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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2019AP1573-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK A. KELLER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE LEE. S. DREYFUS, JR. AND LAURA F. LAU, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Patrick A. Keller (Keller) appeals from a circuit court order admitting Child Protection Service (CPS) intake reports that struck the names of the reporters. A jury convicted both Keller and his wife Alicyn Keller (Alicyn) of three counts of causing mental harm to a child, as party to a crime (PTAC). The child victim in this case was A.M., who is Keller's step-daughter and Alicyn's biological daughter. Before trial, the State moved to admit several CPS intake reports under the business records exception. In those CPS reports, anonymous callers called a CPS worker to report potential abuse by Keller or Alicyn. Keller opposed the motion. After a hearing on the matter, the trial court granted the State's request. Consequently, at trial, the CPS records were admitted, but the names of the callers who reported the potential abuse were stricken. Keller therefore could not cross-examine those anonymous callers. Even assuming the circuit court erred in admitting the CPS reports under the business records exception, such an error was harmless. And, as non-testimonial records, there is no constitutional error in the circuit court striking the reporters' names. This Court should affirm.

ISSUES PRESENTED

1. Were the CPS reports admissible under the business records exception?

The trial court held, Yes. This Court should hold that even assuming the trial court erred when it admitted the CPS reports under the business records exception, such error was harmless.

2. Was Keller's Sixth Amendment right to confrontation violated?

The trial court held, No. It determined that the CPS reports were nontestimonial records, and therefore there was no Confrontation Clause violation. This Court should affirm.

3. If Keller's right to confrontation was violated, was such error harmless?

The postconviction court did not decide this issue. This Court should determine that because the overwhelming admissible evidence showing Keller's guilt, such error was harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication, as it believes that the briefs adequately address the issues presented.

STATEMENT OF THE CASE

The complaint

The State charged Keller with three counts of causing mental harm to a child, as party to a crime (PTAC), contrary to Wis. Stat. §§ 948.04(1), 939.50(3)(f), and 939.05. (R. 1; 22.) Essentially, the State alleged that Keller engaged in a continuous pattern of abusive behavior towards A.M. over a period of more than two years, causing her mental harm. (R. 1:2–3.) A.M. has cognitive disabilities and low-level autism. (R. 1:2–3.) A.M. lived with Keller, Alicyn, and A.M.'s two younger half-sisters. (R. 1:4.)

On March 3, 2015, police investigated a child neglect complaint involving A.M. (R. 1:3.) Police met with an anonymous complainant who indicated that A.M. is "kept in the basement of her residence and is treated like an animal." (*Id.*) The complainant also indicted that A.M. "goes to school covered in feces." (*Id.*)

School personnel advised police that A.M. had arrived at school repeatedly "in soiled clothing and covered in dry feces." (*Id.*) Personnel also advised police that A.M. had told them that when she goes home, "she is taken to her room in the basement which consists of a cot in an unfinished basement. She is changed into a onesie which zips in the back and then [A.M.] [is] locked in the basement until the next morning." (*Id.*) A.M. told personnel that she is sometimes "given dinner in the basement and that the basement does not have a bathroom. [A.M.] described her room to them as being cold and told staff that her blankets were taken away from her because she soiled them." (R. 1:3.) Personnel also advised that in mid-December of 2015, A.M. arrived to school "with dried stool in her hair, coming out of her sleeves, bottom and neck of her shirt and had soiled her pants." A.M. continued to "come to school with dry stool in her pull-up diaper and sometime on her clothing on January 5, January 16, January 23, February 6, February 12, and February 18 all in 2015." (R. 1:3–4.)

Police interviewed A.M.'s step-sister, Amber. Amber indicated that A.M. slept in the basement on a cot. (*Id.*) A.M. "does not use the bathroom at their house," and Alicyn and Keller "do not go downstairs and play with [A.M.]" According to Amber, if A.M. "stopped having 'poop accidents' [her parents] would allow [A.M.] to come upstairs." (*Id.*) Amber said that A.M. must eat in the basement "because Alicyn does not want [A.M.] to 'taint' anything." (*Id.*)

Lutheran Social Services family support specialist Amanda Smith indicated that Alicyn had told her that Keller "finds [A.M.] disgusting and refuses to allow her to sit on any surface in the home" and "does not want [A.M.] to use the toilet or sink in the house so she is not allowed to do so." (*Id.*) Alicyn told Smith that A.M. "is not being showered, shampooed or brushing her teeth," and that she "is forced to be separated from the family and remain in the basement

from 6 pm until 6 am, that [A.M.] is placed in pajamas that zip from behind and changed into a pull up diaper upon coming home." (*Id.*) Additionally, there is no running water or toilet for A.M. to use in the basement. (*Id.*) Smith provided that one time during the spring of 2014 she was allowed into the residence where she observed that the unfinished basement had cement block walls, a concrete floor, a cot, a table and chair, and A.M.'s clothes and diapers. (*Id.*) There were "no toys, books, or electronics." (*Id.*) Smith had been at the residence in her role to assist families with children who have autism. (R. 1:4.)

Police obtained a warrant and searched Keller's and Alicyn's residence. *(Id.*) In the basement, police found "an alcove" where A.M.'s room was set up with a blanket that was hung for privacy. (*Id.*) Behind the blanket was a cot, a blanket, and a doll. (*Id.*) There was no toilet or sink in the basement. (*Id.*) Alicyn told police that Keller "wanted nothing to do with [A.M.] and that he is emotionally and verbally abusive towards [her] when the police have been called." (*Id.*) During the execution of the search, police took temperatures of the basement, recording temperatures in the 50s. (*Id.*)

Pretrial motion to admit CPS records

Before trial, the State filed a motion seeking admission of CPS intake records as business records under Wis. Stat. § 908.03(6). (R. 26.) In those CPS records, the State indicated, callers communicated their observations and concerns about A.M. to CPS workers. (R. 26:2.) According to the State, the callers' "observations are nontestimonial because they were made in the context of potential ongoing emergencies involving A.M., the reports are meant to protect A.M. from future neglect or abuse, and the primary objective is [to] protect A.M." (R. 26:6.)

Keller objected, claiming that the records were testimonial and that their admission would violate Keller's

Sixth Amendment right to confrontation. (R. 37:1–2.) According to Keller the CPS reports "were made to investigate past events, and practically speaking, to hold someone accountable." (R. 37:2.)

The trial court held a hearing. (R. 134.) At the hearing, the court stated, "if [mandatory reporters] get information or some information is provided to them that they believe may show there's some child abuse going on, they're required to report it, to make specific reports. If they fail to do that, they are subject to penalties." (R. 134:17.) The court continued, the mandatory reporters are "required to provide information and they get it to entities or individuals that then will do the investigative aspect of it and determine whether there is or is not a situation that needs to be addressed." (*Id.*) The court also explained that when CPS reports arrive, they are not always for purposes of prosecution:

> Very often or in many circumstances, they end up not acting on the information because there isn't a basis for them to do so. I would also note when the reports come in, it isn't necessarily for the purposes of a prosecution even though that can and does occur. We get all kinds of circumstances involving children where they may be subject to abuse where there never is a criminal prosecution at all and it may very well be handled as a CHIPS proceeding, a child in need of protection or services, and that is non-criminal by definition. It can go any number of ways. So, certainly, I agree that the initial intent is not for the purposes of prosecution, but to, essentially, be provided some information that triggers an inquiry that may ultimately lead to a prosecution or some other type of involvement.

(R. 134:18.)

The court issued an oral ruling on August 3, 2017, granting the State's motion to admit the CPS records. (R. 135:3.) The court determined that admission of the CPS

reports was appropriate because they provided context and were nontestimonial records. (*Id.*)

Testimony and evidence at the jury trial regarding CPS records

Kathy Mullooly, manager of Health and Human Services (HHS), testified that she supervises CPS. (R. 141:34.) She explained to the jury that one of the responsibilities of her department was to complete access reports. (R. 141:35) She informed the jury that access reports are generated when individuals call into the department regarding concerns for a child's well-being. (*Id.*) Such reports are completely confidentially, and they are made at or near the time the call was made. (R. 141:36, 44.)

With respect to calls about A.M. and allegations made against Keller specifically, Mullooly indicated that reports were completed on the following dates: December 7, 2012, January 9, 2013, January 30, 2013, February 12, 2013, August 1, 2013, June 12, 2014 (two reports on that day), September 4, 2014, September 16, 2014, and December 5, 2014. (R. 141:41–45.) These reports were ultimately admitted into evidence. (R. 141:40.)

Bobbi Borchardt, also a supervisor at HHS, testified that she was an access worker who received calls and was responsible for taking and investigating the reports between December 7, 2012, and September 4, 2014 reports.[1] (R. 141:54–57.) According to Borchardt, under state law, she and other access workers were "required to make a decision on

[1] Borchardt did not take the information from a reporter related to the December 7, 2012 report. (R. 141:71.) When asked to identify the reporter for the December 7, 2012 report, Borchardt indicated the identity was confidential under state law. (R. 141:72.) She also testified that she did not remember the identity of any of the reporters. (*Id.*)

every child abuse report within 24 hours." (R. 141:55.) "If," Borchardt testified, "we screen in a child abuse and negligence report, an initial assessment worker is assigned, and then we'll do an investigation." (R. 141:56.) If a report is screened out, then the report "basically just becomes part of [the] electronic record."[2] (*Id.*) Borchardt then testified to the information in the reports regarding Keller's and Alicyn's treatment of A.M. (R. 141:59–65.)

Kris Borkowski, a social worker with Waukesha County Department of Health Human Services, testified that she takes reports of child abuse or neglect. (R. 141:77.) She took two of the reports from callers in this case: June 20, 2014 and September 16, 2014. (R. 141:78, 79, 85, 86.) Borkowski then informed the jury as to the information she received from callers in those reports. (R. 141:79–89.) These reports were also entered into evidence. (R. 141:79.)

Sarah Vargas, an access supervisor with Waukesha County Health and Human Services, testified that she took the January 30, 2013 CPS report[3], and she testified to the information she received from the caller. (R. 142:17–18.) Vargas also testified about the contents of the February 12, 2013 report, even though she was not the access worker. (R. 142:23–27.) With respect to the June 12, 2014 report, Vargas, who was the supervisor for the report, testified about the report's contents. (R. 142:27, 29–32.)

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[2] Similar to Borchart, access worker Kathryn Flansburg testified that if a CPS report is screened out, "there would be no way to notify the family regarding the allegations." (R. 142:92–93.) This is because it "is not assigned to a worker, so there would be nobody to contact the family." (R. 142:93.) Flansburg was the access worker on August 1, 2013 and December 5, 2014, and she testified about the contents of those CPS reports. (R. 142:57–74.)

[3] Vargas was an access reporter, not supervisor, at this time. (R. 142:23.)

After a five-day jury trial, the jury found Keller guilty of all charges. (R. 147.) For ease of repetition, additional relevant facts regarding the jury trial are set forth in the State's harmless-error argument.

Postconviction proceedings

Keller moved for postconviction relief. (R. 109; 110.) He argued that he was entitled to a new trial because the court erred when it granted the State's request to introduce CPS reports detailing statements made by reporters against Keller. (R. 109:1; 110:3.) According to Keller, the admission of the reporters' testimonial statements violated Keller's right to confrontation. (R. 109:2; 110:4.)

Both parties agreed that an evidentiary hearing was unnecessary and asked the court to rule on the legal issue – whether the CPS reports were properly admitted.[4] (R. 149:5–6.)

The court stated, "I would be really second-guessing Judge Dreyfus, and I don't know that that is going to help you at all. You know what I mean? So I think my -- it would seem to be ripe to go straight to the Court of Appeals." (R. 149:7.) The court subsequently entered an order that provided the following: Keller's "motion for postconviction relief is denied because the issue remaining on appeal has been preserved by trial counsel and should be determined by the court of appeals." (R. 116:1.)

[4] Although Keller initially sought an evidentiary hearing (R. 109:2; 110:11), he later informed the court that "there is really no need for any evidence to be presented or testimony" (R. 149:2).

ARGUMENT

I. Even if the trial court erred in admitting the CPS records as business records under Wis. Stat. § 908.03(6), such error was harmless.

In this case, the State concedes that the trial court erred in admitting the CPS records under the business record exception set forth in Wis. Stat. § 908.03(6).[5] However, Keller is not entitled to a new trial. Because of the overwhelming untainted evidence showing Keller's guilt, any error was harmless.

A. Legal principles regarding harmless error.

An erroneous admission of evidence is subject to harmless-error analysis, which this Court reviews de novo. *State v. Monahan*, 2018 WI 80, ¶ 31, 383 Wis. 2d 100, 913 N.W.2d 894.

For an error to be harmless, the party benefitting from the error must demonstrate that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Martin*, 2012 WI

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[5] There are three parts to the CPS reports: (1) the mandatory reporters or anonymous callers who make the call, (2) the content of those calls, and (3) the actions that CPS took as a result of the call. While portions of the CPS reports (e.g. statements of CPS staff that document their observations at the premises and child's condition) might be admissible as a *public record* under Wis. Stat. § 908.03(8)(a) and (b) because they document "the activities of the office" and "matters observed pursuant to duty imposed by law," those portions of the reports that contain the contents of statements made by anonymous callers or mandatory reporters (who are not available to testify) are hearsay within hearsay under Wis. Stat. § 908.05, and would not be admitted for hearsay purposes under Wis. Stat. § 908.03(8)(c) when the State offers them in a criminal case.

96, ¶ 45, 343 Wis. 2d 278, 816 N.W.2d 270 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

When considering whether the erroneous admission of evidence is harmless, the following seven factors, among others, assist the Court's analysis: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) and the overall strength of the State's case. *Martin*, 343 Wis. 2d 278, ¶ 46.

B. The jury still would have convicted Keller of mental harm to a child as PTAC.

Applying the seven harmless-error factors below, it is clear beyond a reasonable doubt that a rational jury would have found Keller guilty absent the error.

1. The CPS records did not affect the verdict because they were not important given the presence of corroborating evidence and they duplicated untainted evidence.

The State concedes that the first harmless-error factor weighs in Keller's favor because the frequency of the error was common. But the remaining six factors demonstrate that the error in admitting the CPS records did not affect the verdicts.

Factors 2 – 4 of the harmless error test tilt in the State's favor. With respect to these factors, the CPS records were not important because of the presence of the corroborating, untainted evidence, much of it duplicative. This evidence includes testimony from Lutheran Social Services, medical experts, law enforcement officers, employees at A.M.'s

daycare, employees at A.M.'s middle school, A.M.'s half-sister and grandmother, and A.M.'s adoptive mother.

a. Testimony from Lutheran Social Services.

Luther Social Services (LSS) employees Maria Dean and Amanda Smith provided untainted direct evidence that corroborated and duplicated the CPS records, thereby diminishing any importance to the records. Both employees had direct observation of the Keller's house and provided more compelling testimony than the duplicative information in the CPS records.

Dean testified that she worked for LSS in the children's long-term support program unit that included meeting with Alicyn twice a year,[6] and one additional visit. (R. 142:97, 102, 106.) When Dean initially went inside Keller's house in New Berlin, she documented that A.M.'s things were "very separate from everybody else." (R. 142:107.) While "the rest of the home was very child friendly," where A.M. "was at there were boxes stacked and a metal cot on the floor with a curtain across." (R. 142:107.)

Dean also read from her LSS reports that are distinct and independent from the CPS records. (R. 142:108.) In one report, Alicyn spoke to Dean about accusations being made against her at A.M.'s school. (R. 142:109.) The police had been called "for different reasons," and the school reported that A.M. "had discoloration in her face." (R. 142:110.) The school had complained about how A.M. was sent to school "with feces

[6] Dean explained that this was required through the State-funded program "waiver," which is for autistic children. The goal of waiver (which is a voluntary program) is "to keep the child safe in the home and prevent institutionalization." (R. 142:103.) Services are provided and those who participate are provided with funding that goes towards services for the child. (R. 143:8.)

in her pants." (*Id.*) In another report, Dean documented a conversation that she had with Alicyn about A.M.'s specially-designed jumpsuits. (R. 142:112.) According to Dean, A.M. wore a "closed ankle jumpsuit" zipped in the back, so there was no way that she could unzip it. (*Id.*) It was made of a "jean material," and the purpose of it was "to prevent children attempting to access their feces and digging in them." (*Id.*) According to Dean, Alicyn wanted new, replacement jumpsuits. (R. 142:113.) Dean, however, "felt that the jumpsuits were a danger to [A.M.]" (R. 142:118.) While she recognized that the purpose of the jumpsuit was so A.M. could not access her feces, Dean explained that it was mid-summer, the jumpsuits were thick, and A.M. "could not get out of" them. (R. 143:12; 142:118.) Dean was afraid A.M. would get "too hot and something bad would happen to her." (R. 142:118.) Alicyn's request for new jumpsuits was ultimately denied. (R. 142:120.)

Dean testified about home visits she made on June 19 and 27, 2014. (R. 142:119, 121.) In the first visit, Alicyn felt that the vice principal of A.M.'s school had been harassing the family because the "[p]olice have been called for discoloration on [A.M.'s] face." (R. 142:120.) Dean and her supervisor arrived at Kellers' for the second visit to find that behind the curtain was where A.M. slept, on a metal cot next to storage bins. (R. 142:122.)

By September 2014, the Kellers' had moved to a new 3-bedroom home in Brookfield, moving A.M. to the basement. (R. 142:125.) Dean read her notes to the jury about mildew and the lack of a bathroom and an adequate fire exit from the basement room:

> [Alicyn] explained that the basement has too much mildew for the other girls, but [A.M.] will live down there. There is not a second door if needed for a fire exit. She's also not allowed to access the bathroom. [A.M.] is in the jumpsuits that don't allow her access

> to the bathroom. [A.M.] is not changed and has to go to school with a dirty diaper every day.

(*Id*.) Dean noted "[t]he smell of mildew and mold was very strong" in the basement. (R. 142:129.) The floor was concrete, and A.M. had a metal cot to sleep on. (*Id*.) There was a folded blanket on it. (R. 142:130.) The furnace and hot water heater were exposed. (*Id*.) The basement also had a laundry chute which, Alicyn told Dean's supervisor, is how "the other little girls would talk to [A.M.]" (*Id*.) Alicyn told Dean that "[A.M.] would not get up from her cot without permission. [Alicyn] would then give her permission to get up and talk to the sisters through the laundry chute." (R. 142:130.)

The next day, on September 16, 2014 Dean called the access line at CPS. (R. 143:45.)

Dean also testified about a meeting at A.M.'s middle school in December 2014. (R. 142:131.) The school scheduled the meeting to discuss potty training and A.M. repeatedly coming to school with feces on her, once with a blowout in which A.M.'s feces were "all the way up her back." (R. 142:59, 131–33.)

Dean informed the jury about when A.M. was removed from the home in March 2015, which happened shortly after the police executed a search warrant in the Kellers' home in Brookfield. (R. 142:132.) Dean's supervisor had received a voicemail from Alicyn, who was "very upset." (R. 142:133.) Alicyn no longer wanted any involvement with Waukesha County and "[s]he does not want [A.M.] any longer. She is willing to put her in foster care and will not have anything to do with her again." (*Id*.)

Smith also worked for LSS during the relevant timeframe, and she worked with Dean as a parent coach and as a family support specialist. (R. 143:62.) Smith testified that in the summer of 2014, Alicyn and Keller told her that they did not want people in the house, not even professionals. (R.

143:69.) Smith also testified that when the Kellers moved to Brookfield, Smith was upset that that they used the third bedroom as a playroom, and not as bedroom for A.M. (R. 143:82.) Smith wanted "[A.M.] to be safe, for her to be entertained at a developmental level, for her to have interaction, positive interactions with her family, including her siblings and her mother. My intention was for [A.M.] to live in a safe space." (R. 143:124.) But Alicyn told Smith that "they didn't want [A.M.] to be upstairs in that third bedroom." (R. 143:122.) To the Kellers, "it was clearly off limits that [A.M.] would live upstairs." (R. 143:124.)

Alicyn informed Smith that A.M. would eat dinner in the basement. (R. 143:86.) Smith, who saw the basement "on a couple of occasions," testified that it was unfinished, with no toys. (R. 143:89, 95, 101.) A.M. slept on an "army cot," and "at one point there weren't blankets" on the cot. (R. 143:96, 101.)

From the time they moved into the Brookfield house in September of 2014, Alicyn told Smith that A.M. was not allowed to use the bathroom at the house. (R. 143:96–97.) In January of 2015, Smith talked to Alicyn about letting A.M. have access to a bathroom, but Alicyn told Smith she was not hopeful it would ever happen. (R. 143:97.) Smith testified that she made three CPS access reports in a 9-month period because she "didn't feel that [A.M.'s] needs were being met or – and/or I felt that she was unsafe in her environment." (R. 143:98.)

When asked about two specific CPS reports (State's Exhibits 9 and 81)[7], Smith testified that she and Dean were the confidential reporters. (R. 143:26, 101.) Smith testified, "Because I was a mandated reporter I was collecting what I thought was -- I was documenting what I thought was

[7] Smith was a confidential caller of *three* access reports, but there was no exhibit for one of those reports. (R. 143:97, 109.)

evidence of that at one point may turn to abuse and neglect." (R. 143:126.)

b. Testimony from employees at A.M.'s daycare and middle school.

April Bolan, who was the center director of A.M.'s daycare in New Berlin, testified about A.M.'s routine at daycare: after putting her things away, A.M. would use the restroom by herself. (R. 144:123–24.) Sometimes A.M. would have accidents, but once she got into her routine "they became far and few in between." (R. 144:124.)

Karin Steinke, who was a special education teacher at A.M.'s middle school in 2014 and 2015, testified that in September of 2014, A.M. came to school with some scratches on her face and neck. (R. 145:126.) According to Steinke, "it looked like [A.M. and Alicyn] obviously had had a struggle, and Alicyn was very upset" and "called it a blowout" because A.M. "had pooped in her pants in the car on the way to school, and . . . asked if we would take her and clean her up." (R. 145:127.) Steinke told Alicyn she would get supplies for *Alicyn* to clean A.M. (R. 145:128.) Alicyn looked shocked at this response. (*Id.*) A.M. and Alicyn then went into a bathroom for a long time, and Steinke could hear them both crying. (*Id.*) Steinke was "taken aback" with Alicyn's conduct, because "I didn't see any sort of nurturing there." (R. 145:129–30.)

Steinke also testified that there were days when A.M. would come to school with a soiled pullup. (R. 145:130–31.) There were times when A.M. had "dried feces on her clothing." (R. 145:133.) Often, feces were on her socks or on her pants. (*Id.*) But *during* school, Steinke testified, A.M. "never" soiled herself. (R. 145:131, 133.) Steinke also testified from notes that she took during the school year. (R. 145:139, 143.) On December 5, 2014, A.M. came to school with diarrhea, "and it was from up in her hair all the way into her shoes, all down

her back, and it had soaked through her clothing." (R. 145:139.)

c. Testimony from medical experts and law enforcement.

Dr. Angela Rabbitt, a board-certified child abuse pediatrician, provided a case review on A.M. (R. 144:17–19.) Rabbitt testified that she "was asked in this case to review medical records and talk about the association between encopresis[8] and potential maltreatment." (R. 144:77–78.) Rabbitt noted from a November 2013 therapist report, that when A.M. was with her biological father and grandfather on weekends, that "there were no complaints about stooling," and that A.M. "was not having accidents" when she was with them. (R. 144:46.) In a December of 2013 GI clinic report, Alicyn reported to a provider that she has to take A.M. out of the house to a department store to change her pullup. (R. 144:47.) Rabbitt testified, "when you repeatedly see these different accounts of what's happening in one home versus another, that's -- that's an indication that there's something happening in one of the environments that's leading to the increased problems in that environment." (R. 144:48.) She continued: "Based on the evaluation by urology and on the gastroenterologist, this did not appear to be a *medical* situation for this child. . . . [B]ased on the difference in reports of incontinence between locations, that it was *situational and*

[8] Rabbitt testified that "[e]ncopresis is incontinence of stool" that is a majority of the time in children is caused by constipation where "quite often, [ ] there's some withholding of stool; so for whatever reason, the child doesn't have a bowel movement, then the stool kind of backs up inside the colon, and you get a very large, hard mass of stool that's very difficult and painful for the child to pass." (R. 144:38–39.)

behavioral, and likely the result of some stress and trauma that was occurring."[9] (R. 144:53 (emphasis added).)

The State then asked the following questions to Dr. Rabbitt:

> Q Would keeping a child in a basement with very little interaction with the child's children [sic] be a source of trauma for a young, autistic child?
>
> A Yes.
>
> Q Would keeping a child in the basement and not allowing the child to use the restroom at all to defecate, would that be a source of trauma for a child?
>
> A Yes.
>
> Q Would refusing to allow a child in a basement to come upstairs and interact with his or her siblings, would that be a source of trauma?
>
> A Yes.
>
> Q Would sending a child to school with dried feces on the back and hair, would that be a source -- could that be a source of trauma for a child?
>
> A Yes.
>
> Q Would the calling of names of Stinky or Butt Goo repeatedly by siblings, could that be a source of trauma for an autistic child?
>
> A Yes.

(R. 144:54–55.)

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[9] Dr. Rabbitt similarly testified on cross-examination, "the difference there tells me that she is capable of controlling her bowel or bladder." (R. 144:86.)

On cross-examination, Rabbitt testified: "Once [A.M.'s] in foster care, it seems to improve significantly; so it seems hard to believe that there's any source of trauma within that foster care system, if she's continually getting better within that environment." (R. 144:58.)

Dr. Rolan Manos, a psychologist, testified that he conducted an evaluation of A.M. in May of 2015 in order "to offer an opinion to the Court whether [A.M.] had been emotionally damaged due to the behavior of" Keller and Alicyn. (R. 145:54, 62, 63.) Manos noted that "there was no social stimulation" for A.M. (R. 145:72.) "There was no contact when she was down in the basement with half-sisters, mother, or step-father." (*Id.*) For A.M., Manos testified, "it must have been devastating." (R. 145:73.) Such lack of stimulation can affect an autistic child's ability to develop intellectually, emotionally, and socially. (*Id.*)

Manos found it "inconceivable for a ten year old with [A.M.'s] medical diagnosis [of constipation] to be able to maintain her bowels for twelve hours. With no access to a toilet." (R. 145:78.) "When she was wasn't [allowed access to a toilet], and she would board the school bus covered in feces, obviously, she was shamed, and she was teased by her classmates on the bus and at school until the teachers cleaned her up." (R. 145:79.) Manos believed that "any ten year old who was subjected to treatment like that would have been traumatized. Now we're looking at a ten year old who has multiple limitations that most kids don't have to deal with." (R. 145:79–80.) According to Manos, "what happened certainly met the criteria for emotional damage to child, evidenced by her anxiety, her depression, what I felt was an acute stress reaction, the reliving of the December 18th incident, and th[e]n later, the aggression, the anger, the hitting, the throwing things, the striking out at teachers, and alternately asking for hugs and kisses [from teachers]." (R. 145:80.) "The emotional turmoil jumps out at me." (*Id.*) As he

testified, "I still have a hard time getting my head around the idea that the other girls get their own bedroom and an upstairs playroom, and she's in the basement." (R. 145:108.)

Officer Joseph Lofy of the City of New Berlin Police Department testified that on December 13, 2013, he received a phone call from the principle at A.M.'s school regarding a suspicious mark on A.M.'s face. (R. 144:201.) Lofy and Officer Tom Johannik went to Keller's apartment that evening, after talking with A.M.'s teachers and the principal. (R. 144:203.) When they arrived at the apartment, they both knocked and rang the doorbell. (R. 144:204.) While waiting, Lofy "heard Mr. Keller very loudly announce, are you kidding me, it's the fucking police?" (R. 144:205.) After two minutes, Keller answered the door, and Alicyn was with him. (R. 144:204–05.) They were both "highly agitated at our presence there." (R. 144:207.) Keller would not let them inside the house because they refused to take off their shoes. (R. 144:208.) "[W]e were denied access any further than the linoleum foyer." (*Id.*) Lofy testified, "there's a lot of vulgarities, obscenities directed towards us, and how we were doing our job, and that -- also saying that [A.M.] was fine, there's, you know, no reason for concern." (R. 144:213.)

After asking Keller several times to bring A.M. downstairs to speak to the officers, he finally did so. (R. 144:210.) Lofy explained "[w]hen she came down the flight of stairs to the landing, that she was dressed in what appeared to be, like, a one-piece children's zipup pajamas, like a onesie, and she had about knee-high rubber farmer boots on?" (*Id.*) Lofy then inspected A.M.'s face for the suspicious mark. (R. 144:211.) He saw a small, red blemish. (R. 144:213.) Lofy advised the Kellers that he would note his observation in his report, but that he was required to contact Child Protective Services to have them follow up. (R. 144:214, 218.) Keller responded by getting "louder and more obscene." (*Id.*) In front of his biological daughters and A.M., Keller called the officers

"fucking assholes, you know, pigs, eventually told us to get out of his house."[10] (*Id.*)

Lofy called CPS to report the Kellers' "conduct and behavior." (R. 144:218–19.) On cross-examination, Lofy testified: "In my eight and a half years in Shorewood as a juvenile investigator, I was never greeted or treated that way during any investigations, and I had very similar type cases." (R. 144:221.)

Officer Benjamin Langer testified that on June 14, 2014 he received a phone call about a missing child when the caller found A.M. wandering around an apartment complex. (R. 144:238–39.) Langer went to the residence, found A.M., and then brought A.M. to Kellers' apartment. (R. 144:242.) It appeared to Langer that Alicyn did not even realize that A.M. had been missing. (R. 144:243–44.) Langer explained that A.M. had been found wandering, and Alicyn told Langer that "she can't possibly continue to watch [A.M.], because she has other children to watch for." (R. 144:242–43.) When Langer left and was just outside of Kellers' residence, he heard yelling. (R. 144:247.) He then observed Keller in his car, driving towards Langer, "flipping [him] off." (*Id.*)

Cindy Naumczik, a police social worker for the City of Brookfield, testified that she was present when Kellers' house was searched on March 4, 2015. (R. 144:143–46.) The next day, she conducted a modified forensic interview of A.M.'s half-sister, Amber, at the elementary school. (R. 144:147–48.)

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[10] Officer Johannik testified about his visit to the Kellers' house with Officer Lofy. (R. 144:229.) When he saw A.M. on the stairs, she was wearing knee-high rubber boots. (R. 144:232.) Similar to Lofy's testimony, Johannik testified that the Kellers were "both raising their voices and using obscenities" towards them in front of all of the children. (R. 144:234.) "I think the last words that were spoken to us was, get out of our fucking house." (*Id.)*

An audio recording of the interview was admitted into evidence and played for the jury. (R. 144:151.)

Naumzcik also interviewed A.M. on March 5, 2015. (R. 144:154.) However, she initially became involved a day or two earlier, when an anonymous caller called the police "about alleged neglect to [A.M.]" (R. 144:180.) The allegations were specifically against Keller and Alicyn and how they treat A.M. in their home. (R. 144:180–81)

Officer Jennifer Toepfer testified about an anonymous call received on March 4, 2015, regarding A.M. and her family. (R. 144:253.) The complainant reported that A.M. was living in an unfinished basement that she didn't have heat and "was being treated like an animal." (*Id.*) The next day, Topefer met with A.M.'s sister, Amber, at her elementary school. (R. 144:257.) After she spoke with Amber, Toepfer traveled to A.M.'s middle school. (R. 144:260.) She picked up A.M. and drove her to the Waukesha County Care Center for a forensic interview.[11] (R. 144:260.) After the interview, Toepfer drove to the district attorney's office to draft a search warrant for Kellers' home. (R. 144:264.)

Toepfer testified that when they got to Kellers' house, there was snow on the ground, that it had been a cold winter, and that the temperature was in the teens. (R. 144:268.) When she went down to the "relatively cool" unfinished basement, Topefer saw "this alcove, and there's a blanket that's draped across, and then the metal pole, and then that – there's a cot behind it." (R. 144:286.) On the cot was a blanket, a pillow, and a Barbie doll. (*Id.*) Attached to the cot was "a hanging-down pocket" that held a bag of medications. (R. 144:289.) These "unsupervised medications" concerned Toepfer, as A.M. "could have obtained these at any time." (R.

[11] Over the State's objection, the court allowed the forensic interview to be played for the jury. (R. 145:12, 22.)

144:289–90.) When Teopfer looked at the vent, which was "the only area for heat," it was closed. (R. 144:291.) Toepfer testified, "based on what I had seen, I believe that this was a case for neglect." (R. 144:293.) She referred charges to the district attorney's office. (R. 144:294.)

Detective Richard Oehlke of the Brookfield Police Department testified that he assisted with the search warrant of Kellers' house. (R. 145:110–11.) One his responsibilities was to take the temperature of the Kellers' basement. (R. 145:111.) The temperature of the floor was 58 to 60 degrees, the temperature of the walls was between 53 to 55 degrees, and the temperature of the ceiling was between 59 to 62 degrees. (R. 145:113–14.) In the alcove area, where A.M.'s cot was located, the temperature of the walls was between 53 to 56 degrees. (R. 145:114–15.)

d. Testimony from A.M.'s half-sister, grandmother, and adoptive mother.

A.M.'s half-sister, Amber, also testified for the State. (R. 144:91.) At the time of trial, Amber was in 4th grade. (R. 144:93.) She had not seen A.M. for two years, as A.M. no longer lived with her. (R. 144:97.) Amber testified that when A.M. *was* living with her, that A.M "lived – She stayed in the basement." (R. 144:104.) She also testified that "we" would talk to A.M. through the laundry chute that led to the basement. (R. 144:107–08.) Amber and her sister would call A.M. "Stinky." (R. 144:110.)

Rosemarie Markham, A.M.'s paternal grandmother, testified that from December 2012 until March of 2015, she and her husband would pick up A.M. at Kellers' house and have A.M. stay with them almost every weekend. (R. 145:176.) Markham would also pick up a weeks' supply of A.M.'s dirty laundry at Kellers', which included A.M.'s onesies that zipped in the back. (R. 145:179.) Markham testified that

in the laundry bag, there were "dirty, feces-filled diapers," and that A.M.'s onesies had "caked feces" on them. (R. 145:180.) "It was absolutely disgusting," Markham testified. (*Id.*) "Quite frequently," when Markham picked A.M. up from Kellers', Markham would need "to get a blanket, put down on my car seat so it wouldn't get all soiled." (R. 145:181–82.)

The State's last witness was Ginger Braam. (R. 145:209.) Braam testified that she became A.M.'s foster parent in June of 2015, and that she had recently adopted A.M. (R. 145:210.) Braam testified that she was in the process of potty-training A.M., but that A.M. wears pullups and has accidents during both day and night. (R. 145:213–14.) When A.M. does have an accident, "someone gets in there right away to assist her to the bathroom and get cleaned up." (R. 145:215.) A.M. does not wear onesies at Braam's. (R. 145:223.) She wears clothes that A.M. can remove, and she is "thriving" at Braam's. (R. 145:223–24, 235.)

Considering the testimony of the above-described witnesses, it is apparent that the admission of the CPS records was harmless because of the presence of the other corroborating, duplicative, untainted evidence. As is shown, many of the above-State's witnesses testified first-hand of their interactions with the Kellers, their interactions with and observations of A.M., their observations of the Kellers' horrific treatment of A.M., the condition of the cold, unfinished basement where A.M. was forced to live, and witnesses Dean and Smith corroborated information in the CPS reports with their testimony of what mandated them to report their observations to CPS three times. (R. 143:26, 45, 97, 101, 109.) Factors two through four weigh in the State's favor.

2. The nature of the defense, the nature of the State's case, and the overall strength of the State's case demonstrate that the error was harmless.

The final three harmless-error factors—the nature of the parties' cases and the overall strength of the State's case—especially demonstrate that the court's admission of the CPS reports as business records was harmless.

As shown above, the nature of the State's case was that Keller, as a PTAC, caused mental harm to A.M. over a two-year period. In doing so, it introduced many witnesses who testified as to Keller's treatment of A.M.

Keller's defense was that the State's witnesses were incredible. (R. 146:63.) According to Keller, it was not Keller and Alicyn, but "the system" that failed A.M., which included the social workers, teachers, psychologists, and experts. (R. 146:67.) For example, Keller argued that Lutheran Social Services "pushe[d] the Kellers through the impossible situation, and they stab them in the back, when they have failed." (R. 146:66.) Keller argued that he and Alicyn were "[c]onstantly blamed for their inevitable failures." (R. 146:67.) However, Keller and Alicyn were not "malicious monsters." (R. 146:68.) Rather, "they did what they could." (*Id.*)

But the facts presented simply did not support Keller's defense that Keller and Alicyn did "what they could" for A.M., but instead, with their prolonged, horrendous treatment, caused her mental harm. Keller did not seem to dispute that they made A.M. sleep on a cot in the basement that had no toilet, while she was wearing a onesie that she could not access. A.M. was also not allowed upstairs, not provided toys except for a single doll, and not allowed to use the bathroom in the house. (R. 143:89, 95, 101, 124; 142:125.) A.M. "would not get up from her cot without permission. [Alicyn] would then give her permission to get up and talk to the sisters

through the laundry chute." (R. 142:130.) The temperature of the basement was cold, between 53 to 56 degrees. (R. 145:114–15.) And, "[t]he smell of mildew and mold [in the basement] was very strong." (R. 142:129.)

Kellers kept A.M., in short, in an indefensible housing situation. As the State argued during closing, "[w]hat is not cruel about keeping an autistic, intellectually low-functioning girl in an unfinished basement for 7 months, by herself, with little to no interaction?" (R. 146:37.)

Finally, Drs. Manos and Rabbitt strengthened the State's case. Manos testified that "any ten year old who was subjected to treatment like that would have been traumatized. Now we're looking at a ten year old who has multiple limitations that most kids don't have to deal with." (R. 145:79–80.) According to Manos, "what happened certainly met the criteria for emotional damage to child." (R. 145:80.) And, according to Rabbitt, keeping a child in a basement with very little interaction with others, not allowing a child to use the restroom to defecate, and sending a child to school with dried feces could all be a source of trauma for a child. (R. 144:54–55.)

Considering the overwhelming, untainted, admissible evidence of Keller's guilt, any error in admitting the CPS records as business records was harmless. There is no reasonable probability that, but for the admission of the CPS records, a rational jury would have reached a different verdict.

II. Because the callers' statements to CPS were nontestimonial, there is no Confrontation Clause violation.

Keller is incorrect in his contention that "if the State intends to submit said reports at the time of trial and elicit testimony from said reports, the confrontation clause requires

the State to disclose the identity of the accuser or complainant."[12] (Keller's Br. 10.)

A. The Confrontation Clause and *Crawford*.

"The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront the witnesses against them." *State v. Hale*, 2005 WI 7, ¶ 43, 277 Wis. 2d 593, 691 N.W.2d 637; U.S. Const. amend. VI; Wis. Const. art. I, § 7. Wisconsin courts generally apply United States Supreme Court precedents when interpreting both Clauses. *See Hale*, 277 Wis. 2d 593, ¶ 43.

In *Crawford*, the Supreme Court held that the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50 (2004). "Thus, not all hearsay implicates the Confrontation Clause's core, only that which is 'testimonial.'" *State v. Manuel*, 2005 WI 75, ¶ 37, 281 Wis. 2d 584, 697 N.W.2d 811 (citing *Crawford*, 541 U.S. at 51). And, as the Wisconsin Supreme Court recognized in *State v. Nieves*, if statements are nontestimonial, then confrontation rights are not violated. 2017 WI 69, ¶¶ 2, 29, 67, 376 Wis. 2d 300, 897 N.W.2d 363.

While *Crawford* established the boundaries of the Confrontation's Clause's core, the Supreme Court declined to provide a comprehensive definition of "testimonial." The Court did observe that "testimony" is typically a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" and that "[a]n accuser who makes a formal statement to government officers bears

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[12] Keller's appellate brief also offers: "To the extent that Keller's attorney failed to preserve this argument he was ineffective." (Keller's Br. 10.) The State views Keller's argument as preserved. (*See* R. 37:1; 134:11–12.)

testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51.

The Supreme Court noted that various formulations had been proposed to define the "core class" of testimonial statements, such as in-court testimony, sworn statement, and statements for later use in court:

> (1) "[E]x parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."
>
> (2) "[E]xtrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."
>
> (3) "[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."

Id. at 51–52 (citation omitted). The *Crawford* Court "found it unnecessary to endorse any" of these formulations because the statements at issue in *Crawford* fell within any of these definitions. "Whatever else the term [testimonial] covers," the Court held, "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. These, the Court wrote, represent "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id*.

In *Manuel*, the Wisconsin supreme court "adopt[ed] all three of *Crawford's* formulations." 281 Wis. 2d 554, ¶ 39. The court was "reluctant to accept [an] invitation to choose among the three formulations as the proper test for measuring

whether a statement is testimonial" because "[t]he particulars of the various formulations have yet to be developed, and the facial desirability of choosing one formulation may come at the hidden expense of another." *Id*. The court saved "for another day whether any of these formulations, or for that matter different formulations, surpass all others in defending the right to confrontation." *Id*.

Finally, "whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." *State v. Jensen*, 2007 WI 26, ¶ 12, 299 Wis. 2d 267, 727 N.W.2d 518.

B. The callers' statements to CPS were nontestimonial under any formulation.

Keller first argues that nothing limits a district attorney from disclosing the contents of CPS reports under Wis. Stat. § 48.981(7)(a)8. (Keller's Br. 11.) He also relies upon an Attorney General's Opinion. (Keller's Br. 11, citing 81 OAG 66 (1993)). In that opinion, the Attorney General responded to a district attorney's question whether Wis. Stat. § 48.981(7)(a)1. "requires that a district attorney prevent a defendant from obtaining information about the identity of a mandatory reporter in child abuse cases." 81 OAG 66. The Attorney General replied a district attorney is not required to conceal an identity:

> My opinion is that the provisions of section 48.981(7) do not require that either the report or the identity of the reporter remain confidential when either of these types of proceedings are pending and, therefore, the district attorney is not required to conceal information that would identify the reporter or otherwise keep the information in the report confidential in these circumstances.

Id. The Attorney General continued: "However, it is also my opinion that a district attorney . . . will further the policies embodied in section 48.981(7) if the district attorney . . .

protects the identity of a reporter whenever that can be done without impairing either the district attorney's ability to present the state's case or the constitutional or statutory duty to disclose evidence." *Id.*

In his brief, Keller does not argue that this OAG opinion establishes that a callers' statements to CPS are testimonial. But for Keller to prove that his confrontation rights were violated, he must prove that. *Nieves*, 376 Wis. 2d 300, ¶¶ 29, 67. Nor does Keller argue that the OAG opinion requires that the district attorney to release the identity of the caller. Indeed, the Attorney General opined that such a determination was within the district attorney's discretion. 81 OAG 66 (citing *State ex rel. Richards v. Faust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991)) (public records law does not provide access to prosecutor's files). Therefore, the OAG opinion does not assist Keller's Confrontation Clause argument.

Keller implicitly recognizes that, when compared to the first two formulations presented in *Crawford,* the callers' statements in the CPS reports cannot be called testimonial. It was not *ex parte* in-court testimony or its functional equivalent. It was not contained in any formalized testimonial materials. And it was not a confession resulting from custodial interrogation or any other type of questioning by government officers. Keller invites this Court to adopt the third formulation presented in *Crawford* (Keller's Br. 18), and to conclude that the callers' statements were testimonial because they "were not made in an informal setting but were strategically made for purposes of baring testimony against Keller." (Keller's Br. 18.) Keller continues, "It is clear that the [callers] made these statements to human services for purposes of establishing facts for use in an action which would restrain Keller's interactions with his child, whether civil, criminal or otherwise." (*Id.*) According to Keller, "the

statements made are testimonial where an investigative motive exists." (Keller's Br. 20.)

This Court should decline Keller's invitation. Under the third formulation listed above, the callers' statements to CPS are nontestimonial.

Before trial, the State aptly argued to the court the purpose of the CPS calls: "By the very nature of how these calls are received – confidentially and mandatorily – these calls are inherently more reliable than those out of court statements that occur during official police investigations. In other words, in these intake CPS records, the furthest thing from these confidential callers' minds is to relay this information 'for purposes of future litigation.'" (R. 26:6.) The State continued, "[i]n fact, the very confidentiality of these calls encourages and shields these callers from future litigation." (*Id.*)

Like many 911 calls, the calls in this case were made with the intent to stop harm to a victim, not to consider the legal ramifications against the callers as witnesses in future proceedings. And in *Davis v. Washington,* 547 U.S. 813 (2006), the Supreme Court specifically considered whether a 911 call is "testimonial" for confrontation clause purposes and concluded that "[a] 911 call . . . is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance," *id.* at 827 (second set of bracketing in original), and, therefore, is not generally "testimonial" in nature. *Id.* at 827–29. Thus, a recording of a 911 call describing an ongoing domestic disturbance was nontestimonial in *Davis*, where the victim's "elicited statements were necessary to be able to *resolve* [the ongoing] emergency," and the statements were not formal. *Id.* at 827.

Similarly, this Court in *State v. Rodriguez* recognized that 911 calls "serve . . . a dual role—the dichotomy between

finding out what is happening as opposed to recording what had happened. 2006 WI App 163, ¶ 23, 295 Wis. 2d 801, 722 N.W.2d 136. This Court explained: "[T]he out-of-court declaration must be evaluated to determine whether it is, on one hand, overtly or covertly intended by the speaker to implicate an accused at a later judicial proceeding, or, on the other hand, is a burst of stress-generated words whose main function is to get help and succor, or to secure safety, and are thus devoid of the 'possibility of fabrication, coaching, or confabulation.'" *Id.* ¶ 26 (citation omitted).

Finally, as it is in this case, the Supreme Court looked to statements made to non-law enforcement agencies in *Ohio v. Clark*, 576 U.S. 237 (2015). In that case, Supreme Court was "presented [with a] question [it had] repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause." 576 U.S. at 246 (2015). The Court acknowledged the applicability of the primary purpose test in such cases: "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Id.* at 245. The Court stated that even though "statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns . . . such statements are much less likely to be testimonial than statements to law enforcement officers." *Id.* at. 246.

The calls to CPS were not made because the callers expected Keller to go to trial with the callers bearing witness. They were not made for the purpose of making a record against Keller. The calls to CPS, which are not made to law enforcement[13], are made because of the callers' concerns for a

[13] See *State v. Nieves*, 2017 WI 69, ¶ 44, 376 Wis. 2d 300, 897 N.W.2d 363 (providing, "statements to non-law enforcement individuals are unlikely to be testimonial.").

child's health and safety. As Mullooly testified, "Anyone can call in if they are - - if they're concerned about the well-being of a child." (R. 141:35.) And, as the State similarly argued to the trial court, the cloak of anonymity surrounding these calls to CPS encourages those callers to make the calls and not fear repercussion.[14] This is consistent with Mullooly's testimony at trial: "We keep that information confidential about who's reporting in order to protect people from any kind of a retribution, that they can feel free if they have those concerns that they can call in and make those reports." (R. 141:37.)

For the above reasons, the callers' statements to CPS are nontestimonial and do not violate the Sixth Amendment or *Crawford*. They were not "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* 541 U.S. at 52.

Finally, it must be remembered that two callers in this case did not remain "anonymous," but instead testified at trial about their observations that mandated that they call CPS: LSS employees Dean and Smith both called CPS regarding their concerns for A.M.'s health and safety, and both testified. (R. 143:26, 45, 101, 105, 125.) Dean and Smith were subject to cross-examination, and therefore their detailed testimony in this case does not violate the Confrontation Clause. *Crawford*, 541 U.S. at 68.

[14] Mullooly testified that the reports are "completely confidential. Especially the reporters of those - - that information. That is not something that is revealed." (R. 141:36.)

III. Even if Keller's right to confrontation was violated, Keller is not entitled to a new trial because the error was harmless.

If this Court determines that Keller's right to confrontation was violated, such violation "does not result in automatic reversal, but rather is subject to harmless error analysis." *State v. Weed*, 2003 WI 85, ¶ 28, 263 Wis. 2d 434, 666 N.W. 2d 485. The test for this harmless error was set forth in *Chapman v. California*, 386 U.S. 18, 87 (1967). There, the Court explained that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. An error is harmless if the beneficiary of the error, here, the State, proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*

For lack of repetition, the State incorporates the evidence and argument provided in its prior harmless-error argument, above. Any Confrontation Clause violation was also harmless error. The State in this case proved, beyond reasonable doubt, that the error Keller complains of did not contribute to the guilty verdicts.

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 25th day of June 2020.

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 9,398 words.

Dated this 25th day of June 2020.

_____
SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of June 2020.

_____
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