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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

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Appeal Case No. 2020AP001228-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SALAR ZANGANA,

Defendant-Appellant.

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Appeal of Written Decisions and Final Orders Denying Defendant-Appellant's Postconviction Motion on July 7, 2020 and Motion for Reconsideration on July 13, 2020, in Milwaukee County Circuit Court Case Number 18CM1193, Honorable David A. Feiss, Circuit Judge, Presiding

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# BRIEF OF PLAINTIFF-RESPONDENT

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## ISSUES PRESENTED

I. Whether Zangana forfeited his confrontation and impeachment by extrinsic evidence claims by failing to raise them in front of the trial court?

Circuit Court Answered: Yes.

II. Whether the trial court properly excluded the prior out-of-court statement of RZ's husband and any prior out-of-court statements RZ made to her husband which RZ denied existed?

Circuit Court Answered: Yes, the statements were inadmissible as both hearsay and protected under the marital privilege.

III. Whether any error in the exclusion of the evidence was harmless.

Circuit Court: The circuit court did not answer. However, this court's harmless error analysis is appropriate under *State v. Darcy* N.K., 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998) ("[A] respondent may advance for the first time on appeal any argument that will sustain the trial court's ruling."). This court should find any error of the trial court harmless.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. § 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. § 809.23(1)(b)4.

## STATEMENT OF THE CASE

On May 1, 2018, the State of Wisconsin charged Salar Zangana with **1)** misdemeanor battery to GZ, **2)** misdemeanor battery to RZ and **3)** Disorderly Conduct all based on his conduct in April, 2018. (R. 1.) Zangana was GZ's husband and father to her children, RZ and DZ. (R. 72:77, 93-94; R. 73:41-43.)

At trial, RZ testified that she was home with GZ and DZ when Zangana began pounding on the door. (R. 72:76-80.) GZ let Zangana into the house and he immediately started yelling at GZ, saying that he was going to kick them out of the house and that he was going to kill them. (R. 72:80-81.) RZ saw Zangana grab GZ by the neck and punch GZ as GZ tried to protect her head with her arms. (R. 72:82-87.) RZ stated that when she tried to pull Zangana back from GZ, Zangana came after RZ and started to hit her, causing her to fall to the floor. (R. 72:85-87.) RZ described how Zangana fell on top of her and continued hit her face and body as GZ then tried to pull Zangana back. (R. 72:87-89, 122-23.) RZ explained that Zangana had previously grabbed their phone from the kitchen and GZ was able to get it back from him. (R. 72:90-91.) RZ testified that GZ gave her the phone and told her to go outside and call police, which she did. (R. 72:88-92.) An audio recording of RZ's 911 call, in which RZ reported Zangana had a knife, was admitted and played for the jury. (R. 72:92-99.) RZ testified that Zangana's attack caused her pain a couple hours later, including a "horrible headache," and a "sprained knee," but she did not have any observable injuries. (R. 71:101-04.)

Trial counsel, during cross-examination, was able to highlight RZ's lack of recollection of details surrounding Zangana's attack on both GZ and RZ before the trial court adjourned for the evening. (R. 72:107-124.) The next morning, defense counsel continued cross-examining RZ, highlighting inconsistent statements RZ had made regarding the presence of a knife during the offense, as well as inconsistencies in how RZ stated she received the injury to her knee. (R. 73:17-18; 35-38.) Counsel also highlighted that RZ was having difficulty recalling her statements to police. (R. 73:18-20.)

Defense also confronted RZ with a text message sent from her husband's phone to Zangana's phone in February, 2019. (R. 73:21-24.) Despite RZ's testimony that her husband had sent the text message, that she was not aware of the message until after the fact, and that the message was not sent because of any conversation she had with her husband, defense counsel asked RZ to read the text message out loud to the jury. (R. 73:21-23.) RZ began reading, "Hi dad," but the State interrupted with a hearsay objection, which the trial court sustained. (R. 73:23.) After re-iterating that RZ did not send the text message, defense counsel asked RZ if the content of the text message was consistent with conversations that she previously had with her husband. (R. 73:23-24.) The State again objected based on hearsay and relevancy, to which trial counsel responded that he was "not asking for the actual statement to be read into the record, but rather was only asking whether the message "is consistent with her thoughts and with her discussions with her husband in laying foundation then for that [the discussions with her husband] to be admissible." (R. 73:24.) The parties then had a side bar, which the court later summarized:

> THE COURT: The record should reflect that we had two sidebars. The first sidebar, when [Defense Counsel] on cross-examination of [RZ] began to ask questions about a text that was allegedly sent by her husband on February 15th of this year, and it established that the text was sent. When she was asked to read it, the State objected on hearsay grounds, and then [Defense Counsel] continued with a question regarding whether the text message was consistent with communications between [RZ] and her husband. The State requested a sidebar. We went into chambers. The Court indicated that it felt there were problems here, both with hearsay and that the next question was going to violate [RZ]'s marital privilege. [Defense Counsel] indicated that it was his belief that marital privilege was inapplicable because the statement was outside of any criminal or litigation proceedings. The Court indicated that its belief and view of the marital privilege that it covers any confidential communication between a husband and wife and is not limited to statements made in any type of litigation. So the Court did indicate that it would sustain the objections and would not allow further questioning with regard to the text message. [State], anything you want to add with regard to that statement?

> [STATE]: No, Your Honor.
>
> THE COURT: [Defense].
>
> [DEFENSE]: I think that's an accurate recitation of the sidebar, but the only thing I would add, just at this point, as part of the record with respect to the confidentiality. Again, this is a text that is then sent to a third party, so while the specific communications between [RZ] and her husband would fall under that privilege, I believe that a statement sent to a third party would fall without that, even if that's reflective of a summary or her statements that are within the confidential marital privilege.
>
> THE COURT: And the Court's view was that the text by her husband would have been hearsay, and then when you asked if that statement was consistent with communications, that question was improper because it would have gone into a marital privilege, but your objection, in your position, I think you've made a good record on.

(R. 73:24; 51-52.)

After the sidebar, RZ completed her testimony. (R. 73:24, 39-40.) Later, after returning from lunch, the parties revisited the discussion, focusing primarily on the issue of marital privilege:

> THE COURT: Good afternoon. We're ready for the continuation of trial. Anything that we need to talk about before we bring the jury down?
>
> [State]: Not by the State.
>
> [Defense]: Briefly, by the defense. And, Your Honor, I hate belaboring points that the Court has already ruled on, but getting back to the Court's prior order regarding the prior determination regarding the marital privilege. Over the lunch hour I did have a chance to look at the literal statute. Wisconsin Statute 905 sub 05 and, again, it states that a person has a right to exert a privilege to have their spouse, former spouse or domestic partner, from testifying against them. "Against them." I'm adding my own emphasis, but that is the language in a proceeding. So once again, I believe that because of the nature of what was being asked would not be contrary to any legal interest of [RZ] or her husband, that I believe she would be permitted to testify to discussions they may have had predating the text message that was sent. And, again, I realize at this point I may be making a record perhaps for appeal but I did want to make sure that I made this clear

> while we have [RZ] still in the building in case that changes any procedure.
>
> THE COURT: All right. The Court's belief is still that the privilege covers confidential communications between spouses, and the question that you were asking called for the witness to disclose a confidential communication. And so therefore the Court believed that the privilege was applicable, but you have made your record.
>
> [State]: The State would just like to add that even aside from that there's still the hearsay issue with regard to those conversations.
>
> THE COURT: That's accurate as well. Anything else?
>
> [State]: No.
>
> [Defense]: No.

(R. 73:78-79.)

GZ also testified, through an interpreter, that she was home with RZ and DZ when Zangana began banging on the back door in a manner that suggested he was "riled up," causing her to be afraid. (R. 73:40-45, 67-73.) GZ explained that after she let Zangana into the house, he was screaming with "foul language," calling her a "bitch," threatening to kick them out of the house and kill them. (R. 73:45-46, 62.) Zangana, who had taken RZ and GZ's cell phones from the kitchen, held their phones in one hand and refused to give them back. (R. 72:63-64.) GZ described how Zangana hit her in the head, pulled her hair, and choked her so she could not breathe. (R. 73:47, 71.) GZ explained that RZ and DZ helped to free her, at which point Zangana attacked RZ. (R. 73:48.) GZ described how when RZ fell to the floor, Zangana was on top of her beating her. (*Id.*) GZ testified that she pushed Zangana, took the phone out of his hand, gave the phone to RZ, and told her to call the police. (R. 73:49-50.) GZ experienced pain in her ear, head, neck; photos of GZ and GZ's injuries were admitted and published to the jury. (R. 73:58-60, 66; R. 22-25.) GZ pointed out the redness to her ear and face in the photos that were caused by Zangana's attack. (*Id.*) When asked how the incident made her feel, GZ responded, "I was beaten and broken inside...At that moment most of the hurt and the hurt was inside internally in my heart after all these years of living with him." (R. 73:66.)

Zangana's trial counsel's only attempts to undermine GZ's credibility during cross-examinations were highlighting that GZ did not need a translator for her daily job or to talk to police, as well as questioning the status of her and Zangana's relationship time of the incident. (R. 73:72-75, 80-81.) GZ explained that her culture understands the terms "wife" and "divorced" differently than in the legal sense of the word. (R. 73:73-25)

Officer Budish testified that when he responded to a "subject with a weapon call," GZ, RZ, and DZ were screaming for help. (R. 73:87). GZ was crying and appeared "shaken up." (R. 73:87, 94.) RZ was also crying, hysterical, and frantic when she disclosed Zangana beat them and also had a knife. (R. 73:88, 91-92.) However, Officer Budish testified he determined there was no knife involved. (R. 73:93.) He also testified that he went with RZ to the hospital in case there was a "substantial injury," but there was "nothing like that. (R. 73:96.) On cross, trial counsel drew attention to the inconsistencies in RZ's initial statements to police, pointed out that GZ did not tell Officer Budish on scene that Zangana choked her, and confirmed that GZ told officers on scene that Zangana was re-married at the time of the incident. (R. 73:73-75, 98-103, 108-112.)

The State rested and defense counsel declined to put on a case. (R. 73:162-63.) Before adjourning for the evening, the parties discussed the State's request for a bail increase:

> [STATE]: It's come to the State's attention that since the close of [RZ]'s testimony Mr. Zangana has been calling family members, including [RZ]'s brother, and is asking specifically for [RZ]'s address. The State notes that this is not a technical violation of Mr. Zangana's bail, but the State is concerned about this activity given that [RZ] testified today, so the State is going to request a modification of Mr. Zangana's bail.
>
> [DEFENSE]: Your Honor, we've been making attempts to figure out [RZ]'s new address since moving out of the address at the time of this incident, for the fact that I was attempting to get a subpoena generated for her husband based upon her testimony first thing this morning. This is in no such way a bond violation. This is an attempt to simply be able to get a witness to court, which because of the timing and because of the very circumstances that

we've been discussing throughout the day, wasn't in the cards. That's it.

[STATE]: I'd respond by saying the victim is currently terrified, and that if this is a legitimate attempt to find her address for those purposes, there should have been communication with the State.

THE COURT: I guess at this point I know this text message came up today. There were issues about the husband, and the record should reflect that when we were in chambers to talk about the question as to whether or not the defendant, Mr. Zangana, was going to testify, [Defense Counsel] indicated that he wanted to push things off to tomorrow so that he could attempt to subpoena [RZ]'s husband. The Court indicated that it wouldn't do that, that Mr. Zangana would have to make his decision this afternoon because, if Mr. Zangana was going to testify, he was going to have to do it. I put that on the record because I think it does provide some context that would provide an explanation for why this was happening. That wouldn't be an intentional violation of his bond....so based upon the fact that [Defense Counsel] did expressly ask to have overnight to try and subpoena the husband, I could understand why [RZ] would be upset, but I also can understand that there's a legitimate reason other than witness intimidation or something like that as to why this may have been done. So, at this point, because that matter is behind us, because the evidence is closed, I would presume there would be no further attempts to make that contact, but at this point I am not going to modify or change his bail because I believe that there's a very reasonable probability that this was being done, not for the purposes of getting back at her with intimidation, but rather with the intent to find a witness who the defense believed would have been of value to their defense.

[DEFENSE]: And for what it's worth, I did, at one of our breaks, I'm holding up an actual file-stamped subpoena that has her husband's name but did not have an address yet.

THE COURT: I completely accept your explanation, [Defense Counsel]. I mean, we talked about it. I didn't let you have time to do that because I didn't think it was appropriate. We didn't get into whether this would have been a 971.23 violation, but the husband couldn't have testified anyhow, but I've been told that your client's been trying to get [RZ]'s address. The State believed that that was a violation, that it was done for intimidation purposes or a violation of his bond. I think given the context in which it came up during the trial and what we've talked about today, if there's another equally plausible

> explanation, and for that reason I'm not going to take any action to change his bail.

(R. 73:166-169.)

The State had filed a witness list that included RZ's updated address nine months prior to trial. (R. 1; R. 7.) Trial counsel did not name RZ's husband as a potential witness. (R. 69:7; R. 71:7.)

The State's closing argument highlighted GZ's testimony in arguing why the jury should find Zangana guilty of Count One, and highlighted RZ's testimony in arguing why the jury should find Zangana guilty of Count Two. (R. 74:19-25.) The State drew on both witnesses' testimony in its arguments as to Count Three, Disorderly Conduct. (R. 74:25-26.) Zangana's trial counsel focused on RZ's (in)credibility in his closing argument stemming from her lack of injuries and inconsistent statements; his only attack on GZ's credibility centered around "non-elemental inconsistencies" — her English proficiency and her description of her relationship status with Zangana, which Zangana's attorney claimed she provided inconsistent statements on despite her explanation of culturally different uses for words. (R. 74:34-4.)

The jury convicted Zangana of Count One, the Battery against GZ, and Count Three, Disorderly Conduct. (R. 29; R. 75:7.) The jury was unable to reach a verdict on Count Two, the Battery against RZ, so the trial court declared a mistrial as to that count. (R. 31; R. 75:2-6, 12.) The court noted, "This was a credibility case, particularly with regard to [GZ]…The jury chose to accept [GZ's] testimony as credible, and that was within their right to do so." (R. 35; R. 75:11-12.)

On April 8, 2020, Zangana filed a motion for post-conviction relief, claiming that the trial court prejudiced his right to present a defense. (R. 47.) Specifically, Zangana argued that RZ's prior statement to her husband indicating that she falsely accused Zangana was admissible as a prior inconsistent statement through RZ's direct testimony, as well as through her husband's testimony. (R. 47:6-7.) He also claimed that the text-message itself, which stated "I am sorry for everything I have done to you…" was admissible extrinsic

evidence of her prior-inconsistent statement. (R. 47:8; R. 49.). Zangana further asserted that the trial court erred when it found any such communications barred by the marital privilege. (R. 47:8-11.)

On July 7, 2020, the circuit court denied Zangana's post-conviction motion. (R. 55.) The circuit court found that Zangana forfeited his claim that the text-message evidence offered through RZ's husband's testimony was admissible extrinsic evidence because that basis for admission was not presented to the trial court. (R. 55:7-8.) The circuit court also found Zangana's "confrontation or [] right-to-present-a-defense argument," was not only underdeveloped, but also had not been properly been preserved for review in front of the trial court. (R. 55:8.)

Also on July 7th, 2020, Zangana filed a *Motion for Reconsideration*, in which Zangana asked the court to reconsider its denial of his post-conviction motion. (R. 56.) The circuit court denied the *Motion for Reconsideration* on July 13, 2020. (R. 57.) This appeal follows.

## STANDARD OF REVIEW

Whether an evidentiary objection sufficiently preserved an issue for appeal is reviewed *de novo*. *State v. Peters*, 166 Wis. 2d 168, 174, 497 N.W.2d 198, 200 (Ct. App. 1991).

Whether to admit evidence at trial generally falls within the trial court's discretion. *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis. 2d 253, 263, 759 N.W.2d 557, 562. When reviewing such decisions, this Court independently "review[s] the record to determine whether it provides a basis for the trial court's exercise of discretion." *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498, 502 (1983). Even if the trial court "gave the wrong reason or no reason at all," a reviewing court will not reverse so long as the decision is supported by the record. *Nischke v. Farmers & Merchants Bank & Trust*., 187 Wis. 2d 96, 105 (Ct. App. 1994).

However, "[w]hether the limitation of cross-examination violates the defendant's right of confrontation is a

question of law that [this Court reviews] de novo *State v. Barreau,* 2002 WI App 198, ¶ 48, 257 Wis. 2d 203, 230-31, 651 N.W.2d 12, 26. Similarly, while the question of whether a person has voluntarily disclosed confidential communications to a third party typically requires a factual analysis subject to the clearly erroneous standard, the question of whether a person has waived a privilege is a question of law" reviewed *de novo*. *State v. Schmid*t, 2016 WI App 45, ¶ 41, 370 Wis. 2d 139, 162, 884 N.W.2d 510, 521 (citations omitted).

Regardless of whether an erroneous exercise of discretion in excluding evidence implicates a defendant's confrontation right, any error "does not necessarily lead to a new trial." *Martindale v. Ripp*, 2001 WI 113, ¶ 30, 246 Wis. 2d 67, 88, 629 N.W.2d 698, 706; *State v. Weed*, 2003 WI 85, ¶ 28, 263 Wis. 2d 434, 456, 666 N.W.2d 485, 495. Rather, the reviewing court engages in a harmless error analysis. *State v. Weed*, 263 Wis. 2d 434, 456. *See also Wis. Stat. § 901.03* ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected…) Harmless error is reviewed *de novo*. *State v. Carnemolla*, 229 Wis. 2d 648, 653, 600 N.W.2d 236, 239 (Ct. App. 1999).

**ARGUMENT**

Zangana argues that the trial court erroneously excluded admissible evidence and that the exclusion violated his rights under the Confrontation Clause. (Appellant Br. at 5, 9-16.) Specifically, Zangana alleges erroneous exclusion of **1)** the text message RZ's husband sent, and **2)** RZ's prior out-of-court statements to her husband. (*Id.*)[1] Zangana argues that the

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[1] The circuit court found Zangana's claims regarding subpoenaing RZ's husband and claims that the evidence was admissible as extrinsic evidence of inconsistent statements both underdeveloped and forfeited. (R. 55:8.) The State understands Zangana's appellate brief to argue that he should have been permitted to solicit the evidence through both RZ's testimony and the admission the text message itself. (Appellant Br. at 10, 11, 14-15). While Zangana makes passing remarks about RZ's husband being subpoenaed or called to testify, (Appellant Br. at 8-9, 11, 16), the State believes such arguments are underdeveloped and forfeited. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). However, the State will also address the admissibility of RZ's husband's testimony should this Court find the claim sufficiently raised and preserved.

evidence was admissible as prior inconsistent statements or as extrinsic evidence of the same, and contends that it was also not protected by marital privilege. (*Id*.) However, Zangana's extrinsic evidence and Confrontation Clause arguments were not brought before the trial court and were therefore forfeited. Regardless, the record supports the trial court's determinations that the evidence was both inadmissible hearsay and protected by marital privilege. Therefore, those decisions are not subject to reversal. Furthermore, even if this Court determines that the trial court did improperly exercise its discretion, the error was harmless.

## I. Issues That Zangana Did Not Raise At Trial, Including His Confrontation And Extrinsic Evidence Claims, Are Forfeited.

Issues are forfeited and not subject to consideration on appeal unless they were first raised before the trial court. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730 (finding defendant forfeited his right to twelve-person jury by failing to raise his objection to the trial court). The party raising the issue bears the burden of showing that it was previously raised, even if the issue is an alleged constitutional error. *Id*.

"In order to preserve his right to appeal on a question of admissibility of evidence, a defendant must apprise the trial court of the *specific* grounds upon which the objection is based." *State v. Peters*, 166 Wis. 2d 168, 174 (Ct. App. 1991) (emphasis added). *See also Holmes v. State*, 76 Wis. 2d 259, 272, 251 N.W.2d 56, 63 (1977) ("general objections which do not indicate the grounds of inadmissibility will not be sufficient to entitle the objector to raise the question on appeal if").

Furthermore, where the trial court's ruling excluded evidence, error cannot be found unless a substantial right was affected *and* "the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." Wis. Stat.§ 901.03. Such offers of proof "should state an evidentiary hypothesis underpinned by a sufficient statement of facts, to warrant the conclusion or inference that the trier of fact is urged to adopt."*Milenkovic v. State*, 86 Wis. 2d 272, 284, 272 N.W.2d 320, 326 (Ct. App. 1978). When an issue is not raised by trial counsel—and is

therefore not properly preserved—the appropriate procedure is to address that issue within the context of ineffective assistance of counsel. *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749, 766 (1999).

As the circuit court pointed out, Zangana raises several issues that his trial counsel failed to raise, and are thus forfeited on review. (R. 55:7-8.) Specifically, trial counsel did not argue that the text message was admissible as extrinsic evidence of a prior inconsistent statement. In fact, trial counsel indicated that he was not seeking admission of the actual message into the record, but was rather just trying to lay foundation. (R. 73:24.) Also, although trial counsel made a record as to why he believed the marital privilege did not apply, he never explained why any of the evidence was not hearsay or was admissible as prior-inconsistent statements. (R. 73:24; 51-52; 78-79, 166-69.) Additionally, trial counsel did not raise any confrontation claim when the trial court denied the request for a mid-trial continuance in order to subpoena RZ's husband. (R. 55:8; R. 73:166-169.) His failure to raise these issues before the trial court constitutes a forfeiture on review. Therefore, this court need not consider the merits.

Furthermore, although Zangana attached translations of the text message to his post-conviction motion, (R. 48-49), there is no indication in the record that trial counsel made any offer of proof as to the actual content of the message other than RZ's translation of, "Hi dad," as required by § 901.03(1), (R. 73:23.) Further still, there is zero indication in the record that there was any offer of proof as to what RZ's purported statement to her husband actually was, nor when she made such a statement. Although Zangana now tries to explain that RZ told her husband that she wrongfully accused Zangana, the trial record is, in fact, devoid of any such information, which is also contradicted by RZ's testimony. (Appellant Br. at 6-7;) (R. 73:21-22.) Trial counsel's statements were vague, speculative, conclusory, and unsupported by sufficient facts to preserve any claim of error.

Zangana's reliance on *State v. Holland Plastics, Co.*, for the proposition that his unraised arguments are *not* forfeited on appeal is misplaced. There, the issue on appeal was whether a six-year statute of limitation barred the action. 111Wis. 2d 497,

505, 331 N.W.2d 320 (1983). The Supreme Court of Wisconsin noted that although the State's argument in the lower court had been that a ten-year limitation applied, the "defendants themselves urged the trial court to grant their motion for summary judgment because the six year statute barred the action." *Id*. Therefore, the Court found the issue *had* been previously raised. *Id*. In contrast, here trial counsel was nowhere close to asserting an extrinsic evidence or confrontation claim and the record is completely devoid of any such discussions by either party in front of the trial court. (R. 73:21-24, 51-52, 78-79.) Thus, *Holland* does not govern. Rather, the principal that objections to evidence must be raised with specificity or forfeited governs. *Holmes v. State*, 76 Wis. 2d 259, 271-72 (1977).

Zangana also argues the circuit court erred by deeming his arguments forfeited while *sua sponte* upholding its rulings at trial (Appellant Br. at 12.) However, nothing he cites stands for the proposition that this is reversible error. Additionally, his position ignores that the court does have authority to raise issues *sua sponte*, *Bartus v. DHSS*, 176 Wis.2d 1063, 1070–71, 501 N.W.2d 419, 423-24 (1993), and that respondents "may advance for the first time on appeal … any basis for sustaining the trial court's order or judgment." *State v. Darcy* N.K., 218 Wis.2d 640, 651, 581 N.W.2d 567 (Ct.App. 1998). Therefore, this is now a basis for reversal.

In summation, because the majority of Zangana's claims were not properly preserved, this Court need not consider them. *State v. Huebner*, 235 Wis. 2d 486, 492. As the circuit court found, such arguments were waived for purposes of appeal. (R. 55:7-8.) However, even if this Court finds Zangana's arguments were not forfeited, the record shows that the court properly exercised its discretion in excluding the evidence.

## II. The Trial Court Properly Exercised Its Discretion In Excluding The Evidence

### A. The evidence is inadmissible hearsay.

Hearsay is a statement offered for the truth of the matter asserted, "other than one made by the declarant while testifying

at the trial or hearing." Wis. Stat. § 908.01(3). However, a declarant's prior statements are not hearsay if "the declarant testifies at the trial [] [] and is subject to cross-examination concerning the statement and the statement is... inconsistent with the declarant's testimony." Wis. Stat. § 908.01(4)(a)&(a)1 (formatting omitted). Whether or not a prior out-of-court statement is in fact inconsistent with the declarant's testimony is a discretionary decision of the trial court. *State v. Lenarchick*, 74 Wis. 2d 425, 434–36, 247 N.W.2d 80, 85-87 (1976).

Furthermore, Wisconsin Statutes § 906.13(2)(a) prohibits the admission of extrinsic evidence of a prior inconsistent statement by a witness unless one of the following:

> 1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement.
>
> 2. The witness has not been excused from giving further testimony in the action.
>
> 3. The interests of justice otherwise require.

Wis. Stat. § 906.13(2)(a)1-3. *See also State v. Smith*, 2002 WI App 118, ¶¶ 12-13, 254 Wis. 2d 654, 665, 648 N.W.2d 15, 19-20 (noting [t]he rule is... modified to eliminate the 'prior warning' condition where a witness has not been excused from further testimony.")

However, when the criteria of §§ 908.01(3) and 906.13(2)(a) are met, the Wisconsin courts have consistently upheld the admission of law enforcement testimony regarding prior inconsistent statements of testifying witnesses. *See e.g. State v. Nelis*, 2007 WI 58, ¶¶ 28-34, 300 Wis. 2d 415, 426-429, 733 N.W.2d 619, 624-35; *Haskins v. State,* 97 Wis. 2d 408, 421, 294 N.W.2d 25, 34 (1980).

Nevertheless, the trial court may still limit the defendant's cross-examination of an adverse witness on relevance and materiality grounds. *State v. Echols*, 175 Wis. 2d 653, 679, 499 N.W.2d 631, 639 (1993) (finding defendant's offer of proof inadequate, "therefore we cannot find that the trial court erroneously exercised its discretion in limiting the cross-examination..."); *see also* Wis. Stat. § 904.01 ("relevant evidence" tends to make the existence of any fact "of

consequence to the determination of the action" more or less probable).

Here, the evidence at issue was properly excluded as it constitutes inadmissible hearsay. The text message and any prior conversation that RZ *might* have had with her husband are all out-of-court statements. Further, Zangana's arguments on appeal confirm that the purpose for their admission would be for the truth of the matter asserted — or at least the truth of the matter which Zangana construes the statements to mean, that RZ wrongfully accused her father. (Appellant Br. at 10.) Therefore, clearly all the evidence which Zangana claims the court erred ruling inadmissible falls squarely under the definition of hearsay. *See* Wis. Stat. § 908.01(3). Moreover, the text message itself is even more clearly inadmissible hearsay because the record demonstrates that it was not even a prior statement of RZ, but rather of her husband who defense counsel failed to name as a witness or subpoena prior to trial. (R. 69:7; R. 71:7; R. 73:21-24; 51-52; 166-169.) Therefore, the trial court properly exercised its discretion when ruling the statements were hearsay. (R. 73:23-24; 51-52; 73:78-79.)

Additionally, none of the evidence would have been properly admissible as prior inconsistent statements. Turning first to the text message itself, because the message was a statement of RZ's husband, RZ's husband is the "declarant" under §§ 908.01(4)(a)&(a)1. (R. 73:21-23.) Because he neither testified nor was subject to cross-examination, his prior statement contained in the text message fails to satisfy the requirements of §§ 908.01(4)(a)&(a)1. The text message fails to be admissible under § 906.13(2)(a) for similar reasons — the message is a written statement of RZ's husband. (R. 73:21-23.) RZ did not send the message, was not aware of its existence until after the fact, and did not direct her husband to send the message. (*Id.*) Therefore, it is clear that the message is not her statement, but that of her husband. (R. 73:21.) Accordingly, the message itself is extrinsic evidence of RZ's husband's prior statement, which is not admissible under § 906.13(2)(a) because he was not a testifying witness and, thus, it cannot be inconsistent with his trial testimony.

Turning next to any *purported* statements RZ made directly to her husband, elicited either through RZ's direct

testimony or that of her husband, the record fails to show that there even was any such prior statement, let alone that it was inconsistent with RZ's testimony at trial. Although Zangana speculates that RZ told her husband that she regretted falsely accusing Zangana for the charged offenses (Appellate Br. at 8-9), nothing in the trial transcript supports these inferential leaps. There certainly was never any offer of proof as to what RZ specifically said during this supposed conversation which occurred at an unknown time and an unknown location. Nor is it clear what exactly these prior unknown statements would be inconsistent with. RZ was never asked whether she was, or had admitted to, falsely accusing Zangana. (R. 72:76-124; 73:6-31.) Moreover, even if RZ's supposed prior statement was identical to that of her husband's message, "I am sorry for everything that I have done to you…" is vague and not necessarily referring to the criminal case against him (R. 49.) Such a statement could refer to anything in the course of their entire relationship. Therefore it would not even tend to make the determination of the current case more or less probable. *See* Wis. Stat. § 904.01. Regardless, there is no indication in the record, nor any offer of proof based in facts, that RZ actually made such a statement to her husband. This case is a far cry from that of *State v. Nelis*, or any other case where a law enforcement officer can say what the testifying witness previously said, when, and to whom, and where the parties know that the prior statement both exists and is inconsistent with the witnesses' trial testimony. 300 Wis. 2d 415, 428-429. Because all of these details are speculative at best, and contradicted by the record at worst, there is insufficient basis to deem any statement admissible under either § 906.13(2)(a) or § 908.01(4)(a)&(a)1. Accordingly, Zangana cannot show that the circuit court erroneously exercised its discretion in finding that any prior out of court statement RZ *may* have made, elicited either through her direct testimony or that of her husband, fell under § 908.01(3)'s general rule that hearsay is inadmissible. (R. 73:24; 51-52.)

Zangana's reliance on *Vogel v. State*, 96 Wis. 2d 372, 386 (1980), to support his claim that the evidence was admissible as RZ's apology for having accused him of the offense is misplaced as the case is distinguishable. (Appellant Br. at 5, 9.) In *Vogel*, the witness gave a "signed, question and answer statement to the police concerning the robbery." 96

Wis. 2d 372, 376. Therefore, there was no question that the witness had made the prior statement, nor any question as to what statement was made, when, or to whom. *Id*. Here, however, the written statement was not RZ's, she did *not* sign off on it, did not know about it until after the fact, and it was not sent at her direction. (R. 73:21-24.) Additionally, unlike *Vogel* where the witness' prior statement regarding the defendant's involvement in the robbery was directly contradicted by the witness' trial testimony, *Id*. at 377, there is no direct contradiction here. Even presuming Zangana's trial counsel *had* established that the text message was RZ's statement to her father, or that RZ actually made a similar statement to her husband, such statements are vague and contain no indication that the apology had anything to do with the criminal allegations that RZ made against Zangana. Regardless, RZ's explanation in the record that she did not know about the message until later, nor did she direct that it be sent, showed that Zangana's inferential leaps are without basis. (R. 73:21-24.) Without a sufficient offer of proof grounded in facts, as opposed to counsel's speculation, Zangana cannot show that the trial court abused its discretion. *See* Wis. Stat.§ 901.03.

Moreover, *People v. Jones*, which Zangana cites in support of his argument, in fact completely contradicts it. (Appellant's Br. at 9-10.) 57 Cal.4th 899, 306 P.3d 1136 (Cal. 2013). There, the Supreme Court of California found *no* abuse of discretion in the exclusion of the victim's purported apology to the defendant for falsely accusing him. *Id*. Jones' victim testified that she returned to the apartment following the assault but remained in the car while others went inside. *Id*. at 954. When asked what these other people told the defendant, the trial court sustained the prosecutor's hearsay objection. *Id*. However, the victim was allowed to testify that she did not know what the people said, only what they told her they said. *Id*. The defendant's mother testified that a woman did arrive with a preacher, however she could not identify the woman as the victim. *Id*. at 955-56. His mother testified outside of the jury's presence that the woman stated that she was there to say "sorry." *Id*. at 955. Finding the circuit court properly exercised its discretion in excluding the statements, the Supreme Court of California noted, "[b]ecause Jones could not say the [] woman was in fact [the victim] there is no reason to think the

speaker's statements were a prior statement of [the victim], inconsistent or otherwise." *Id*. The court also rejected the argument that these individuals were acting as the victim's agent, "because no evidence establishes such agency." *Id*. Here too, there is no reason to think RZ's husband's statements were a prior statement of RZ, "inconsistent or otherwise." Furthermore, Zangana's speculation that RZ's husband was acting as RZ's agent is completely contradicted by the evidence of the record, in which RZ explains she neither directed her husband to send the message, nor knew about it until after the fact. (R. 73:21-24;) (Appellant Br. at 5-6.) Therefore, *People v. Jones*, in fact supports the trial court's exercise of discretion in excluding the hearsay statements.

For all of the above reasons, the record shows that the trial court acted well within its discretion in prohibiting the admission of the text message and any testimony regarding RZ's prior out-of-court statements, whether elicited through her direct testimony or that of her husband, as the evidence is inadmissible hearsay. However, even if this Court finds that the court erroneously found the evidence inadmissible hearsay, the trial court properly found the evidence is protected by marital privilege.

**B. The evidence is protected by marital privilege.**

Wisconsin Statutes § 905.05(1), in relevant portion, states, "[a] person has a privilege to prevent the person's spouse… from testifying against the person as to any private communication by one to the other made during their marriage…" The public policy behind the privilege "is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." *Wolfle v. United States*, 291 U.S. 7, 14 (1934).

Marital privilege is applicable in both civil and criminal cases. *See* Wis. Stat. § 911.01(2). *See also* Judicial Council Committee's Note to Wisconsin Rules of Evidence § 905.05(1), 59 Wis. 2d R 131 (1974). Such communications are assumed confidential unless the nature of the communication or the surrounding circumstances indicate that it "was

obviously not intended to be confidential." *Wolfle v. United States*, 291 U.S. at 14. Also, a marital communication remains privileged despite one spouse making an unauthorized out-of-court disclosure of the communication. *Muetze v. State*, 73 Wis. 2d 117, 129-130, 243 N.W.2d 393, 398-99 (1976).

Here, the Court properly found that any communication by RZ to her husband, whether elicited through RZ's or her husband's testimony or directly through the text message, fell within the confines of marital privilege. RZ had the right to prevent her spouse from testifying about any private communication between them — a right to be free from being pitted against one another. To hold otherwise would undermine the public policy behind marital confidences. Further, because RZ neither knew about the message before it was sent, nor was the message sent because of any conversation with her husband, *even* if there existed any prior communications between her and her husband regarding the same subject matter, the unauthorized disclosure does not destroy the privilege. *Muetze v. State*, 73 Wis. 2d 117, 129-130 (holding wife's unauthorized disclosure to police privileged marital communications that could not be used in a proceeding to obtain a search warrant.) (R. 73:21-22.)

Zangana also cites *Wolfle v. United States* to support his argument that the alleged communications between RZ and her husband that supposedly resulted in the text message do not constitute marital privilege. (Appellate Br. at 12.) However, not only is such a contention speculative, but *Wolfe* is also distinguishable. There, the defendant dictated a letter to his wife through a stenographer, who was called to testify about the contents of that letter. *Wolfle v. United States*, 291 U.S. 7 (1934). The question which the *Wolfe* court considered,

> is the extent to which the privilege which the law concedes to communications made confidentially between the husband and wife embraces the transmission of them, likewise in confidence, through a third party intermediary, communications with whom are not themselves protected by any privilege.

*Id*. at 15.

In other words, the issue in *Wolfle* was whether confidential communications from one spouse, through an unprotected third-party intermediary, to the other spouse remained protected. *Id*. Finding the issue analogous to when spouses communicate in front of other, non-privleged individuals, the *Wolfle* court held the communications fell outside the scope of the privilege because the defendant voluntarily disclosed them to a non-protected individual. *Id*. at 16-17. Here, unlike *Wolfle*, the alleged communication between RZ and her husband did not involve any such third-party intermediary. (R. 72:21-24; 51-52.) There is no allegation that RZ voluntary disclosed any statement to a third party with the intent that the individual communicate the statement to her husband. (Appellant Br.) Therefore, even *had* RZ made a communication to her husband, his subsequent disclosure to Zangana does not destroy the privilege since RZ did not instruct him to send the message. *Muetze v. State*, 73 Wis. 2d 117, 129-130 (1976); (R. 73:21-22.) Furthermore, Zangana's speculation that RZ intended that her husband relay her statement to Zangana is directly contradicted by the record. (Appellate Br. at 11-12;) (R. 73:21-22.)

Zangana also claims that the trial court erroneously claimed the privilege on behalf of RZ. (Appellant's Br. at 11.) However, RZ has the right to invoke the privilege, *Umhoefer v. Police and Fire Com'n of City of Mequon* 257 Wis. 2nd 539, 549, 652 N.W. 2d 412, 417 (Ct. App. 2002), and the trial court remains, "the gatekeeper in determining what evidence is admissible and why." *State v. Wilson*, 2015 WI 48, ¶ 99, 362 Wis. 2d 193, 238, 864 N.W.2d 52, 73. Therefore, it was not improper for the trial court to recognize the privilege prevented its admission.

In summation, RZ had a right to her marital confidences. To make her or her husband testify against her about any conversation, *even presuming* such a conversation occurred, would run afoul the marital privilege. Also, again, there is no indication that any such conversation occurred. (R. 73:21-22.) Therefore, the court properly excluded the evidence at issue as protected under the public policy of marital privilege.

### C. The trial court properly exercised its discretion in declining to grant a continuance.

Should this court construe Zangana's brief as sufficiently raising a claim that the trial court erred in prohibiting the testimony of RZ's husband, such claim necessarily fails as trial counsel had not named him as a witness nor subpoenaed him to testify. The court was within its discretion to deny a mid-trial continuance on these grounds.

Whether to exclude a witness or to deny a motion for continuance falls within the trial court's sound discretion. *State v. Wright*, 2003 WI App 252, ¶ 42, 268 Wis. 2d 694, 718, 673 N.W.2d 386, 398. *See also e.g. Lunde v. State*, 85 Wis. 2d 80, 92, 270 N.W.2d 180, 186 (1978) (finding it within the trial court's discretion to refuse a mid-trial continuance to allow defense to interview a rebuttal witness). Whether to deny a continuance based on the desire to secure a witness' attendance, too, falls within the court's discretion. *Elam v. State*, 50 Wis. 2d 383, 389-90, 184 N.W.2d 176, 180 (1971). When evaluating such requests, courts consider whether the testimony is material, the moving party was neglectful in procuring the witness' attendance, and whether there is a reasonable expectation the witness can be located. *Id*. at 390-91. "A defendant's failure to make a satisfactory showing on one or more of the three considerations is grounds for denying his or her motion for a continuance." *State v. Williams*, 2000 WI App 123, ¶ 15, 237 Wis. 2d 591, 603, 614 N.W.2d 11, 18. Furthermore, trial courts may preclude the testimony of a surprise defense witness. *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

Here, trial counsel had plenty of notice the State would call RZ as a witness, yet waited until mid-trial to attempt to subpoena her husband without providing prior notice that he was a witness. (R. 7; R. 69:7; R. 71:7; R. 73:166-169.) This, alone, was grounds for the court to deny a continuance. However, because no sufficient offer of proof grounded in facts was made about what RZ's husband would actually testify to, the trial court also had no reason to believe that RZ's husband would be a material witness. Moreover, he could not be a material witness because, as the trial court indicated, his testimony would be barred both as hearsay and as privileged

communications. (R. 73:166-169.) Therefore, the court did not improperly continue with trial or exclude RZ's husband from testifying.

### D. The Trial Court Did Not Violate Zangana's Confrontation Right.

While the right to cross-examine "is implicit in the constitutional right of confrontation," the right is not absolute. *Chambers v. Mississippi*, 410 U.S. 284, 296 (1973); *State v. Rhodes*, 2011 WI 73, ¶ 32, 34, 336 Wis. 2d 64, 799 N.W.2d 850. Trial judges are given "wide latitude insofar as the Confrontation Clause is concerned" to restrict cross-examination., *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), subject only to the general requirement that the defendant be given a "'meaningful opportunity'" to test the credibility of his accusers. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoted source omitted). "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Van Arsdall*, 475 U.S. at 679 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original)). For instance, the Sixth Amendment rights to confrontation still only allows a defendant to present relevant evidence that is not substantially outweighed by its prejudicial effect. *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990). Moreover, a court may exclude evidence which is inadmissible under the rules of evidence without violating a defendant's right to present a defense. *State v. Muckerheide*, 2007 WI 5, ¶ 40, 298 Wis. 2d 553, 573, 725 N.W.2d 930, 939 (finding the circuit court properly excluded the defendant's other acts evidence as impermissible character or propensity evidence barred by Wis. Stat. § 904.04).

Zangana's confrontation arguments, which are almost completely identical as raised in his post-conviction motion, are still conclusory and underdeveloped. (Appellant's Br. at 14-16;) (R. 47:11-12; R. 55:8; R. 57:3.) Therefore this Court need not consider them. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). However, even if this Court finds Zangana's arguments sufficiently developed and properly preserved for appeal, the record demonstrates there

was no violation of Zangana's right to confrontation. The evidence was inadmissible hearsay and privileged, thus its exclusion does not infringe upon his confrontation rights. *See Muckerheide*, 298 Wis. 2d 553, at 939. Further, his confrontation right was not violated because he was permitted meaningful cross-examination on the issue of RZ's credibility, including her lack of memory and her inconsistent statements regarding the details of the assault. (R. 72:107-124; 73:17-18; 35-38.) Therefore, the trial court properly exercised its discretion in limiting the cross-examination of RZ about the text message, which she denied was her statement, and any statement that had *allegedly* been made to her husband.

However, even if this Court determines that the trial court erroneously excluded the evidence, Zangana is still not entitled relief because any error was harmless.

## III. Even If The Trial Court Erroneously Exercised Its Discretion, Any Error Was Harmless.

Erroneous exclusion of evidence, even in violation of the Confrontation Clause, is subject to the harmless error analysis. *State v. Weed*, 263 Wis. 2d 434, 456. An error is harmless where it did not contribute to the jury's verdict. *Weed*, 263 Wis. 2d 434, 457. An error does not contribute to the verdict where a reviewing court concludes "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id*. (internal quotations omitted).

Here, the record demonstrates that any error in excluding the evidence, whether through admission of the message or the testimony of RZ or her husband, did not contribute to the jury's verdict. The jury found Zangana guilty of Battering GZ and of Disorderly Conduct, but not on the Battery count in which RZ was the victim. (R. 29; R. 75:2-7, 12.) Therefore, because the jury did not convict on him of the offense in which RZ was the victim, it is clear that omission of further impeachment evidence against RZ was harmless. The jury chose to accept GZ's testimony as credible, but could not make the same conclusion as to RZ even without the admission of the evidence. (R. 75:2-7, 11-12.) Clearly, the jury weighed GZ's and RZ's credibility independently, as they were

permitted to do so. Trial counsel was able to impeach RZ with her lack of recollection and inconsistent details on key details of the offense, such as whether Zangana had a knife. (R. 72:107-124; R. 73:17-20; 35-38.) In contrast, there were no major reasons to attack GZ's credibility. It is not surprising that jurors did not feel that GZ's cultural beliefs or level of English proficiency negatively impacted her credibility, especially in light of her vivid description of the emotional trauma she experienced as a result of the offense. (R. 73:66-75.) Accordingly, it was GZ's, not RZ's, credibility that was the key component to Counts One and Three. (See Appellants' Br. at 15.) It is clear that even had the court admitted a vague statement that RZ was "sorry for everything," this would not have impacted GZ's credibility, nor the outcome at trial. Therefore, Zangana is not entitled relief even if the court erred.

Furthermore, it is appropriate for this court to engage in a harmless error analysis although it was not raised in the circuit court. In *State v. Darcy N.K.* this Court ruled that "a respondent may advance for the first time on appeal any argument that will sustain the trial court's ruling," when the State's failure to raise the issue in the circuit court does not prevent a defendant from curing an omission or making a factual record. 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998) (noting there was nothing the defendant could have done during post-conviction proceedings to alter the fact that the trial court's in camera review of psychiatric records had been conducted at his own request). Because harmless error analysis are, by their nature, a review of the record created at trial, Zangana could not have cured any defect with the record in post-conviction proceedings. Accordingly, it is permissible for the State to raise, and the court to consider, harmless error.

## CONCLUSION

For the reasons detailed above, the State respectfully asks that this Court affirm the judgment of conviction against Zangana and the trial court's orders denying Zangana's motion for post-conviction relief.

Dated this 23rd day of December, 2020.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)**

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes Sections 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The word count for the portions of this brief that are outlined in Wisconsin Statutes Sections 809.19(1)(d), (e), and (f) is 8,667

____________ ______________________

Date

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**CERTIFICATE OF COMPLIANCE WITH RULE 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 Wisconsin Statutes Section 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 and that 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.

____________ ______________________

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