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 REPLY BRIEF

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

Crawford and its progeny constituted settled law at the time of trial.

The State argues that trial counsel did not perform deficiently because the "law was not settled" with regard to whether a victim's statements during a sexual examination are testimonial. See State's brief, pages 15-16. This argument falls short.

Trial counsel's obligation to object to the admission of C.H.'s statements stemmed from the legal standard as to a defendant's right to confrontation that at the time of trial had been well-established by *Crawford*, *Bullcoming, Melendez-Diaz*, and *Ohio v. Clark,* and state case law following such precedents including *State v. Jensen*, and *State v. Mattox*. Trial counsel should have known that based on the facts before him, and the standard set forth in *Crawford* and its progeny, he had a valid basis to challenge the admission of C.H.'s statements through L.K. Contrary to the State's position, the law was settled, and

available to be applied by trial counsel to the set of facts before him.

The State's argument mischaracterizes a legal standard with the application of that standard to a particular set of facts. A legal standard may be settled yet yield different results based on the facts to which it is applied.

Justice Davis made this point in *State v. Nelson*. In discussing cases from around the country addressing the "Sixth Amendment implications of testimony provided by a medical profession acting as a surrogate for a nontestifying witness in a sexual assault case," Justice Davis noted that there was a "divergence of results," and that "[c]lose inspection reveals that this divergence stems from factual differences among the cases, rather than disagreement on the applicable legal standard." *State v Nelson* at ¶63. Justice Davis stated that "[v]ivid proof of this point comes from two decisions, unanimously decided by the same court on the same day, reaching opposite conclusions about the testimonial nature of a SANE nurse report. *Id.* citing to *State*

v. Bennington, 264 P.3d 440 (Kan. 2011) and *State v. Miller*, 264 P.3d 461 (Kan. 2011). As Justice Davis further recognized, "[i]n short, a SANE or similar exam may give rise to testimonial evidence in one situation and not another." *State v. Nelson* at ¶64.

This does not mean, as the State argues, that the particular standard of law has not been settled. It simply means that the specific facts to which that standard of law applies may yield different conclusions. *Crawford* and its progeny constituted settled law as to a defendant's right to confrontation. Trial counsel was deficient in not employing such law to Smith's advantage.

The primary purpose of the SANE examination was not "to respond to a potential ongoing emergency."

The State argues that the primary purpose of A.B.'s SANE examination was either "to determine what happened to Alice for treatment purposes," or "to respond to a potential ongoing

emergency of a dangerous sexual predator of unknown identity on the loose." See State's brief at page 21.

At pages 24-31 of Smith's brief-in-chief, Smith discusses why the primary purpose of A.B.'s SANE examination was not medical in nature. Smith will not repeat the discussion here.

Instead, Smith will address the State's second posited primary purpose for the SANE examination, "to respond to a potential ongoing emergency of a dangerous sexual predator of unknown identity on the loose." In this regard, the State argues that there was a rapist "still on the loose and able to victimize others" and that it was "imperative to try to catch this person as quickly as possible to protect potential future victims." See State's brief at page 23. Nonetheless, the State also argues that since A.B. "had absolutely no memory of nearly the entire night leading up to her arrival in the hospital," "CH could not have known *whether* Alice had been sexually assaulted, much less by whom," and that "CH had no idea *whether* any crime had even

been committed by anyone…" See State's brief at pages 21 and 23.

The fact that, in the State's words, "no one," including C.H. or A.B. herself,[1] knew whether a sexual assault, or any crime had occurred, belies the notion that the circumstances presented an "ongoing emergency" like that presented in *Michigan v. Bryant*, 562 U.S. 344 (2011). In *Bryant*, the declarant specifically informed police that the defendant had shot him in his abdomen. *Bryant,* 562 U.S. at 349. The case presented the specific context of a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim. I*d.* at 359. The court emphasized that *Bryant* was the first of its "post-Crawford Confrontation Clause cases to involve a gun." *Id.* at 373. The court stated, "[a]t bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within

[1] A.B. only "feared that she had been sexually assaulted." See State's brief at page 22.

a few blocks and a few minutes of the location where the police found Covington." *Id.* at 374.

In contrast, here there was no gun, no crime scene, and no mortal wound. There was not even a definitive report of a crime. Additionally, the State points to no witness who perceived any imminent threat.

In *Bryant*, Justice Scalia stated the following in dissent:

> A final word about the Court's active imagination. The court invents a world where an ongoing emergency exists whenever "an armed shooter, whose motive for and location after the shooting [are] unknown,…mortally wound[s]" one individual "within a few blocks and [25] minutes of the location where the police" ultimately find that victim. Breathlessly, it worries that a shooter could leave the scene armed and ready to pull the trigger again.

In rejecting the majority decision, Justice Scalia stated that "[t]he court's distorted view creates an expansive exception to the Confrontation Clause for violent crimes." *Id.* at 588.

In this case, the State asks this court to adopt an even more "distorted view." It essentially urges the court to find that an "ongoing emergency" existed when it was unclear that a crime had even been committed. This court should refrain from doing so.

Evidence that Smith's photo was from the Department of Corrections was irrelevant and constituted improper other acts evidence.

The State urges that the "Department of Corrections photograph was not other acts evidence and in any event was not introduced as propensity evidence." See State's brief at page 25. In support of this assertion, the State argues that the photograph was introduced for the "permissible purpose of proving that Alice did not know or recognize Smith." See State's brief at page 26.

The State's argument is disingenuous. Even if evidence that police had shown A.B. a photograph of Smith in order to determine if she knew or recognized him, it did not need to introduce evidence before the jury that the photograph was a Department of Corrections photo. The State simply could have introduced evidence that it showed A.B. a photograph of Smith without referencing where it came from, and taking care to omit any incriminating information about the photograph. The State did not need to introduce the photograph itself, a "mugshot," and specifically inform the jury twice, that it came from the

Department of Corrections. Such evidence was irrelevant to the ostensible purpose of showing that A.B. did not know or recognize Smith. Such evidence served no purpose other than to portray Smith in a negative fashion.

Further, even if the State offered the evidence for a proper purpose, and the evidence was relevant to such purpose, it was still subject to exclusion on grounds that the probative value of such evidence was substantially outweighed by the danger of unfair prejudice under Wis. Stat. §904.03 and *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998). Trial counsel was deficient in failing to seek exclusion of the evidence as such.

Evidence of Smith's guilt was not "overwhelming."

The State argues that Smith was not prejudiced by trial counsel's errors "because the evidence of his guilt was overwhelming." See State's brief at pages 26-27. The State specifically argues that "[t]here 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 the sexual assault examination." See State's brief at page 26. This argument means little as the defense in the case was that Smith had consensual relations with A.B. 111:29-30. The State additionally argues that "Alice was far too intoxicated to consent to sexual intercourse, and that Smith would have been aware of Alice's state of intoxication." See State's brief at page 27. As already discussed in Smith's brief-in-chief page 38-39, there was significant evidence in the record which indicated that A.B. was not so intoxicated that she lacked capacity to consent. Finally, the State additionally points to "false denials" Smith made in initially speaking with police. See State's brief at page. 27. While the State casts such denials as showing "consciousness of guilt," they also can be interpreted as an African-American man's distrust in the Milwaukee Police Department and criminal justice system. Smith's initial denials had little probative value, and hardly comprised "overwhelming evidence."

CONCLUSION

For the above reasons, and those provided in Smith's brief-in-chief, this court should vacate the judgment of conviction and sentence, and grant Smith a new trial; in the alternative, this court should at a minimum remand the case for a *Machner* hearing.

Dated this 1st day of August 2021.

Electronically signed by:
Steven W. Zaleski
Zaleski Law Firm
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone), Zaleski@Ticon.net
Attorney for Defendant- Appellant

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 1797 words.

Dated this 1st day of August 2021.

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