STATE OF WISCONSIN

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

DISTRICT I

Case No. 2021AP0072-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRELL K. SMITH,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

A young woman underwent a sexual assault exam and DNA swab after waking up in a hospital with no memory of the previous several hours. A subsequent DNA test revealed that Darrell K. Smith had sexual intercourse with her. Smith was convicted of second-degree sexual assault.

1. Was Smith's trial counsel ineffective for not objecting, on Confrontation Clause grounds, to the introduction of the examination report stating that the nurse took a DNA swab?

The circuit court answered: "No."

This Court should affirm.

2. Was Smith's trial counsel ineffective for not objecting to a Department of Corrections photograph as Smith on the grounds that it constituted other acts evidence used to prove his propensity to commit crimes?

The circuit court answered: "No."

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

This is a "cold hit" DNA case. Alice,[1] a college student, went to a concert after drinking with friends. After arriving at the concert, the next thing she remembered was waking up in the hospital and suspecting that she had been sexually assaulted. She underwent a sexual assault examination, which included a vaginal and cervical swab. Semen was identified from these swabs. The DNA profile was entered into the CODIS database and was determined to belong to Darrell K. Smith, a man in his fifties who Alice did not know. Smith was charged with second-degree sexual assault and was found guilty by a jury.

Smith argued that his trial counsel was ineffective for two reasons. First, he argued that his counsel should have objected, on Confrontation Clause grounds, to the sexual assault examination report from the (non-testifying) examining nurse stating that vaginal and cervical swabs were conducted. He argued that without this report, there would have been no basis to introduce the DNA test result. Second, he argued that a Department of Corrections photograph that was shown to Alice and later shown at trial constituted impermissible other acts evidence. The circuit court denied Smith's motion without a hearing. The circuit court held that counsel did not perform deficiently because the law regarding sexual assault examinations and the Confrontation Clause was unsettled and went on to conclude that the report nevertheless was not testimonial hearsay. Regarding the photograph, the circuit court held that Smith was not prejudiced due to the overwhelming evidence of his guilt. Smith now appeals.

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[1] Alice, Mary, Tammy, Ellen, Ryan, and David are all pseudonyms.

Smith is not entitled to a *Machner*[2] hearing[3] on his ineffective assistance claims. First, the law was not settled as to whether or when a sexual assault examination can produce testimonial hearsay, so counsel did not perform deficiently by not objecting on Confrontation Clause grounds. And even if this Court reaches the merits, this Court should conclude that the report was not testimonial hearsay because its primary purpose was not to serve as a substitute for trial testimony. Regarding the photograph, counsel did not perform deficiently because the photograph was not other acts evidence, and in any event, Smith was not prejudiced due to the overwhelming evidence of his guilt.

STATEMENT OF THE CASE

On the night of February 6, 2016, Alice went to a bar in Milwaukee with several friends and became intoxicated. (R. 1:1.) The next thing she remembered was waking up in the hospital bleeding from her vagina. (R. 1:1–2.) Alice became concerned that someone may have had sexual intercourse with her without her consent, so she underwent a sexual assault examination, which included vaginal and cervical swabs. (R. 1:2.) Semen was located during the swab. (R. 1:2.) The DNA profile was entered into the Combined DNA Index System (CODIS) database and was determined to match Smith's DNA profile. (R. 1:2.) Smith was charged with second-

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[2] *State v. Machner*, 101 Wis. 2d 79, 303 N.W.2d 633 (1981).

[3] Smith asks this Court to grant him a new trial on his ineffective assistance claim; he requests a *Machner* hearing only in the alternative. (Smith's Br. 49.) However, a postconviction *Machner* hearing is a necessary prerequisite to a finding that counsel performed deficiently. *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W. 2d 409 (Ct. App. 1998). For this reason, the only potential relief available to Smith in this appeal is a remand for a *Machner* hearing.

degree sexual assault. (R. 1:1.) The case proceeded to a jury trial beginning on March 6, 2018. (R. 106).

At trial, Alice's sorority sister Maryexplained that she and Alice were students at the University of Wisconsin-Milwaukee. (R. 108:26.) On the night of February 6, 2016, Alice, Mary, and their friends Tammy and Ellen planned to attend a concert at The Rave in Milwaukee. (R. 108:27–28.) They gathered at a friend's apartment before the concert and drank alcohol. (R. 108:28.) Another sorority sister then drove the four friends to the concert. (R. 108:30.) After they arrived at the concert, all four of them went to the coat check together. (R. 108:32.) After that, however, Mary and Ellen went into the concert venue. (R. 108:32.) Alice and Tammy stayed behind together. (R. 108:32.) Mary turned around to look for them but saw a security guard talking to them, so she and Ellen continued inside. (R. 108:32.)

Mary did not see Alice for the remainder of the night. (R. 108:33.) She saw Tammy at approximately midnight, however, after she returned to her dorm room. (R. 108:33.) She explained that Tammy was "acting really different" and that she appeared to be "more than drunk." (R. 108:33.) Tammy "wasn't all there" and could not remember anything from that night. (R. 108:33.)

Ellen explained that the four friends were drinking alcohol before the concert. (R. 108:43.) She confirmed that after the coat check, she and Mary went into the venue while Alice and Tammy stayed behind. (R. 108:47.) Ellen also saw Tammy later that night; she explained that Tammy's condition was "scary" because Tammy was uttering incomprehensible statements that were not "logical." (R. 108:49–50.) Tammy also appeared to be having trouble using her arms and legs, and Ellen saw her attempt to stand up but fall down. (R. 108:50–51.) Tammy testified that after getting into the car to go to the concert, the next thing she could remember was looking up at the ceiling of her dorm

room; she had no memory of how she got there. (R. 108:61–62.)

David explained that he was walking home on the night of February 6 when he saw a car "peel off to the side of the road" and stop abruptly. (R. 108:74.) The stop occurred "swiftly for the purpose of the people getting out of the car . . . right away." (R. 108:75.) Two females got out of the car; the first stumbled, and the second "literally fell out of the car." (R. 108:76–77.) David, who was Alice's friend, recognized Alice as the person who fell out of the car. (R. 108:80.) The car left quickly after Alice fell out. (R. 108:80.) David brought Alice back to his house—which at times required him to physically carry her because she was unable to walk on her own—and called Alice's former boyfriend. (R. 108:85–87.) Alice appeared to have been crying shortly before getting out of the car. (R. 108:93–94.)

Alice's former boyfriend, Ryan, arrived to find Alice "pretty unresponsive" and believed that she "had been given something or taken something" aside from alcohol. (R. 108:107.) Alice was unable to formulate sentences, was unable to stand up, and had scratches and vomit on her body. (R. 108:107.) She also appeared to be "terrified." (R. 108:108.) Ryan drove Alice to the hospital because he believed she had been drugged. (R. 108:109.)

Alice testified that she remembered leaving for the concert and feeling "buzzed" but not "blackout drunk." (R. 109:11.) She remembered getting tickets from will call, but the next thing she remembered after that was waking up in the hospital. (R. 109:13.) After waking up in the hospital, Alice noticed blood on her underwear. (R. 109:15.) She explained that "the only time that [she] ever bleed[s] is after sex," so she immediately began crying because she had no memory of having sexual intercourse that night before ending up in the hospital. (R. 109:15.) Alice was transferred to

another hospital because the first hospital did not conduct sexual assault examinations. (R. 109:16.)

LK, a registered nurse who has performed over 500 sexual assault examinations, testified that she was the manager of the Sexual Assault Treatment Center program at Aurora hospital in Milwaukee. (R. 109:44–46.) She explained to the jury how sexual assault examinations are conducted. (R. 109:46–48.) For suspected vaginal assaults, a vaginal and cervical swab are conducted. (R. 109:49–50.) She explained that the cervix is at the end of the vaginal canal, about 4–5 inches inside the body. (R. 109:54–55.)

LK explained that she reviewed the medical report of another Sexual Assault Nurse Examiner (SANE), CH, who no longer worked at the hospital. (R. 109:55–56.) Alice had reported that she went to a concert with friends and did not remember anything else until waking up in the hospital. (R. 109:62–63.) Alice consented to a collection of evidence and of blood. (R. 109:64.)

LK was shown the chain of custody evidence report, which was entered into the record, and confirmed that it shows a sexual assault kit was taken. (R. 109:64.) Officer James Henry was presented with the same chain of custody form and confirmed that he personally received the sexual assault kit in undamaged and sealed condition and brought it from the hospital to a secure evidence room. (R. 109:36.)

Crime lab analyst Michelle Burns testified that she examined the vaginal and cervical swabs from Alice's sexual assault kit. (R. 109:91.) Semen was identified on both swabs. (R. 109:92.) Burns explained that the DNA profile from the semen was entered into the Combined DNA Index System (CODIS), a nationwide DNA testing system where laboratories upload "unidentified profiles from crimes as well as profiles from convicted offenders or other individuals based on state law." (R. 109:96.) The CODIS system revealed that

the semen found on Alice's cervical and vaginal swabs belonged to Smith. (R. 109:99.) This result was confirmed through a buccal swab taken from Smith. (R. 110:9.)

Alice was shown a photograph of Smith and explained that she had never seen him before, did not know him, and had no memory of having sex with him. (R. 109:23–24.) Detective Jon Charles confirmed that he showed Alice a "Wisconsin Department of Corrections photo of the defendant" (R. 111:17), and Detective Jolene Del Moral additionally explained that she obtained a Department of Corrections photograph of Smith to show to Alice because Smith was not on file in the police department's database (R. 111:30).

Alice's urine initially screened positive for Rohypnol, a "date rape" drug. (R. 110:55.) However, a follow-up test did not confirm this result. (R. 110:56.) A toxicologist explained that this could mean it was a false positive, or it could mean the Rohypnol was present only in a small quantity at the time of the test, as the follow-up test was less sensitive than the original screening test. (R. 110:56–57.) Additionally, she explained that they did not test for the date rape drug "GBH" because sufficient time had passed before the test that it would no longer have been detectable. (R. 110:63.) Finally, Detective Del Moral explained that Alice's medical record from her hospital visit said, "admits to taking molly." (R. 111:39.)

On February 7, the day after the assault, Smith was interviewed by a police detective. (R. 111:22.) Smith was asked whether he had sexual intercourse with "a young, white female" the night before, and he claimed he had not. (R. 111:23.) He went on to deny several more times that he had sexual intercourse with Alice. (R. 111:24.)

The jury found Smith guilty of second-degree sexual assault. (R. 64:1.) He was sentenced to eight years of initial confinement and 12 years of extended supervision. (R. 64:1.)

Smith filed a postconviction motion alleging that his trial counsel was ineffective for two different reasons. (R. 76.) First, he alleged that counsel was ineffective for not objecting on Confrontation Clause grounds to LK's testimony about the sexual assault exam conducted by CH. (R. 76:8.) He asked the circuit court to conclude that a SANE examination report is testimonial hearsay, and that counsel was therefore ineffective for not objecting. (R. 76:8.) Second, he argued that the Department of Corrections photograph constituted impermissible "other acts" evidence because it hinted to the jury that he was convicted of a crime in the past, and that counsel was therefore ineffective for not objecting to its admission. (R. 76:1–2.)

The circuit court denied Smith's motion without a *Machner* hearing. Regarding the Confrontation Clause claim, the circuit court explained that "[w]here the law is unsettled, counsel does not perform deficiently by failing to challenge it." (R. 87:4.) The circuit court held that because the law is unsettled as to whether a SANE examination produces testimonial hearsay, counsel did not perform deficiently by not objecting. (R. 87:4.) The circuit court then went on to conclude that the SANE report was not testimonial and that its admission therefore did not violate the Confrontation Clause. (R. 87:5.) Finally, regarding Smith's other acts argument, the circuit court found there was no reasonable probability that the admission of the photograph affected the verdict. (R. 87:6.) Smith now appeals.

STANDARD OF REVIEW

"Ineffective assistance of counsel claims 'present mixed questions of fact and law.'" *State v. Reinwand*, 2019 WI 25, ¶ 18, 385 Wis. 2d 700, 924 N.W.2d 184 (citation omitted). The circuit court's findings of fact are upheld "unless they are clearly erroneous." *Id.* (citation omitted). "However, whether counsel's performance was deficient and whether a defendant was prejudiced thereby" are questions of law subject to this Court's independent review. *Id.* (citation omitted).

Whether a motion alleges sufficient facts to entitle a defendant to a *Machner* hearing is a question of law that this Court reviews de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

ARGUMENT

I. Smith is not entitled to a *Machner* hearing on his claim that counsel was ineffective for not objecting to the SANE report because the law was not settled and because the report was not testimonial hearsay.

A. A defendant faces a high bar in proving ineffective assistance of counsel.

This Court reviews ineffective assistance of counsel claims under the two-part *Strickland* test. *Reinwand*, 385 Wis. 2d 700, ¶ 40. A defendant claiming ineffective assistance of counsel must prove both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Id.* ¶¶ 40, 42.

"To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are 'outside the wide range of professionally competent assistance.'" *State v. Beauchamp*, 2010 WI App 42, ¶ 15, 324 Wis. 2d 162, 781 N.W.2d 254 (quoting *Strickland v.*

Washington, 466 U.S. 668, 690 (1984)). This Court "strongly presume[s]" counsel has rendered constitutionally adequate assistance. *Strickland*, 466 U.S. at 690. This Court finds deficient performance only if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Additionally, "[a]n attorney does not perform deficiently by failing to make a losing argument." *State v. Jacobsen*, 2014 WI App 13, ¶ 49, 352 Wis. 2d 409, 842 N.W.2d 365.

"[C]ounsel's performance need not be perfect, nor even very good, to be constitutionally adequate." *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695.

The second prong of the *Strickland* test is prejudice. Prejudice means counsel's alleged errors "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. To prove prejudice, "[t]he 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." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Strickland asks whether it is 'reasonably likely' the result would have been different" if not for counsel's alleged error. *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (citing *Strickland*, 466 U.S. at 696). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Richter*, 562 U.S. at 111–12 (citing *Strickland*, 466 U.S. at 693, 697).

B. Smith's claim of deficient performance fails because the law was not settled with respect to whether statements made during a sexual assault examination may be testimonial

In order for Smith to succeed in his deficient performance claim, it is not enough for him to merely persuade this Court that the information from the SANE examination was testimonial hearsay; he must also prove the law was settled regarding whether, or when, a SANE exam produces testimonial hearsay.

"[T]he test for effective assistance of counsel is not the legal correctness of counsel's judgments, but rather the reasonableness of counsel's judgments." *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993) (emphasis omitted). For this reason, a defendant claiming ineffective assistance must "demonstrate that counsel failed to raise an issue of settled law." *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93. An issue of law is not settled if there is no binding case law on point. *State v. Van Buren*, 2008 WI App 26, ¶ 19, 307 Wis. 2d 447, 746 N.W.2d 545. Additionally, "[w]hen case law can be reasonably analyzed in two different ways, then the law is not settled." *State v. Jackson*, 2011 WI App 63, ¶ 10, 333 Wis. 2d 665, 799 N.W.2d 461.

Here, Smith can point to no binding case law discussing whether, or under what circumstances, the statements contained in a SANE examination report are testimonial hearsay. On the contrary, Smith cites this Court's recent decision in *State v. Nelson*, 2021 WI App 2, ¶ 16, 395 Wis. 2d 585, 954 N.W.2d 11, and concedes that it is "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.* ¶ 63 (Davis, J., concurring); (Smith's Br. 21.) *Nelson* was a splintered decision that did not

clearly settle the issue of whether, or in what circumstances, some or all of the information in a SANE report can be testimonial hearsay.

More important for the purposes of this case, however, is the fact that *Nelson*—which Smith concedes was the "first published decision" on this topic (Smith's Br. 21)—was not yet published at the time of Smith's 2018 jury trial. This necessarily means there was no binding case law on point at the time of Smith's trial. In other words, the law was unsettled. *Van Buren*, 307 Wis. 2d 447, ¶ 19; *Jackson*, 333 Wis. 2d 665, ¶10. For this reason, this Court need not address the issue of whether any of the statements contained in the SANE examination report were testimonial hearsay. The law was not settled, so counsel did not perform deficiently by not objecting, regardless of how this Court may settle the issue in a future case. *Brietzman*, 378 Wis. 2d 431, ¶ 49.

C. Counsel's performance was not deficient because the information from the SANE examination was not testimonial hearsay

As explained above, counsel did not perform deficiently because the law was not settled as to whether, or under what circumstances, information contained in a SANE examination report can be testimonial hearsay. This Court therefore need not reach the merits of the issue. If this Court disagrees, however, this Court should conclude that there was no Confrontation Clause violation in this case because the information in the SANE report was not testimonial.

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. The purpose of the Confrontation Clause "is to ensure the reliability of testimony by allowing the accused to challenge a witness's statements 'in the crucible of cross-

examination.'" *Reinwand*, 385 Wis. 2d 700, ¶ 21 (citation omitted). The Confrontation Clause bars the admission of testimonial hearsay statements unless 1) the declarant is unavailable, and 2) the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 54–55 (2004).

In contrast, hearsay statements that are not testimonial do not implicate the Confrontation Clause. *Reinwand*, 385 Wis. 2d 700, ¶ 23; *Michigan v. Bryant*, 562 U.S. 344, 354 (2011). Nontestimonial hearsay statements "are admissible so long as the rules of evidence permit their admission." *Reinwand*, 385 Wis. 2d 700, ¶ 23. A hearsay statement is testimonial only if "in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Ohio v. Clark*, 576 U.S. 237, 245 (2015) (citation omitted).

"[The] 'primary purpose' test is an objective test." *Reinwand*, 385 Wis. 2d 700, ¶ 24 (quoting *Clark* 576 U.S. at 244). "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Bryant*, 562 U.S. at 360. Courts look to four factors to determine whether a statement is testimonial: "(1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant and (4) the context in which the statement was given." *State v. Mattox*, 2017 WI 9, ¶ 32, 373 Wis. 2d 122, 890 N.W.2d 256 ((footnote omitted) citing *Clark*, 576 U.S. at 244–48). In this case, an analysis of the four *Mattox* factors demonstrates that the statements in CH's report were

nontestimonial, so their admission did not violate the Confrontation Clause.

1. The formality / informality of the situation

The first factor is the formality or informality of the situation and the interrogation. *Mattox*, 373 Wis. 2d 122, ¶ 32. "A 'formal station-house interrogation' . . . is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused." *Reinwand*, 385 Wis. 2d 700, ¶ 26 (quoting *Clark*, 576 U.S. at 245).

In this case, the SANE examination took place in an informal setting, making the report unlikely to be testimonial. Far from the "formal station-house interrogation" contemplated by *Clark* and *Reinwand*, the conversation in this case was not an interrogation at all—it was an examination of a patient by a nurse. And the conversation took place in the informal location of a hospital, not in a formal setting such as a police interrogation room. The examination was conducted by a nurse without assistance by a police officer. The informality of the setting surrounding the medical examination weighs strongly in favor of a primary purpose other than providing an out-of-court substitute for trial testimony. *Mattox*, 373 Wis. 2d 122, ¶ 32.

2. Whether the statement was given to a member of law enforcement

The second factor is whether the statement was given to a member of law enforcement. *Mattox*, 373 Wis. 2d 122, ¶ 32. While the United States Supreme Court has "stopped short of adopting a 'categorical rule' that statements to non-law enforcement individuals will never implicate the Confrontation Clause," statements made to non-law

enforcement officers are "much less likely to be testimonial." *Id.* ¶ 34.

In this case, the SANE examination was a conversation between a nurse and a patient. There is no indication that a police officer participated in the examination. Smith spends significant timing explaining that a SANE nurse works closely with law enforcement and prosecutors for the purpose of gathering evidence in sexual assault cases. (Smith's Br. 28–29.) But regardless of whether CH may work with law enforcement officers in certain situations, CH herself is not a law enforcement officer—she is a nurse.

Smith claims that CH is an "agent of law enforcement by statute." (Smith's Br. 29.) In support, he cites Wis. Stat. §§ 949.20, 949.24(1), & 949.26(1). But these statutes merely explain that *any* heath care provider—defined as "any person providing health care services," whether a SANE nurse or otherwise—may choose to apply for reimbursement for examination costs if they conduct an examination to gather evidence for a sex offense. Wis. Stat. §§ 949.20, 949.24(1), & 949.26(1). The statutes Smith relies on do not even differentiate between a SANE nurse versus any other medical professional. Further, the statutes merely state that a health care provider *may* apply for reimbursement from the Department of Justice if he or she so chooses—Smith does not even assert that, in this case, CH *did* apply for reimbursement through this program. (*See* Smith's Br. 29–30.)

Additionally, Smith's assertion that "the statute also prohibits health care providers from billing patients or their insurers for the cost of the sexual assault forensic examination" is incorrect. (Smith's Br. 29–30.) Instead, the statute merely prohibits a health care provider who has chosen to apply for reimbursement for an examination from the department of justice from "double-dipping" by also charging the victim for that same examination. *See* Wis. Stat.

§ 949.26(2). And even if Smith were correct, it is not clear why this would render CH an agent of law enforcement.

In short, the statutes cited by Smith cannot reasonably be construed to designate CH as an agent of law enforcement. Because CH is not a law enforcement officer, the second *Mattox* factor weighs strongly in favor of a primary purpose other than providing an out-of-court substitute for trial testimony. *Mattox*, 373 Wis. 2d 122, ¶ 34.

3. The age of the declarant

The third factor is the age of the declarant. *Mattox*, 373 Wis. 2d 122, ¶ 32. "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." *Clark*, 576 U.S. at 247–48. In *Clark*, for example, the declarant was a three-year-old child, which made the child's statements "extremely unlikely" to be testimonial. *Id.* at 248.

Smith asserts that because CH was an adult, the third Mattox factor cuts in favor of a finding that the primary purpose of the SANE examination was to create an out-of-court substitute for trial testimony. (Smith's Br. 30–31.) But this is not how courts analyze the third *Mattox* factor. While the fact that the declarant is a child makes a statement less likely to be testimonial, the reverse is not true if the declarant is an adult. Rather, as the Wisconsin Supreme Court recently explained, "that the declarant is an adult is a neutral factor, making the statement neither more nor less likely to be testimonial." *Reinwand*, 385 Wis. 2d 700, ¶ 29. In this case, CH was an adult, so the age of the declarant is a neutral factor that "does not help us determine the statement's primary purpose." *Id.*

4. The context in which the statement was given

The fourth and final *Mattox* factor is "the context in which the statement [is] given." *Mattox*, 373 Wis. 2d 122, ¶ 32. "Courts must evaluate challenged statements in context." *Clark*, 576 U.S. at 249. Statements are made in the context of an ongoing emergency, for example, are unlikely to be testimonial, as responding to the ongoing emergency is likely to be the primary purpose of the conversation. *See Clark*, 576 U.S. at 244; *Bryant*, 562 U.S. at 356–57. The circumstances surrounding a statement often provide insight into what the statement's objective primary purpose would have been.

In this case, reasonable participants in the conversation between CH and Alice would not have had the objective primary purpose of creating a substitute for trial testimony. Rather, there would have been at least two nontestimonial purposes that took greater priority: 1) to determine what happened to Alice for treatment purposes, and 2) to respond to a potential ongoing emergency of a dangerous sexual predator of unknown identity on the loose.

First, the objective primary purpose of the SANE examination would have been to figure out *whether* Alice was sexually assaulted so that she could receive whatever treatment, medication, counseling, or other services she needed. As discussed above, Alice underwent a SANE examination because, due to finding blood in her underwear, she was afraid that she may have been sexually assaulted. (R. 109:15.) As Alice told CH, however, she had absolutely no memory of nearly the entire night leading up to her arrival in the hospital. (R. 37:38.) Based on this information, CH could not have known *whether* Alice had been sexually assaulted, much less by whom. For this reason, a reasonable person in CH's position would have had a primary purpose of figuring out what had happened to Alice so that she could obtain the appropriate treatment.

Second, the context shows that reasonable participants would have had a purpose of responding to the potential ongoing emergency of protecting the public from a rapist on the loose. The United States Supreme Court has explained that statements arising in the context of an "ongoing emergency" are unlikely to be testimonial for confrontation clause purposes. *Bryant*, 562 U.S. at 361. "[T]he crux of the inquiry is whether the statement is made to 'end[ ] a threatening situation' (not testimonial) or to 'prove[ ] past events potentially relevant to later criminal prosecution' (testimonial)." *State v. Jensen*, 2021 WI 27, ¶ 28, 396 Wis. 2d 196, 957 N.W.2d 244 (citations omitted). In *Bryant*, for example, a dying individual's statement that the defendant had shot him was not testimonial because its primary purpose was to assist police in responding to the threat posed by a potentially dangerous criminal on the loose. *Bryant*, 562 U.S. at 378.

The United States Supreme Court clarified in *Bryant* that an "ongoing emergency" need not be limited to the particular victim who is being questioned. "An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized because the threat to the first responders and public may continue." *Bryant*, 562 U.S. at 363. This is especially true where, as here, the offense does not involve "domestic violence, a known and identified perpetrator," or "a neutralized threat." *Id.*

In this case, the SANE examination occurred in the context of an ongoing emergency. As explained earlier, Alice feared that she had been sexually assaulted but had no idea by whom. Evidence suggested that Alice may possibly have been drugged. (R. 108:109; 110:55.) And crucially, this was not a case that involved domestic violence, a known and identified perpetrator, or a "neutralized threat." *See Bryant*, 562 U.S. at 363. If it turned out Alice had been sexually assaulted (again,

at the time of examination, CH did not even know whether a sexual assault occurred), this would mean that a rapist was still on the loose and able to victimize others. It was imperative to try to catch this person as quickly as possible to protect potential future victims. Reasonable participants to the examination would have had a purpose of identifying and responding to this ongoing emergency.

While it comes from a plurality opinion, the United States Supreme Court's explanation in *Williams v. Illinois*, 567 U.S. 50, 58 (2012) of the reasons a DNA report was nontestimonial is highly persuasive in this case:

> The Cellmark [DNA] report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. *The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose.* And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today.

Id. (plurality opinion) (emphasis added). In this case, CH's report was similarly created before any suspect was identified (and before they even knew whether there *was* a suspect), and the mere fact that CH swabbed Alice for DNA does not tend to incriminate anyone.

The fact that CH had no idea whether any crime had even been committed by anyone, nor who any possible suspect(s) could have been, makes this case significantly different from *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009),

which Smith attempts to analogize to this case. In *Melendez-Diaz*, the defendant was arrested with several bags of suspected cocaine, which was sent to a laboratory for testing. *Melendez-Diaz*, 557 U.S. at 308. The analyst who tested the suspected cocaine did not testify at trial; instead, the prosecution introduced sworn "certificates of analysis" from laboratory analysts stating that the substance was, in fact, cocaine. *Id.* The United States Supreme Court held that these sworn certificates violated the defendant's right to confrontation because they were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id.* at 311 (citation omitted).

Similarly, in *Bullcoming*, the defendant was arrested on suspicion of intoxicated driving and a blood sample was sent to a laboratory for testing. *Bullcoming*, 564 U.S. at 651. At trial, the analyst did not testify; the State instead introduced, through a different analyst, the non-testifying analyst's signed certification stating that the defendant's blood alcohol level was well over the legal limit. *Id.* at 651. Like in *Melendez-Diaz*, the United States Supreme Court held that this report violated the confrontation clause, as it was a "testimonial certification—made for the purpose of a proving a particular fact" by someone who did not testify at trial. *Id.* at 652.

This case is not like *Melendez-Diaz* or *Bullcoming*. Both of those cases involved certified, plainly incriminating documents created for the sole purpose of proving a particular identified suspect's guilt at trial. In this case, in contrast, no one even knew whether there *was* a suspect, much less who any possible suspect(s) could have been, at the time CH conducted the examination and created her report. Thus, it could not have had a primary purpose of substituting for trial testimony against Smith, because at the time of its creation CH did not know who Smith was or even whether criminal charges would occur. And the report is not inherently

incriminating against Smith or anyone else; it merely states that CH obtained vaginal and cervical swabs from Alice. Thus, the context of the statements weighs strongly in favor of a primary purpose other than serving as a substitute for trial testimony.

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Three of the four *Mattox* factors in this case—the formality / informality of the setting in which the statements was given, whether the statement was given to a law enforcement officer, and the context in which the statement was given—weigh strongly in favor of a primary purpose other than serving as a substitute for trial testimony. *See Mattox*, 373 Wis. 2d 122, ¶ 32. A fourth factor, the age of the declarant, is a neutral factor in this case. *Reinwand*, 385 Wis. 2d 700, ¶ 29. Therefore, the SANE examination report was nontestimonial, so its admission did not violate Smith's right to confrontation. Accordingly, counsel was not deficient for failing to object to this evidence.

II. Counsel was not ineffective for not objecting to the DOC photo because the photo was not introduced for the forbidden propensity purpose and because Smith was not prejudiced by any alleged error

1. The Department of Corrections photograph of Smith was not other acts evidence and in any event was not introduced as propensity evidence

Pursuant to Wis. Stat. § 904.04(2)(a), "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." However, "[t]his subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Wis. Stat. § 904.04(2)(a). In other words, the State may introduce evidence of a person's other acts for a nearly infinite number of purposes, but "may not seek to prove a defendant's propensity to commit crimes by showing that the defendant has committed crimes before." *Reinwand*, 385 Wis. 2d 700, ¶ 34.

Smith argues that the Department of Corrections photograph of Smith that was introduced at trial should have been excluded as other acts evidence because it was used to show he had a propensity to commit crimes. (Smith's Br. 40.) But the photograph was not introduced for the forbidden purpose of proving Smith's propensity to commit crimes; it was introduced for the permissible purpose of showing that Alice did not know Smith. Both Detective Charles and Detective Del Moral explained that the reason they obtained the photograph was to show it to Alice to determine whether she knew Smith. (R. 111:15, 30.) Alice explained that she looked at this photograph and told police that she did not know or recognize him. (R. 109:23–24.) Therefore, the photograph was not introduced for the forbidden purpose of proving propensity, but for the permissible purpose of proving that Alice did not know or recognize Smith. For this reason, counsel did not perform deficiently by not objecting to its admission as other-acts evidence. *Strickland*, 466 U.S. at 687.

2. Smith was not prejudiced by any alleged error because the evidence of his guilt was overwhelming.

As explained above, counsel did not perform deficiently by not objecting to the admission of the photograph because the photograph was not other acts evidence. Even if this Court disagrees, however, Smith was not prejudiced because the evidence of his guilt was overwhelming. There was no doubt that Smith had sexual intercourse with Alice, as his semen

was located in both a vaginal swab and a cervical swab during her sexual assault examination. (R. 109:99.)

The evidence was also overwhelming that Alice was far too intoxicated to consent to sexual intercourse, and that Smith would have been aware of Alice's state of intoxication. David testified that Alice was so intoxicated she "literally fell out" of Smith's car and needed to be physically carried because she could not even stand. (R. 108:76–77.) Ryan testified that Alice was so intoxicated she could not stand up or even formulate sentences. (R. 108:107.) Alice herself testified that after arriving at the concert venue to pick up her ticket, her memory was completely blank until after she arrived at the hospital. (R. 109:13.) All the evidence showed that Alice's state of intoxication was both severe and obvious, and no reasonable jury would have concluded otherwise.

Next, Smith's repeated and plainly false denials that he had sexual intercourse with Alice—despite the fact that his semen was found inside her vagina—strongly demonstrated consciousness of guilt. And any slight impact the Department of Corrections photograph may have had was significantly tempered by the fact that the jury already knew Smith's DNA was entered into the CODIS database. As discussed above, the jury was explicitly told that the individuals whose DNA are entered into this database are "convicted offenders or other individuals based on state law" (R. 109:96), and Smith does not argue that the fact his DNA was entered in this database was improperly before the jury. For all these reasons, the evidence of Smith's guilt was overwhelming, so there is no reasonable probability that the verdict would have been different if not for the Department of Corrections photograph. Therefore, Smith cannot prove prejudice. *Strickland*, 466 U.S. at 694.

CONCLUSION

This Court should affirm the judgment of conviction and the denial of Smith's postconviction motion.

Dated: July 16, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6592 words.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of July 2021.

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