STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2021AP000072

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DARRELL K. SMITH Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MARK A. SANDERS AND STEPHANIE G. ROTHSTEIN PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

Did Smith receive ineffective assistance of counsel where trial counsel failed to object at trial to the admission of statements from a nontestifying sexual assault nurse examiner, "SANE," which were introduced through testimony of a surrogate witness and records from the SANE exam, on grounds that the admission of such evidence violated Smith's right to confront the witnesses against him under the 6th Amendment to the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution?

Did Smith receive ineffective assistance of counsel where trial counsel failed to object at trial to the admission of impermissible "other acts" evidence, specifically a Department of Corrections photograph of Smith, and testimony from two law enforcement officers which highlighted for the jury that the photo of Smith was obtained from the Department of Corrections?

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel does not request oral argument.

Counsel believes that publication will not be warranted as this appeal involves the application of well-established legal principles to a particular set of facts.

STATEMENT OF THE CASE

In Milwaukee County Case No. 16CF001654, the State charged Smith with second degree sexual assault. Ap.102.

The complaint alleged that after drinking with some friends on the night of February 6, 2016, A.B. became intoxicated, and went to the Rave Bar in the City of Milwaukee. Ap.100. The complaint alleged that the next thing A.B. remembered was waking up in the hospital. Ap.100. The complaint alleged that A.B. noticed that she was bleeding, and believed that someone may have had sex with her without her consent. Ap.101. The complaint alleged that A.B. was examined at the Aurora Sinai Hospital's Sexual Assault Treatment Center where DNA swabs

were taken, and then submitted to the Wisconsin State Crime Lab for analysis. Ap.101. The complaint alleged that an analyst mapped a DNA profile from semen found on the swabs taken from A.B. Ap.101. The complaint alleged that the profile was entered into the Combined DNA Index System, and matched a known profile of Smith. Ap.100.

After various pre-trial proceedings, the case proceeded to a jury trial during which the jury found Smith guilty as charged.

At sentencing, the circuit court imposed a bifurcated sentence consisting of 8 years initial confinement and 12 years extended supervision. 114:80. Smith timely filed a notice of intent to pursue postconviction relief. 66:1. By and through counsel, Smith filed a motion for new trial raising the same issues brought forth in this appeal. 76:1-21. The circuit court denied the motion without a hearing. Ap.105-110. Smith filed a notice of appeal, 89:1, and these proceedings follow.

STATEMENT OF FACTS

Evidentiary items which implicated Smith's right to confrontation.

At trial, the State introduced into evidence A.B.'s records from Aurora Health Care which included the results of a Sexual Assault Nurse Examiner (SANE) exam conducted by C.H. 38:1-96. The portion of the records which pertain to the SANE exam appear at 38:37-73.

Under the heading of "Progress Notes-Encounter Notes," C.H. wrote that "Patient returns to SATC (Sexual Assault Treatment Center) accompanied by friend Tiffany who was with her last night at RAVE and friend Molly. *Patient reports that she has returned to have evidence collected and report to police*." 38:37. Italics added. C.H.'s notes indicate that A.B. arrived at the SATC at 9:11 p.m. on February 8, 2016. 38:37. A.P. had earlier in the day, at approximately 4:51 a.m. arrived in the emergency department, received treatment, and was discharged at 6:38 a.m. See 38:2-6.

C.H.'s apparent signature appears on the bottom of a document entitled, "Sexual Assault Record." 38:41. After C.H.'s

apparent signature is the notation, "SANEA SANEP." 38:41. C.H.'s apparent signature also appears on the "Progress Notes-Encounter Notes," 38:37, a "Chain of Custody of Evidence Report For Sexual Assault Violence," 38:42, and a "Consent For Medical/Forensic Examination." 38:43. The latter two documents expressly identify C.H. as a "SANE" or "Sexual Assault Nurse Examiner." 38:42,43. Annotations by C.H. appear on at least six pages of anatomical diagrams. 38:47-52. The documents also include a record of C.H.'s "physical assessment" of A.B., 38:52-62, a record of the "assault history" including "methods of control," 38:62-68, and a "post assault history," 38:68-69, as related to C.H. by A.B.

The progress/encounter notes depict an oral history that C.H. obtained from A.B. during an interview. The "Sexual Assault Record," 38:41, itemizes physical evidence obtained by C.H. from A.P. during the SANE exam, and includes the following: "black thong underwear," "gray tshirt," "pink tshirt," "black pants," "brown underwear worn post assault." 38:41. The inventory also itemizes various biological evidence obtained from A.B including

swabs (vaginal, cervical, external genitalia, right inner thigh, left inner thigh, and right side trunk), and 3 tubes of blood and urine. 38:41. The inventory notes that a total of 14 items were "bagged for Crime Lab." 38:41. The "chain of custody" report describes the evidence as "one lg sealed brown bag, 3 tubes blood, 3 tubes urine," and indicates that the evidence collected by C.H. was released by her on February 8, 2016 at "1256 am." 38:42. The annotations document various injuries ostensibly observed and noted by C.H. in a physical examination of A.B. 38:47-52. Finally, the record of C.H.'s "physical assessment" of A.B., 38:52-62, and record of the "assault history" including "methods of control," 38:62-68, and "post assault history," 38:68-69, further document information received by C.H. from A.B.

The State did not call C.H. to authenticate or otherwise testify regarding the progress/encounter notes, the inventory, the chain of custody record, or any other matter pertaining to the histories received from A.B., the physical examination of A.B., or evidence collected from A.B. C.H. in fact did not testify at all, and

the record is silent as to her unavailability as a witness, other than a reference that she no longer worked for Aurora. 109:55.

The State instead introduced the progress/encounter notes, inventory, chain of custody report, anatomical diagrams, and histories, through L.K. 109:44. At the time of trial, L.K. was the manager of the Sexual Assault Treatment Center Program, and the forensic nurses at Aurora Healing and Advocacy Services at Sinai. 109:44. The specialty of the program was sexual assault exams. 109:44. In her testimony, L.K. made clear that she did not conduct the sexual assault nurse examination of A.B., and that it was C.H. who actually conducted the examination. 109:55 and 61.

As part of L.K.'s testimony, the prosecutor had L.K. read into the record verbatim what C.H. had written in the progress/encounter notes. 109:62. L.K. read in to the record as follows:

> "Patient returned to SATC accompanied by friend Tiffany who was with her last night at Rave and friend Molly. Patient reports she has returned to have evidence collected and report to police.
>
> Patient reports she has not called police at this time and wishes for them to be contacted prior to being seen by the R.N. to speed up the process.

Patient willing to be seen by R.N. while waiting for police arrival. Milwaukee Sensitive Crimes contacted by R.N. at 21:04. Notified that squad will be sent out." 109:62.

- - -

"Patient reports she and friends had been drinking prior to going to the Rave to see a show. Patient states she is unsure of the exact quantity consumed but states it was a fair amount. Patient reports she was intoxicated when they left...

- - -

…They left for the Rave at about 2200. Patient reports she did not have a memory of having a drink once getting to the Rave. Patient has no further memory after arrival at the Rave until awakening at St. Mary's Hospital at about five a.m. this morning.

Patient reports from what she had been told by friends she and her friend Tiffany were in a cab and were kicked out of the cab. The patient's ex-boyfriend's friend witnessed this and brought them to his home prior to midnight.

Patient reports she lost her ID, credit card, debit card, and coat. Milwaukee Sensitive Crimes spoke with patient at SATC to take report.

Patient had evidence collected and full head-to-toe-exam. Patient reports genital exam done earlier in day. Patient declines photos at this time. Patient had all medications including emergency contraception earlier on 2-7-16 when seen at SATC. Reviewed home flagyl instructions with patient. Discharge, reviewed."

109:63.

The prosecutor then asked L.K. about the consent form

signed by A.B. 109:64. The prosecutor asked L.K. if A.B. had agreed to a "visual inspection of the areas of the assault," "collection of evidence," and "collection of blood." 109:64. L.K. responded, "yes." L.K. also testified that A.B. had not consented to any photography. 109:64.

The prosecutor then asked L.K. if there was a section which documented "where injuries were found." 109:65. L.K. responded, "yes, I believe it is documented in the assessment area." 109:65. The prosecutor directed L.K.'s attention to the specific anatomical diagrams and the annotations made by C.H., and asked L.K. to describe the various injuries that C.H. noted in her physical examination of A.B. 109:65. L.K. referred to the specific diagrams and annotations made by C.H., and described injuries to A.B.'s right hand, left hand, right side of her body, and knees. 109:65-68. The prosecutor asked L.K. if C.H.'s notes reflected whether A.B. had these injuries the night before. 109:65-68. L.K. testified that A.B. had reported that the injuries were not present the night before. 109:65-68.

After questioning L.K. regarding the injuries that C.H. had noted, the prosecutor then elicited testimony from L.K. regarding what C.H. had written concerning the "assault history," 109:62-68, and "post assault history," 109:68-69, as related by A.B. In particular, the prosecutor asked L.K. what C.H. had recorded as to whether A.B. lost consciousness. 109:70. L.K. read from C.H.'s notation that "Patient has no memory." 109:70. The prosecutor asked L.K. what C.H. had recorded as to what drugs or alcohol were consumed. 109:70. L.K. read from C.H.'s notation, "drank a fair amount," "shots and a mixed drink prior to arrival at Rave." The prosecutor asked L.K. what C.H. had recorded as the location of the assault. 109:70. L.K. testified that one answer indicated "unknown," and another answer indicated "Rave." 109:70-71. The prosecutor then asked L.K. what C.H. had recorded for a number of different questions/areas including:

"Physical surroundings;"

"Number of assailants;"

"The assailants name:"

"The assailant's age;"

"The assailant's ethnicity;"

"What was the assailant's relationship;"

"Did assailant where a condom?";

"Did the assailant ejaculate?";

"Was jelly, foam or lubricant used?";

"Did the assailant kiss the patient?";

"Did the assailant lick the patient?";

"Did the assailant bite the patient?";

"Did the patient's mouth contact the patient's anus?";

L.K. testified that for each of these questions or areas, C.H.'s notations indicated an answer of "unknown." 109:70-73.

At no time during trial, did trial counsel object to the admission of L.K.'s testimony as outlined above or to the admission of the records from the SANE examination.

Evidentiary items constituting impermissible "other acts" evidence.

During trial, the State introduced evidence regarding a photograph of Smith shown by law enforcement to A.B. 111:17. The State introduced the actual photograph itself as Exhibit No. 1,

115:1, and elicited testimony from law enforcement officers regarding where the photograph came from. The following question and answer took place between the prosecutor and Detective Jon Charles of the Milwaukee Police Department:

> Q: Detective, I'm showing you what's been marked as State's Exhibit 1. Can you tell me what that is?
>
> A: It's a department of correction - -Wisconsin Department of Corrections photo of the defendant.
>
> Q: So is this a fair and accurate photograph of the picture that you showed (A.B.)?
>
> A: I believe this is the picture that I showed her.
>
> Q: And what makes you believe that?
>
> A: When I showed it to her, it was a department of corrections photo. This is the photo that I personally placed in the - - we have files in sensitive crimes. I placed this in a file, and that's where it was located.
>
> 111:17.

The State then introduced similar testimony from another officer, Detective Jolene Del Moral:

> Q: Given that it appeared Mr. Smith was unknown to (A.B.), but his DNA had linked to her sex kit, what did you do to follow up with that investigation?
>
> A: So normally when we have that type of information, what we

> would do is - - a lot of times we would check our own database to see if the person would be on file with us. Mr. Smith was not on file with us. What we would do is normally get a picture to see if she knows him. He was not on file with us, so then my next option was to check the department of corrections, and he was on file.
>
> Q: So were you able to obtain any kind of photographs of Mr. Smith?
>
> A: I did obtain one photo.
>
> 111:30.
>
> - -

Detective Moral in later testimony again highlighted that the photo came from the Department of Corrections:

> Q: Detective Del Moal (sic), I'm showing you what's been marked as Exhibit 1. Do you recognize that?
>
> A: Yes, I do.
>
> Q: And what is it?
>
> A: That's the photo of Mr. Smith from the department of corrections.
>
> 111:31.

At no time during trial, did trial counsel object to the admission of Smith's Department of Corrections photo or the testimony about it.

Motion for new trial

Smith's motion for new trial raised the same issues presented in this appeal. 76:1-21.

Circuit court decision

The circuit court denied Smith's motion without a hearing. Ap.110. In doing so, the circuit court entered a six (6) page written decision which is contained in the appendix. Ap.105-110. The circuit court concluded that the admission of C.H.'s statements through L.K.'s testimony and the SANE records did not violate the Confrontation Clause. Ap.109 As a result, the circuit court additionally concluded that trial counsel was not deficient in failing to object to such evidence, and that Smith was not prejudiced by its admission. Ap.109-110. With respect to the evidence concerning Smith's Department of Corrections photo, the circuit court concluded that the admission of such evidence "was not reasonably probable to affect the outcome," and that Smith

was therefore not prejudiced by trial counsel's failure to object to the admission of such evidence. Ap.110.

ARGUMENT

I. Trial counsel was ineffective in failing to object to the admission of C.H.'s statements, as admitted through L.K.'s testimony and the SANE records, on grounds that such evidence violated Smith's right to confrontation.

A. Standard of review.

Criminal defendants are constitutionally guaranteed the right to counsel under both the United States Constitution and the Wisconsin Constitution. U.S. Const. amends. VI, XIV; Wis. Const. Art. I, §7. The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)); *State v. Trawitzki*, 2001 WI 77, ¶39, 244 Wis.2d 523, 628 N.W.2d 801.

In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's

representation was deficient. *Strickland*, 446 U.S. at 687. The defendant must also show that he or she was prejudiced by the deficient performance. *Id.* Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *Id.* at 688. When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Williquette*, 180 Wis.2d 589, 605, 510 N.W.2d 708 (1993).

In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "The question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt

respecting guilt." *State v. Moffett*, 147 Wis.2d 343, 357, 433 N.W.2d 572 (1989). A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Trawitzki*, 244 Wis.2d 523, ¶19. This court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." *State v. Knight*, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540 (1992). Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which we review de novo. *Id.*

B. C.H.'s statements were testimonial and their admission violated Smith's right to confrontation.

Both the Sixth Amendment to the United States Constitution and the Wisconsin Constitution guarantee a criminal defendant the right to confront witnesses who testify against him at trial. See U.S. Const. Amend. VI; Wis. Const. Art. 1, §7. Wisconsin courts generally apply United States Supreme

Court precedent when interpreting these clauses. See *State v. Mattox*, 2017 WI 9, ¶20, 373 Wis.2d 122, 890 N.W.2d 256.

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

> [E]x parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or *similar pre-trial statements that declarants would reasonably expect to be used prosecutorily*.
>
> ----
>
> [E]xtrajudicial statements …contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.
>
> ---
>
> [S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the *statement would be available for use at a later trial.*

Italics added. See *Crawford*, 541 U.S. at 51-52.[1] See also *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

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

[1] The Wisconsin Supreme Court similarly recognizes all three formulations. *State v. Jensen*, 2007 WI 26, ¶18, 299 Wis.2d 267, 727 N.W.2d 518.

the declarant; and 4)the context in which the statement was given. See *Ohio v. Clark*, 135 S.Ct. at 2180-2182.

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

Recently, this court, in *State v. Nelson*, 2012 WI App 2, __Wis.2d__, 954 N.W.2d 11, writ denied, February 24, 2021, issued "the first published decision in Wisconsin addressing the Sixth Amendment implications of testimony provided by a medical professional acting as a surrogate for a nontestifying witness in a sexual assault case." *Id.* at ¶63. Applying the "primary purpose" test from *Mattox*, this court concluded that the report and related testimony admitted by the surrogate witness

were nontestimonial, and that the Confrontation Clause was not implicated by the admission of the evidence. *Id.* at ¶47.

Nonetheless, *Nelson* does not stand for the broad proposition that statements from a nontestifying nurse examiner in a sexual assault case, offered through a surrogate witness, are nontestimonial. Justice Davis's concurrence makes this point clear:

> I write separately to emphasize certain aspects of this case, that in my view, inevitably lead to the result we reach but also demonstrate that our decision should not be read as foreclosing the possibility, if not likelihood, that in future cases, the testimony of an examining nurse in a sexual assault case (whether a SANE nurse or anyone else) should be viewed as testimonial, subject to the Sixth Amendment right of confrontation. Consequently, it would be a mistake for future parties considering either the presentation of, or objection to, such testimony, whether it be from a report or otherwise, to take from our decision any message that such testimony is generally admissible. It is not…..

Id. at ¶62.

Justice Davis emphasized that "[a]lthough guidance can be gained from our decision, the underlying evidentiary issue is one that, for better or worse, defies easy characterization, and should be addressed on a case-by-case basis." *Id.* at ¶62.

In rejecting Nelson's argument that the statements admitted through the surrogate were testimonial, the court

focused on evidence in the record which "overwhelmingly suggests Kadamian (the nontestifying witness) is not a SANE nurse and did not perform a SANE examination on J.T." *Id.* at ¶45. The court interpreted the evidence to show that the nontestifying witness was basic nurse practitioner whose examination of the alleged victim was to "evaluate her health condition…treat her…and recommend a health care plan for her going forward." *Id.* at ¶45. The court suggested that a "different result may have ensued" had the surrogate testified for a SANE nurse who conducted a SANE examination. *Id.* at 64.[2]

This is such a case. Here, the record overwhelmingly establishes that C.H. was indeed a SANE nurse, and that she performed a SANE examination on A.B. See 38:41,42,43. The

[2] The court also discussed that Nelson brought his confrontation challenge in the context of a plain error claim as opposed to an ineffectiveness of counsel claim. See Id. at ¶¶69,70 and 72. The court stated that "any claim for relief should fall within the more factually developed confines of an ineffectiveness claim." *Id*. at ¶72. The court reasoned that "we do have a ready-made legal vehicle for learning more-a vehicle that should, in cases where a defendant suffers legitimate, unfair harm from unobjected-to error, provide a level of protection as robust as the plain error doctrine. That vehicle, of course, is an ineffective assistance of counsel claim. Nelson could have brought such a claim, but-perhaps tellingly-did not. Had he done so, it would almost certainly have led to a *Machner* hearing, where the trial court could have learned exactly why counsel did not object and then determined whether the failure to do so was a reasoned choice or an oversight that might lead to a deficiency finding under *Strickland v. Washington*, 466 U.S. 668 (1984)." Id. at ¶69. Of course, Smith's postconviction motion raised Smith's confrontation challenge in the context of an ineffectiveness claim, yet Smith did not receive a hearing.

record also overwhelmingly establishes that the primary purpose of the SANE examination was the collection of evidence to be used in a criminal prosecution.

In this regard, it is important to note that A.B. was evaluated by medical personnel not once, but twice. The first time was at approximately 4:51 a.m. when she arrived at the emergency room of Aurora Sinai Medical Center, received treatment, and was discharged at 6:38 a.m. 38:2-6. Between 4:51a.m. and 6:38 a.m., she received medical care and treatment as outlined in the records, 38:2-6, and Smith concedes that the primary purpose of this first visit was medical in nature.

But then, approximately 15 hours later, at 9:11 p.m., A.B. returned to Aurora Sinai Medical Center, this time to visit the "SATC," sexual assault treatment center." 38:37. C.H.'s notes expressly indicate, "[p]atient reports that she has returned *to have evidence collected and report to police*." 38:37. According to C.H., A.B. wanted the police to be contacted prior to being seen by the nurse in order to "speed up the process." 38:37. C.H.'s

notes similarly indicate that "Milwaukee Sensitive Crimes" unit was contacted, and that she was notified that a "squad will be sent out." 38:37. In a consent form signed by A.B., A.B. was expressly informed that the purpose of the SANE examination was not medical in nature:

> The Sexual Assault Nurse Examiner (SANE) at Aurora Health Care has explained to me that a medical/forensic exam is not a routine medical checkup. **The SANE performing the medical/forensic exam will not identify, diagnose, or treat any medical problems that I may have.** I understand that if the evaluation and care of any physical trauma or psychiatric condition is beyond the scope of the medical/forensic exam, I will be referred to a physician or to the Emergency Department at Aurora Health Care for further medical examination or treatment.

38:43.

The consent form sought authorization for the SANE to perform the following services:

> "visually inspect injuries and possible areas of assault, including the oral cavity, the genitalia, and the rectum. If appropriate, this may include the use of a speculum and /or anoscope;"
>
> "Collect evidence, which may include hair combings, body fluid samples and clothing;"
>
> "Collect blood and/or urine to send for laboratory testing, for the deterction od drugs or alcohol used to facilitate the assault;"
>
> "Photography of external body areas and/or internal anogenital areas, by use of colposcope and/or camera, for the purpose of documenting injury and providing ongoing medical evaluation and/or consulation."

38:43.

Further, under the consent form's own terms, the only medical care to be provided as part of the examination was "[t]esting and/or prophylactic treatment for sexually transmitted infections," a "pregnancy risk evaluation," and "an offer to administer Emergency Contraception." 38:43.[3] Beyond those limited areas, the form advised that A.B. would be referred back to the "Emergency Department at Aurora Health Care for further medical examination and treatment." 38:43.

It is clear then, that the primary purpose of this second visit, was not medical in nature, but rather, as both A.B. and C.H. indicated, "*to have evidence collected and report to the police*."

A consideration of the *Ohio v. Clark* "factors" leads to the same conclusion.

[3] Such services had previously been provided as part of A.B.'s earlier visit to the emergency room. 38:1-7.

First, the formal context of the circumstances from which the statements originate bears out such primary purpose. As discussed above, all the statements at issue stemmed from a formal SANE examination of A.B. by C.H.

In Wisconsin, "forensic nurses" or "sexual assault nurse examiners" are trained and certified through the Wisconsin Department of Justice which operates a "Medical Forensics Program." Ap.111. The explicit and bold banner for the program's web site claims, "Working with crime labs to *collect physical evidence*." Ap.111. Italics added. Under the category of "What is a medical forensic examiner?" the first function noted by the D.O.J. is that "Sexual assault forensic examiners perform the medical forensic exam, gather information for the medical forensic history, collect and document forensic evidence, and document pertinent physical findings from patient." Ap.118. Of course, the D.O.J. notes that they also "testify in court, if needed." Ap.118. Indeed, they are specifically trained in "Courtroom testimony and Legal Considerations." Ap.118. Sexual assault nurse examiners are

additionally trained that their role and purpose is to function as part of a "county based team," a "sexual assault response team," or "SART." Ap.113. Also on the team are a law enforcement representative and a prosecutor. Ap.113.

Given the formal and official context of C.H.'s SANE examination of A.B. and records documenting it, this court cannot fairly view the statements made pursuant to such evaluation as having any *primary* purpose other than to gather, collect, and create evidence to be used in a criminal prosecution. Any medical purpose of the evaluation was minimal and secondary.

Another factor to consider under *Ohio v. Clark*, is whether the statements were given to a law enforcement or a non-law enforcement individual. See *Ohio v. Clark*, 135 S.Ct. at 2182. C.H. was not a law enforcement officer per se but she was an agent of law enforcement. As discussed earlier in this brief, sexual assault nurse examiners are trained that their role and purpose is to function as part of a "coordinated team," a "sexual assault response team," or "SART." Ap.113. Also on the team are

a law enforcement representative and a prosecutor. Ap.113. As such, although C.H. was not a peace officer, she was by formal training and protocol part of the law enforcement and prosecutorial team.

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

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

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

sexual assault forensic examination. See Wis. Stat. §949.26(2)(a) and (b).

Finally, beyond C.H.'s own status as an agent of law enforcement, it is relevant to note that law enforcement, specifically, the Milwaukee Sensitive Crimes Unit, was called as part of the SANE examination process, and indeed, sent a squad unit to the examination. 38:37. The "Sexual Assault Record" designates "Milwaukee PD" as the entity to receive the specified evidence collected by C.H. from A.B. 38:41.

For the above reasons, there can be no credible dispute that the statements generated in connection with C.H.'s SANE examination were statements made effectively to law enforcement. As such, this factor cuts in favor of a determination that the primary purpose of C.H.' statements was to create an "out-of-court substitute for trial testimony."

So too does the "age of the declarant," *Ohio v. Clark*, 135 S.Ct. at 2181-2182. Unlike the declarant in *Ohio v. Clark* who was a three year old child who made statements to his pre-school

teachers, the declarant here was an adult. Not only that, the declarant was, as already discussed in this brief, a professional who was formally and specifically trained to collect, document, and preserve evidence as the primary purpose of her examination of a sexual assault victim.

Additionally, the records of the SANE examination created by C.H., were records which C.H., as a sexual assault nurse examiner, would reasonably expect to be used prosecutorily, and which would be available for use at a later trial. So too, were all of C.H.'s statements within such documents. As such, the statements were "testimonial" not only under the "primary purpose" test, but directly under *Crawford* as well. After all, *Crawford* provides that testimonial statements include "*pre-trial statements that declarants would reasonably expect to be used prosecutorily*," and "[s]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the *statement would be available for use at a later trial."* See *Crawford*, 541 U.S. at 51-52. Italics added. The

records regarding the SANE examination, and all statements by C.H. within such records, fell within these categories.

While C.H.'s SANE examination of A.B. perhaps had some minimal medical purpose, its *primary purpose* was the collection of evidence. For this court to conclude otherwise would require the court to ignore the general role SANE examiners perform in Wisconsin as well as the specific role C.H. played in interacting with A.B. and law enforcement. With the record before it, this court cannot reasonably do.[4]

The record is silent as to C.H.'s unavailability for trial. The record is clear however that Smith had no prior opportunity to cross examine C.H. regarding the histories she took from A.B.., the physical examination she conducted of A.B., and the evidence

[4] Of course, there is significant case law from other jurisdictions where courts have found, under the facts presented in those cases, a victim's statements to a SANE nurse to be testimonial. See for example *Hernandez v. State*, 946 So.2d 1270 (Fla. Dist. App. 2007); *Medina v. State*, 143 P.3d 471 (Nev. 2006); *People v. Stechly*, 870 N.E.2d 333 (Il. 2007); *State v. Bennington*, 264 P.3d 440 (Kan. 2011); *Green v. State*, 22 A.3d 941 (Md. Ct. Spec. App. 2011); *People v. Vargas*, 100 Cal. Rptr. 3d 578 (Cal. Ct. App. 2009); *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008); *State v. Hooper*, 176 P.3d 911 (Idaho 2007); *State v. Romero*, 156 P.3d 694 (N.M. 2007); *U.S. v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005).

that the she collected from A.B. The record is similarly clear that Smith had no prior opportunity to cross examine C.H. regarding the chain of evidence submitted to the Wisconsin State Crime lab for analysis. The record is clear as to these points because at no time did C.H. testify at any proceeding during the case. For these reasons, under *Crawford*, the written documents generated by C.H. in connection with her SANE examination of A.B. were inadmissible. So too was L.K's testimony, as discussed above, which served to introduce before the jury, the personal assessments and conclusions made by C.H. as to her physical examination of A.B., and the histories taken from A.B.

C. Trial counsel's failure to object to the admission of C.H.'s statements was deficient and prejudicial.

At the time of trial, *Crawford*, *Bullcoming*, *Melendez-Diaz*, *Ohio v. Clark*, and *Mattox* were established precedent. Counsel therefore should have known that he had a viable confrontation objection, and made such objection. Attorneys have a duty to know

and be versed in the relevant law. See *State v. Felton*, 110 Wis.2d 485, 507, 329 N.W.2d 16 (1983). Nevertheless, trial counsel did not object, and instead allowed all evidence at issue to be admitted without challenge. Such omission by trial counsel was objectively unreasonable and deficient.

It was also prejudicial. The State's case depended exclusively on DNA recovered from the cervical and vaginal swabs analyzed by the state crime lab. There was no other evidence that linked Smith to A.B. At trial, analyst Michelle Burns testified that Smith was the source of DNA found in the cervical swab sample. 109:99, 110:12. Burns testified that only one in at least seven trillion people could have the same profile as Smith. 110:13. Burns also testified that Smith was the source of the DNA found on the vaginal swab sample, and that to a high degree of probability, Smith was also a contributor to a mixture found in a semen sample taken from A.B.'s underwear. 110:14, 16-17. Burns's testimony in turn hinged on the testimony of L.K. and the written SANE documentation, especially the "inventory" and "chain of custody"

which established the origin of the swab samples and underwear from which Smith's profile was developed. To the extent that L.K.'s testimony and the related documents were inadmissible on confrontation grounds, there was no factual foundation or evidentiary basis for Burns's testimony. Without proper foundation, her testimony too was inadmissible.[5] Had such evidence been excluded, there was a reasonable probability that the outcome of the case would have been different. Quite simply, there would have been no evidence linking Smith to the offense.

At a minimum, Burns's testimony only had meaning when placed in procedural and factual context by L.K.'s testimony and the related SANE documentation. If L.K.'s testimony and the SANE documents generated by C.H. were excluded, as they should have been, the significance of Burns's testimony would have been greatly diminished.

[5]If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods*, and the witness has applied the principles and methods *reliably* to the facts of the case. Wis. R. Evid. 907.02(1). Italics added.

Additionally, Smith was prejudiced in that he was denied the opportunity to challenge the integrity of the evidence collection and documentation procedures carried out by C.H. At the time of trial, C.H. had no chance to cross-examine C.H. about what she observed, heard, and recorded in her examination and history of A.B. Smith also had no chance to expose any biases, exaggerations, or inaccuracies in C.H.'s reports, and no chance to cross-examine her as to whether the samples and evidence ostensibly taken from A.B. were in fact taken from A.B.

Additionally, C.H.'s statements, particularly, her recitation of what A.B. told her, served to bolster A.B.'s credibility and support her version of events. See generally, *State v. O'Brien*, 223 Wis.2d 303, 326, 588 N.W.2d 8 (1999) (observing that in most sexual assault cases, the jury's verdict is a matter of which the person finds more credible-the alleged victim or the defendant). In this case, A.B.'s purported statements to C.H. buttressed her testimony regarding her lack of memory as to what happened to her the night of the alleged assault. This evidence was important

because it was directly probative of A.B.'s capacity or incapacity to consent to sexual relations.

As instructed by the circuit court, to prove Smith guilty, the State had to prove that A.B. was under the influence of an intoxicant to a degree which rendered her incapable of giving consent. 111:83. Toward this end, the State introduced testimony from A.B. regarding her inability to recall what happened to her after arriving at the Rave. A.B. testified that she did not remember entering the Rave, checking her coat, or using the bathroom. 109:12. A.B. testified that although she recalled being outside, she did not remember actually going into the concert portion of the Rave. 109:112. A.B. testified that she did not remember "anything at all" after she arrived at the Rave. 109:112. A.B. testified that her next memory was "waking up in the hospital." 109:112. A.B. testified that while at the hospital, she went to the bathroom and noticed blood in the toilet and on her underwear. 109:15. A.B. testified that she then started crying, and told the nurse that she only bleeds after sex. 109:115.

C.H.'s statement regarding what A.B. told her had the effect of bolstering this line of testimony. In doing so, C.H.'s statements helped the State establish an element of the offense, that A.B. was under the influence to such a degree that night that she lacked capacity to consent.

Evidence bolstering A.B.'s version of events was crucial because there was significant evidence in the record which indicated that A.B. was not so intoxicated that she lacked the capacity to consent.

A.B. herself testified that she only had a "medium" amount to drink that night, and was not "blackout drunk." 109:10-11. A.B. recalled drinking "shots" of alcohol and a mixed drink before going to the concert. 109:10. A.B. denied taking narcotics, ecstasy or "anything like that". 109:25. A.E., A.B.'s sorority sister, testified that while in the car on the way to the concert, A.B. looked like she "had something to drink" but appeared within the "norm." 108:45. A.E. testified that she "really didn't see anything different" about A.B. 108:45. When asked by the prosecutor if A.B. was acting

strange, A.E. testified, "not at all." 108:46. With respect to how A.B. appeared at the concert, A.E. confirmed that other than being "tipsy," A.B. did not seem out of the ordinary. 108:53.

Such observational evidence of A.B.'s lack of intoxication was supported by toxicological evidence. In this regard, L.M., a toxicologist from the Wisconsin State Crime lab testified that no ethanol was detected in the samples of A.B.'s blood and urine. See 110:52-54. L.M. additionally confirmed that there was no conclusive evidence of any type of "date rape" drug found in A.B.'s blood or urine. See 110:55-58, and 67-68. Additionally, as early as 4:51 a.m., when A.B. first arrived at the emergency department, the treating physician observed that she was "awake, alert and orientated," and that her vital signs were "normal." See 38:8. Such evidence supported the defense theory that A.B., while in a "perfectly consensual position," "decided to have sex with a stranger." 112:29-30.

C.H.'s statements as to what A.B. told her helped the State address this unfavorable evidence by bolstering A.B.'s testimony

through prior statements by A.B. that were arguably consistent with her testimony.

II. Trial counsel was ineffective in failing to object to, and seek a remedy for, the admission of the Department of Corrections photograph of Smith, and testimony from two law enforcement officers which highlighted for the jury that the photo was obtained from the Department of Corrections.

Evidence that Smith's photo came from the Department of Corrections reasonably communicated to the jury a number of things. First, it communicated that Smith had been to prison; second, it communicated that Smith had been on probation or extended supervision; third; it communicated both of those things. At a minimum, the evidence necessarily communicated that Smith had previously been convicted of a crime.

For these reasons, the evidence was prohibited by §904.04(2) which provides in relevant part as follows:

> **(2)** OTHER CRIMES, WRONGS, OR ACTS.
>
> **(a)** *General admissibility.* Except as provided in par. (b) 2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.

That Smith may have been to prison or may have been on supervision at some time in the past was not admissible to prove that he acted in conformity with such character, in this instance, by assaulting A.B. That Smith had been convicted of a crime at some time in the past was similarly not admissible to prove that he acted in conformity with such character.

Such evidence was also prohibited by §904.02 which provides that "[e]vidence which is not relevant is not admissible." The operative legal standard for what is or is not "relevant evidence" is Wis. Stat. §904.01. Such section defines "relevant evidence" as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

That Smith may have been to prison or may have been on supervision in the past, and that he had been convicted of a crime in the past, had no tendency to make it more or less probable that he assaulted A.B.

As such, under §§904.04(2) and 904.02, trial counsel had a legal basis to object to the admission of Smith's DOC photo and the testimony about it. Reasonably prudent counsel would have objected to the testimony, moved to strike it, requested a cautionary instruction, and/or moved for a mistrial. Trial counsel failed to do any of those things. Trial counsel's failure in this regard was objectively unreasonable.

It was also prejudicial. In *Paulson v. State*, 118 Wis. 89, 94 N.W. 771 (1903), the Wisconsin Supreme Court explained the hazards in a jury's learning of other alleged bad acts by a defendant:

> *[Other cases] are cited more especially to show how uniformly courts have held that one cannot be deemed to have had fairly tried before a jury the question of his guilt of the offense charged when their minds have been prejudiced by proof of bad character of accused or former misconduct, and thus diverted and perverted from a deliberate and impartial consideration of the question of whether the real evidentiary facts hasten guilt upon him beyond a reasonable doubt. In a doubtful case, even the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent it having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect.*

Id. at 99.

Consistent with such rationale, the Supreme Court has stated that as a general rule, receipt of evidence of the

defendant's bad character or commission of specific disconnected acts is prejudicial error. See *Hart v. State*, 75 Wis.2d 371, 394-395, 249 N.W.2d 810 (1977), citing *Fischer v. State*, 226 Wis.2d 390, 399, 276 N.W.2d 640 (1937); see also, *State v. Spraggin*, 77 Wis.2d 89, 101, 252 N.W.2d 94 (1977)(admission of other acts evidence held to be reversible error); *State v. Poh*, 116 Wis.2d 510, 531, 343 N.W.2d 108 (1984)(admission of other acts evidence held to be reversible error). The evidence at issue here fell into this category. This court should conclude that the admission of the "other acts" evidence was prejudicial as a matter of law.

If the court is not inclined to deem the evidence prejudicial as a matter of law, it must at least recognize that as a matter of fact it caused unfair prejudice to Smith:

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. *Internal citations omitted.* In this case the danger of unfair prejudice was that the jurors would be so influenced by the other acts evidence that they would be likely to convict the defendant because the other acts evidence showed him to be a bad man.

State v. Sullivan, 216 Wis. 2d 768, 790 576 N.W.2d 30 (1998).

For a number of reasons, such is the case here.

First, the "other acts" evidence in this case was not only evidence of other wrongs, it was evidence of other crimes. It was also evidence that Smith's other crimes were so serious that he we went to prison, and was subject to the supervision of the Department of Corrections.

Second, this harmful depiction was made more meaningful given that Smith did not testify in the case. Had Smith testified, the State could have impeached his testimony by asking him if he had ever been convicted of a crime, and if so, how many times. Smith of course did not testify, and the State had no direct and proper vehicle for introducing before the jury evidence of his past criminal history. Evidence demonstrating that Smith's photo came from the Department of Corrections gave the State an indirect yet improper vehicle. The jury was then able to consider the improper "other acts" evidence in evaluating the State's case, and the defense offered by Smith.

Third, the harm or prejudice caused by the admission of such evidence was not mitigated by the striking of the evidence or by the issuance of a limiting instruction. The evidence as such was allowed to resonate wholly unfettered in the jurors' consciousness.

Fourth, the evidence was of course not offered for any proper purpose under *Sullivan,* and there was no proper *Sullivan* analysis.

Fifth, as discussed at pages 37-38 of this brief, the State's case against Smith was thin, and its evidence contradicted.

Finally, this court must consider the cumulative effective of all errors. See *State v. Thiel*, 2003 WI 111, ¶¶59-60, 264 Wis.2d 571, 665 N.W.2d 305. In this regard, as discussed earlier in this brief, the admission of C.H.'s statements had the effect of improperly, and unfairly, bolstering A.B.'s testimony and version of events. The "other acts" evidence had the effect of tainting the juror's view of Smith, and giving it a reason to credit A.B.'s version of events rather than the defense theory of consent. Given the thin,

and contradicted state of the evidence, it is probable that without trial counsel's cumulative errors in responding to the evidence against Smith, the jury would have had a reasonable doubt as to guilt. Trial counsel's errors however tipped the scale in the opposite direction. Trial counsel's errors directly helped the State prove its substantive case, and allowed the State to taint the jury's view of Smith, and discredit his defense.

III. The circuit court erred in denying Smith's postconviction motion without an evidentiary hearing.

A. Standard of review

A defendant's claim that counsel provided ineffective assistance does not automatically trigger a right to an evidentiary hearing. *State v. Allen*, 2004 WI 106, ¶10, 274 Wis.2d 568, 682 N.W.2d 433. A court may deny the motion without an evidentiary hearing if the motion does not raise facts sufficient to entitle the movant to relief, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not

entitled to relief. *See id.* at ¶9. A circuit court must hold an evidentiary hearing if the defendant's motion raises sufficient facts that, if true, would entitle him to relief. See *State v. Burton*, 2013 WI 61, ¶38, 349 Wis.2d 1, 832 N.W.2d 611. Whether a motion alleges such facts is a question of law subject to de novo review. *Id.*

B. *Smith's postconviction motion required an evidentiary hearing*.

In support of this argument, Smith incorporates all factual references and legal arguments made in Sections I and II as they are relevant to this argument as well. Smith maintains that the record, as referenced throughout this brief, establishes that he received ineffective assistance of counsel. As such, Smith requests that this court vacate the judgment of conviction and sentence and remand the case for a new trial.

In the alternative, Smith maintains that he has at least established that he is entitled to an evidentiary hearing on the issue. Smith's postconviction motion sufficiently alleged facts that, if true, would entitle him to relief. In this regard, the motion alleged specific omissions by trial counsel. 76:14-15. In addition to

alleging specific deficiencies by trial counsel, Smith specifically alleged in his postconviction motion how such deficiencies caused him prejudice. 76:15-20. This court is required to accept as true the facts alleged in the motion. See *State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W.2d 50. Smith's postconviction motion alleged sufficient facts both as to deficiency and prejudice. The motion did not allege merely conclusory allegations. Finally, the record does not conclusively establish that Smith is not entitled to relief. If anything, the record establishes that he is. For these reasons, if this court does not grant a new trial on grounds of ineffective assistance of counsel, it should at least remand the case for an evidentiary hearing. This court's decision in *Nelson*, 2021 WI App 2, ¶69, seems to warrant such result.

CONCLUSION

For the above reasons, this court should vacate the judgment of conviction and sentence, and grant Smith a new trial; in the alternative, given that the circuit court denied Smith's postconviction motion without an evidentiary hearing, this court should at a minimum remand the case for such a hearing.

Dated this 30th day of March 2021.

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 8228 words.

Dated this 30th day of March 2021.

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

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

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

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the Interim Rule For Wisconsin Appellate Electronic Filing Project, Order No. 19-02. I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

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