's statement to which he objects. (Nelson's Br. 27; A-App. 114.) A prosecutor's argument must be viewed in context. *State v. Neuser,* 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). Here, Martinez made the statement, "I firstly believe that he did . . . ," immediately after she outlined in great detail the evidence supporting Nelson's guilt. (R. 39:142–151, R-App. 103–112.) After Attorney Hart objected, Martinez continued to emphasize that the evidence supported a conviction. (R. 39:151, R-App. 112.) The statement by Martinez was proper because, when taken in the context of the entire closing, it was an appropriate comment about Nelson's guilt based on all of the evidence at trial.

On appeal, Nelson argues that Martinez's remark was improper because it "was not made as an ostensible response to any argument" of defense counsel. (Nelson's Br. 27–28.) Nelson claims that a prosecutor's comment about whether the defendant committed the crimes charged may only be made in response to defense counsel's claim that he did not commit

the crimes. That is not the law. *See Mayo*, 301 Wis. 2d 642, ¶ 43 ("the [prosecutor's] statements must be looked at in context of the entire trial").

Nelson also argues that "the prosecutor never retracted or withdrew the remark," that "the circuit court did not strike the prosecutor's remark or instruct the jury that it should not consider it," and that the court "did not admonish or rebuke the prosecutor in any respect." (Nelson's Br. 28.) But instead of a retraction or an admonishment, which would have highlighted the statement, the court properly instructed the jury to "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." (R. 39:169, R-App. 114.) That neither Martinez nor the court spotlighted the brief comment is of little import. The court properly instructed the jury, and jurors are presumed to follow instructions. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989.) Nelson does not provide any reason to believe that the jury failed to follow that instruction. Nelson's argument that he is entitled to a new trial because Martinez did not retract the statement and the court did not strike the statement or admonish Martinez in front of the jury fails.

Finally, Nelson argues that the State's case against him "was thinly circumstantial" because "[t]he entire case boiled down to a 'he said, she said,' type situation." Nelson claims that "aspects" of M.D.'s testimony "supported that the sexual encounter was consensual." (Nelson's Br. 29.) In Nelson's view, the State's case against him was "weak" and therefore, "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." (Nelson's Br. 35–36.) Nelson's argument is devoid of merit.

As discussed above, the State's case was supported not only by M.D.'s compelling testimony that she did not consent to violent, forced sexual intercourse with Nelson, who grabbed her face, choked her and bit her. (R. 38:93–97.) The State presented testimony from the SANE nurse Lackey about M.D.'s injuries and her description of gathering evidence swabs from both M.D. and Nelson that went to the crime lab. (R. 38:148–62.) The State also relied on the DNA evidence and Karaula's testimony that the swabs from M.D. contained semen with DNA that she conclusively determined belonged to Nelson. (R. 39:26–27, 36.) Photographs taken by Officer Vannucci depicted M.D.'s injuries on her arm and upper left leg, as well as bruising to her right cheek, left jaw, and left cheek, which were consistent with and corroborated M.D.'s testimony about the assault. (R. 38:174–76.) Moreover, the State called numerous witnesses who testified that Nelson denied that he had sex with M.D., despite the confirmation from the DNA evidence that he did. (R. 39:58–62, 79–82.)

Nelson's credibility related to his defense that he now raises—that sexual intercourse between him and M.D. was "consensual"—was refuted by the evidence at trial. The jury heard M.D.'s testimony and believed her. In conjunction with the other powerful trial evidence, the jury found that the State had proven the elements of the crimes of second-degree sexual assault and false imprisonment beyond a reasonable doubt and found Nelson guilty of these crimes. Given all this evidence, Martinez's remark during closing argument that based on the evidence, she believed he was guilty, even if it was improper, it was not a due process violation. *See Embry*, 46 Wis. 2d at 161–62 (given overwhelming evidence of defendant's guilt, prosecutor's improper argument expressing personal belief in defendant's guilt was not prejudicial).

In sum, the prosecutor's comments did not constitute reversible error, much less plain error. Nelson is not entitled to a new trial.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction.

Dated this 2nd day of July 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,870 words.

_____
ANNE C. MURPHY
Assistant Attorney General

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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).

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Dated this 2nd day of July, 2019.

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ANNE C. MURPHY
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Thomas A. Nelson
Case No. 2016AP0194-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 one or more initials or other appropriate pseudonym or designation, 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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ANNE C. MURPHY
Assistant Attorney General

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