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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2019AP000194CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

THOMAS A. NELSON, Defendant-Appellant-Petitioner

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

PETITION FOR REVIEW AND APPENDIX

ZALESKI LAW FIRM
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone), Zaleski@Ticon.net
Attorney for Defendant-Appellant Petitioner

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STATEMENT OF ISSUES

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 statements made by another nurse practitioner who actually examined the alleged victim and prepared a written report of the examination, did the admission of the non-testifying nurse practitioner's statements violate Nelson's constitutional right to confrontation[1]?

In a decision recommended for publication, the court of appeals determined that under *State v. Mattox*, 2017 WI 9, 373 Wis.2d 122, 890 N.W.2d 256, the primary purpose of the statements made by the non-testifying nurse practitioner was neither to "gather evidence" for Nelson's prosecution nor to "substitute for testimony in a criminal prosecution," and that therefore, such statements, as related by the testifying nurse practitioner, were not testimonial, and did not implicate the Confrontation Clause. App.121.

2. Did the admission of the non-testifying nurse practitioner's written report violate Nelson's right to confrontation?

The court of appeals determined that under *State v. Mattox*, the primary purpose of the statements made by the non-testifying nurse practitioner was neither to "gather evidence" for Nelson's prosecution nor to "substitute for testimony in a

[1] 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…"

criminal prosecution," and that therefore, the report was not testimonial, and did not implicate the Confrontation Clause. App.121.

3. If the admission of such evidence constituted error, was it plain error?

The court of appeals concluded that any error associated with the admitted report and related testimony was neither "obvious" nor "substantial," and therefore, did not constitute plain error. App.124.

4. Was the admission of such evidence harmless?

The court of appeals determined that even if the admission of the report and related testimony was error, the error was harmless. App.126.

In a dissenting opinion, Justice Reilly concluded that the statements were testimonial, and constituted a violation of Nelson's right to confrontation. App.140. Justice Reilly additionally concluded that the admission of the statements was plain error, and not harmless. App.145-148.

CRITERIA FOR REVIEW

Review is warranted under Rule 809.62(1r)(a) because the case presents a real and significant question of state and federal constitutional law.

As noted by Justice Davis in the concurring opinion, this appears to be the first published decision in Wisconsin addressing the Sixth Amendment implications of testimony

provided by a medical professional acting as a surrogate for a nontestifying witness in a sexual assault case. App.132.

Review is also warranted under Rule 809.62(1r)(d) because the court of appeals decision is in conflict with this court's decisions in *Virgil v. State,* 84 Wis.2d 166, 195, 267 N.W.2d 852 (1978) and *State v. Jorgensen*, 2008 WI 60, 310 Wis.2d 138, 747 N.W.2d 77 (2007). In both *Virgil* and *Jorgenson*, this court recognized that given the significance of a defendant's right to confrontation, the violation of such right constituted plain and reversible error. See *Virgil* 84 Wis.2d 192 and *Jorgensen* at 2008 WI 60 at ¶1.

The court of appeals decision also conflicts with the United States Supreme Court decisions in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Ohio v. Clark*, 135 S.Ct. 2173 (2015). In this regard, the court of appeals determination that the non-testifying nurse practitioner's statements were not testimonial ignores or misapplies principles of law from both *Crawford* and *Clark*. Such determination likewise conflicts with this court's decision in *Mattox* which is based on *Clark*.

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).[2] 3:1-4.

The charges arose from a sexual encounter which occurred between Nelson and M.D. at Nelson's residence. 1:1-5.

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

After various pre-trial hearings, the case proceeded to a two day jury trial. The jury found Nelson guilty of second degree sexual assault, false imprisonment, and four counts of felony bail jumping (Counts one, three, four, five, eight, and nine). The jury found Nelson not guilty of strangulation and two counts of felony bailjumping (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, and raised before the court of appeals the issues presented in this petition. The court of appeals affirmed.

STATEMENT OF FACTS

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.[3] 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 by Kadamian on February 2, 2017 at the Racine Child Advocacy Center. 38:195.[4]

Cahill testified that Kadamian saw M.D. 11 days after she had an initial SANE examination on January 21, 2017. 38:195.[5] 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 transection 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 o'clock appeared to be acute. 38:198.[6] 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. In Kadamian's report, she noted that "[t]he contusion supports (M.D.'s) disclosure of sexual assault." 43:5.

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

[4] The State moved Exhibit 49 into evidence. 38:199. It appears in the record at 43:1-6.

[5] The State introduced evidence of this initial sexual assault examine through the testimony of Gillian Lackey, the nurse examiner who conducted that examination. 38:139-169.

[6] As more fully discussed later in this petition, Kadamian's findings conflict with the findings of Lackey's examination done 11 days prior where Lackey did not see any injury to the hymen. 38:159.

In opening statements, the prosecutor referred to Kadamian's evaluation as an "investigation." 38:71. The prosecutor told the jury that Kadamian's opinion was that the bruises on M.D.'s genitalia were consistent with blunt force trauma. 38:70.

In closing statements, the prosecutor told the jury that Kadamian had "collect[ed] evidence." 39:167. 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.

ARGUMENT

I. This court should accept review because the court of appeals determination that Kadamian's statements, as related in Cahill's testimony and Kadamian's report, were not testimonial, is in conflict with Crawford, Clark and Mattox.

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.

Even without reference to a "primary purpose" analysis, it is clear that Kadamian's statements were testimonial under the specific formulations identified in *Crawford*. The written report of the "sexual abuse evaluation" was a document created by Kadamian which she, as nurse practitioner working for a child advocacy center and conducting a "sexual abuse evaluation," 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 squarely "testimonial" under the formulations expressly identified in *Crawford*. Quite simply, *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.

While it is not necessary to consider a "primary purpose" analysis to determine that Kadamian's statements were testimonial, the application of such analysis only supports the conclusion that the statements were testimonial.

First, the formal context of the circumstances from which the statements originate inform that the primary purpose of Kadamian's "sexual abuse evaluation" was to gather, collect, and

create evidence to be used in a criminal prosecution against Nelson. Unlike in *Mattox* where the toxicology report was prepared at the request of the medical examiner, Kadamian performed her "Sexual Abuse Evaluation" at the request of the police. The context did not involve any ongoing medical emergency, or routine health consideration. The examination did not occur in a hospital, medical clinic or doctor's office, but at the "Child Advocacy Center" eleven days after the event.

Notably, Kadamian's report was entitled "Child Advocacy and Protection Services Sexual Abuse Evaluation." 43:1. Such title itself indicates that the primary purpose of Kadamian's evaluation of M.D. was not medical diagnosis and treatment, but evaluation for sexual abuse. If the purpose of Kadamian's assessment was indeed primarily to diagnose and treat, the nomenclature of the report would have more precisely reflected such medical orientation.

So too would have the patient's chief complaint. Here, Kadamian's record of M.D.'s "chief complaint" was not a medical one, but rather, a "Concern For Sexual Abuse." 43:1. The verbiage, "Concern For Sexual Abuse," does not pertain to a medical condition, ailment or injury. Rather, it pertains to unlawful conduct of a sexual nature. If the purpose of Kadamian's assessment was indeed primarily to diagnose and treat, it would have identified the "chief complaint" in medical rather than legal terms.

The fact that Children's Advocacy Center staff were present in the room during the evaluation, 43:4, additionally belies the notion that Kadamian's evaluation of M.D. was primarily for diagnosis and treatment. If such were truly the case, there would have been no need or reason for child protective services staff to be present in the evaluation.

That the results of Kadamian's evaluation were not confidentially maintained between the patient and health care

provider, but copied and provided to the police and child protective services, likewise supports the conclusion that the primary purpose of Kadamian's evaluation was to collect evidence to be used against Nelson in a criminal investigation and prosecution. 43:6.

Of course, in Kadamian's report, she opined that M.D.'s injuries were "indicative of blunt force penetrating trauma," and that the "contusion supports (M.D.'s) disclosure of sexual assault." 43:5. Under the category of "Assessment," Kadamian lists in bold print, "Child sexual assault" as the number one entry. 43:4. Such notations do not depict a medical diagnosis or a plan for treatment. Rather, they provide factual support for a criminal investigation and prosecution against Nelson who was identified by name, "Thomas," in Kadamian's report. 43:1.

Even the prosecutor's statements at trial support the proposition that the primary purpose of Kadamian's evaluation was not to provide diagnosis and treatment. In opening statements, the prosecutor referred to Kadamian's evaluation as an "investigation." 38:71. In closing statements, the prosecutor told the jury that Kadamian had "collect[ed] evidence." 39:167. Given the formal and official context of Kadamian's "sexual abuse evaluation," its primary purpose was to gather, collect, and create evidence to be used in a criminal investigation and prosecution against Nelson. 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. As discussed above, the "sexual abuse evaluation" was done at the request of the police, and the report was given to the police. In this regard, the report itself indicates that Kadamian was requested to conduct the evaluation by law enforcement,

specifically, police officer Vannucci.[7] 43:1. The report indicates that it was then given to police officer Vanucci. 43:6.

Further, although Kadamian was not a peace officer herself, she was 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).

Further, while it is unclear from the record whether Kadamian was an official SANE, "sexual assault nurse examiner,"[8] it is relevant to note that sexual assault nurse examiners and forensic nurses are by training regarded as part of the law enforcement and prosecutorial "team."

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." Court of Appeals appendix, page 116. The explicit and

[7] Office Matthew Vannucci of the Village of Caledonia Police Department. 38:170.
[8] This is of course because Kadamian did not testify.

bold banner for the program's website claims, "Working with crime labs to *collect physical evidence*." Court of Appeals appendix, page 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." Court of Appeals appendix, page 123. Of course, the DOJ notes that they also "testify in court, if needed." Court of Appeals Appendix at page 123. Indeed, they are specifically trained in "Courtroom testimony and Legal Considerations." Court of Appeals appendix, page 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." Court of appeals appendix, page 118. Also on the team are a law enforcement representative and a prosecutor. Court of Appeals appendix, 118.

For the above reasons, there can be no credible dispute that the statements generated by Kadamian's "sexual abuse evaluation" were statements made to law enforcement by an agent of law enforcement. As such, this factor cuts in favor of a determination that the primary purpose of Kadamian's statements was to collect evidence for a criminal investigation and prosecution of Nelson.

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.

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 Kadamian's "sexual abuse evaluation" perhaps had some minimal medical purpose, its *primary purpose* was the collection of evidence to be used in a criminal prosecution against Nelson. As Justice Reilly properly concluded, "[t]he facts are clear to the police, prosecutor, jury and myself that Kadamian was collecting evidence for and at the direction of the police as part of an investigation for the prosecution of Nelson." App.147.

The court of appeals determination to the contrary conflicts with and misapplies principles from *Crawford*, *Clark*, and *Mattox*, and should be reversed.

II. This court should accept review because the court of appeals determination that any error associated with the admission of Kadamian's statements was neither "obvious" nor "substantial," and therefore not plain error, conflicts with Jorgensen and *Virgil*.

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." Id. citing *State v. King,* 205 Wis. 2d 81, 91, 555 N.W.2d 189 (Ct.App.1996).

In particular, this court has 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.

In *Virgil*, this court concluded that error was plain because the defendant's conviction was obtained through a violation of the defendant's confrontation rights under both the United States and the Wisconsin Constitutions. See *Virgil*, 84 Wis.2d at 192; also see *State v. Sonnenberg*, 117 Wis.2d at 177 citing same. Chief Justice Beilfuss, concurring with the majority opinion in *Virgil*, pointed out that the plain error doctrine "should be used sparingly and only in cases such as this, where a basic constitutional right has not been extended to the accused." See *Virgil*, 84 Wis.2d at 195, and *Sonnenberg*, 117 Wis.2d at 177 citing same.

In *Jorgensen*, this court stated as follows:

> The opportunity to question one's accusers is central to our adversarial system. Without confrontation, potential errors, mistakes of fact, and ambiguities are neither examined nor tested by opposing counsel. Since these observations likely helped to establish the elements of the crimes charge, these

> were not trivial comments by the circuit court. *State v. Jorgensen*, 2008 WI 60 at ¶36.

Such is the case here. The error in admitting Kadamian's statements resulted in the State obtaining a conviction through a violation of Nelson's confrontation rights. Similarly, as with the defendants in *Virgil* and in *Jorgensen*, a basic constitutional right, specifically, the right of confrontation, was not extended to Nelson. Further, as Justice Reilly correctly recognized, the admission of Kadamian's statements helped the State establish the elements of the crimes charged. App.141. Under *Virgil* and *Jorgensen*, the admission of the statements was plain error. The court of appeals determination to the contrary conflicts with, and misapplies principles from *Virgil and Jorgensen,* and should be reversed.

III. This court should accept review because the court appeals determination that any error in admitting Kadamian's statements was harmless conflicts with *Virgil* and *Jorgensen*.

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.

An error is harmless if the party benefited by the error shows "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." See *State v. Monahan*, 2018 WI 80, ¶33, 383 Wis.2d 100, 913 N.W.2d 894.

This court cannot, for the following reasons, accept a determination that beyond a reasonable doubt any error in admitting Kadamian's statements did not contribute to the verdict obtained.

First, as Justice Reilly correctly noted, Kadamian's statements went directly to elements the State needed to prove: "use or threat of force or violence," and that M.D. "did not consent to sexual intercourse." See WIS JI-CRIMINAL 1208, and 38:197. App.141. Specifically, Kadamian's statements addressed the criminal element of "use of force" through her statement that there was evidence of "blunt force penetrating trauma" to an "acute level," and her opinion that M.D.'s internal injury "supports" sexual assault." 38:197 and 43:5.

Second, Kadamian's statements in this regard were important and necessary to the State's case because the Lackey, the initial examiner, testified that she did not see any injury to M.D.'s hymen. 38:159.

Lackey testified regarding her "head to toe" assessment of M.D. 38:148. When asked by the prosecutor if Lackey noted any injuries to M.D., Lackey 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. Lackey 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. Lackey did not see any injury to M.D.'s hymen. 38:159.

On cross-examination, Lackey 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. Lackey 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. Lackey found no evidence of broken skin. 38:169. Lackey acknowledged that at the time of the evaluation, M.D. was in the midst of her menstrual cycle, and that it was fair to say that some women on their cycle can be swollen in that area. 38:167.

As summarized above, Lackey's testimony did not depict traumatic, acute injury which could reasonably be caused by forced or violent sexual conduct. As Justice Reilly noted, "Lackey testified that while she observed J.T.'s injuries, she did not 'personally…know how they got there,' and it was possible they 'could have been part of a consensual action as opposed to a [][non]consensual action." In this regard, Kadamian's statements served to provide what Lackey's testimony did not: evidence of acute, blunt force penetrating trauma, which in Kadamian's words, 43:5, "suppor(ted) (M.D.'s) disclosure of sexual assault." In short, Kadamian's statements made necessary facts to be proven by the State, specifically, that Nelson had sexual relations with M.D. "by use of force or threat of force or violence," and "without consent" 39:133-134, more probable than they would have been without such evidence. This is of course why the State purposed to introduce Kadamian's statements, and why the prosecutor emphasized them in opening and closing statements. 38:70-71, and 39:166-167.

Third, while vital to the State's case, Kadamian's evaluation of M.D. was ripe for cross-examination. In this regard, Kadamian's characterizations of the alleged injuries as a "contusion" and "healed transection" were subjective and dependent upon the interpretation of the examiner. Kadamian's findings of injury to the hymen were of course also inconsistent with the findings of Lackey who testified to seeing no injury to the hymen. 38:159. Additionally, Kadamian's findings were made not immediately after the sexual encounter, or even within 24 hours of it, but 11 days later. Also, 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.

Finally, 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]

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.

[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 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.

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 admission of Kadamian's statements not only helped the State secure a conviction, they played a vital role. As Justice Reilly corrected recognized, Kadamian's statements "went directly to elements the State needed to prove…." This court cannot conclude beyond a reasonable doubt that the admission of such statements did not contribute to the conviction.

Conclusion

The court of appeals decision misapplies controlling precedent by both this court and the United States Supreme Court. The issue at stake is one of constitutional magnitude. To the extent the published decision will improperly guide the bench and bar as to a significant issue, this court should accept review to provide clarification and guidance.

Dated this _____day of December 2020.

Respectfully submitted,
BY:_____/s/_____
Zaleski Law Firm
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone), Zaleski@Ticon.net
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION

I hereby certify that this petition 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 petition is 6170 words.

Dated this ___day of December 2020.

THE ZALESKI LAW FIRM
BY:_____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION

I hereby certify that attached to this Petition for Review is an appendix which contains:

1. The decision and opinion of the court of appeals.
2. The judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition.
3. Any other portions of the record necessary for an understanding of the petition.
4. A copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b).

Dated this _____day of December 2020.

THE ZALESKI LAW FIRM
BY:_____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net
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Dated this _____day of December 2020.

THE ZALESKI LAW FIRM
BY:_____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net
Attorney for Defendant-Appellant-Petitioner

Appeal No. 2019AP000194 CR

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed as of this date.

A copy of this certificate has been served upon all opposing parties.

Dated this 22nd day of December 2020.

_____/s/_____

Steven W. Zaleski
Zaleski Law Firm
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Attorney for Defendant-Appellant-Petitioner