STATE OF WISCONSIN

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

DISTRICT II

Case No. 2021AP1590-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTONIO G. RAMIREZ, JR.,

Defendant-Respondent.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER GRANTING A MOTION FOR A NEW TRIAL ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE WILBUR W. WARREN III, AND THE HONORABLE DAVID P. WILK, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT AND APPENDIX

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ISSUES PRESENTED

In 2001, Defendant-Respondent Antonio G. Ramirez, Jr., was convicted upon a jury trial of multiple crimes resulting from his November 1998 and September 1999 sexual assaults of his stepdaughter M.G. The trial included out-of-court statements that then eight-year-old M.G. made to medical personnel and law enforcement.

In 2005, Ramirez's postconviction attorney filed a Wis. Stat. § (Rule) 809.30 motion raising several claims. A claim that admission of M.G.'s statements violated the Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004), was not among them.

In 2020, the United States Court of Appeals for the Seventh Circuit granted Ramirez's petition for a writ of habeas corpus, concluding that postconviction counsel was ineffective for not raising the *Crawford* claim, which was "clearly stronger" than the other claims counsel actually raised. As a result, this Court on the State's motion reinstated Ramirez's direct appeal rights.

In 2021, Ramirez filed a Wis. Stat. § (Rule) 809.30 motion raising two claims. He argued that (1) M.G.'s statements were testimonial and thus their admission violated *Crawford*; and (2) the circuit court denied his right to a fair trial by barring Ramirez from impeaching a State's witness over a grant of immunity the witness received in exchange for his testimony. The circuit court granted Ramirez's motion and ordered a new trial on both grounds.

1. To decide whether the circuit court properly ordered a new trial on the *Crawford* claim, this Court must answer two questions.

    a. M.G. made most of the statements at issue to emergency room medical providers on the night of the September 1999 assault. Under the Wisconsin Supreme

Court's four-factor test in *Mattox*, were these statements of the eight-year-old victim to emergency room staff shortly after the assault *not* testimonial because they were *not* made for the primary purpose of creating an out-of-court substitute for testimony?

This Court should answer yes.

b. Was the admission of M.G.'s testimonial statements made to law enforcement the next day, which merely duplicated her emergency room statements, harmless error?

This Court should answer yes.

2. Was the circuit court's 2001 decision to bar impeachment of a State's witness—whose testimony was duplicated by two other witnesses, and whose reasonable range of answers was limited by certain facts—also harmless error?

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The issues presented may be resolved on the briefs by applying established law to the facts.

STATEMENT OF THE CASE

Charges and Pretrial

In September 1999, Antonio Ramirez was charged with multiple offenses, including two counts of first-degree sexual assault of a child under the age of 13, first-degree sexual assault causing great bodily harm, and child enticement. (R. 527:1–2.) The charges were based on allegations that Ramirez sexually assaulted his stepdaughter, M.G., then seven and

eight years old, in November 1998 and September 1999. (R. 527:2–3.)

According to the criminal complaint, on September 5, 1999, M.G.'s mother Cynthia Ramirez ("Cynthia") stepped out briefly to run an errand, leaving M.G. and her five-year-old brother A.R. alone with Ramirez. (R. 527:2.) Ten minutes later, Cynthia returned to the apartment to find the front door locked. (R. 527:2.) She unlocked it and pushed on the door to enter, but it was blocked by the chain lock. (R. 527:2.) Suspecting something was wrong, Cynthia kicked in the door and found Ramirez standing in M.G.'s bedroom doorway pulling up his pants. (R. 527:2.) Cynthia told police she then saw M.G. on the toilet "with [a] scared look on her face." (R. 527:2.) Cynthia said that she immediately confronted Ramirez, and they began to argue. (R. 527:2.) Cynthia reported that Ramirez physically assaulted her and A.R. and attempted to prevent her from leaving the apartment with the children.[1] (R. 527:2.) Eventually, a relative picked up Cynthia and the children outside the apartment and drove to the relative's residence, where M.G. told Cynthia that Ramirez "had touched her like he's not suppose[d] to." Cynthia called the police. (R. 527:3.)

An officer arrived and drove M.G. and Cynthia to the Kenosha Hospital and Medical Center emergency room for M.G. to be seen for a sexual assault examination. (R. 527:3.) During the examination, M.G. described the assault that happened earlier that night. (R. 527:3.) She also disclosed

[1] Based on these particular allegations, Ramirez was also charged in the complaint with physical abuse of a child, misdemeanor battery for assaulting Cynthia, and false imprisonment. (R. 375:1–2; 527:1–2.) Cynthia recanted at trial and Ramirez was acquitted of these charges. (R. 420:1; 421:1; 422:1.) Ramirez was also acquitted of resisting an officer for alleged conduct occurring when police tried to take him into custody. (R. 423:1.)

that a prior incident in which she had been treated for a serious vaginal injury had not been caused by a fall in the bathtub, as she had reported, but by Ramirez "trying to put his pee pee in her." (R. 527:3.)

Police arrested Ramirez at the apartment on the night of September 5. (R. 527:4.)

Cynthia ultimately did not cooperate with the prosecution, recanting in a series of letters to the court in which her story shifted over time. (R. 355:1–8; 364:1–12; 367:1–12; 570:1–10.) Initially, Cynthia told the court that M.G. was just tired and confused when she told authorities that she had been assaulted, and that M.G. had never said anything like that to her. (R. 367:3–5.) Several months later, Cynthia said that she, Cynthia, made up the entire story out of rage and jealously over Ramirez's drinking and infidelity, and that she had coached her young children to lie to the police and medical personnel. (R. 364:1–7.)

Dr. Michael Schellpfeffer treated M.G. for her November 1998 vaginal injuries. At that time, M.G. reported that the injuries were caused by a fall on the edge of the bathtub, and Cynthia said she knew of no abuse in the home. (R. 551:146–48, 152.) At trial, Dr. Schellpfeffer would testify that the internal vaginal laceration M.G. suffered was atypical of a bathtub "straddle" injury. (R. 551:149–50.) But he ultimately accepted the family's version, recording the cause of injury as a bathtub fall. (R. 551:148.) He did not report the injury as a case of suspected abuse. (R. 551:157.)

Before trial, Dr. Schellpfeffer testified at a hearing that he had felt "[s]ubtly" intimidated by the district attorney. (R. 459:29–30.) The DA had previously commented that the doctor, as a mandatory reporter under Wis. Stat. § 48.981, should have reported the 1998 injury as suspected abuse. (R. 459:29–30.) But the doctor testified that the DA's comments had had no effect on how he would testify at trial. (R. 459:34.)

At the same hearing, a lawyer retained by Dr. Schellpfeffer told the court that he had advised the doctor that he faced some potential criminal exposure for not reporting the incident. (R. 459:21, 30.)

At a subsequent hearing, the district attorney advised the court that Dr. Schellpfeffer would be offered immunity for his testimony in the case. (R. 460:25.) The district attorney said that the idea was Dr. Schellpfeffer's attorney's. (R. 460:32–33.) The district attorney argued at the hearing that it would be improper for defense counsel to reference the grant of immunity at trial, citing *State v. Heft*, 185 Wis. 2d 289, 517 N.W.2d 494 (1994). (R. 460:25–29.) The defense objected, but the court agreed with the district attorney and directed defense counsel not to mention the immunity grant. (R. 460:35.)

Trial

The case was tried to a jury March 5–9, 2001. (R. 462:2–7.)

Nurse Karpowicz-Halpin's examination of M.G. The State's first witness, Registered Nurse Donna Karpowicz-Halpin of the Kenosha Hospital and Medical Center, testified about her examination of M.G. for a sexual assault on the night of September 5, 1999. (R. 462:92, 94.) The nurse testified that when she first saw M.G. upon her arrival at the emergency room around 9 p.m., M.G. "was very distraught, scared . . . . just very, very frightened." (R. 462:96.) The nurse said that M.G. was accompanied in the examination room by her mother and a police officer. (R. 462:95.) The mother, Cynthia, who also appeared "very upset," told the nurse that M.G. was there to be seen for a suspected sexual assault. (R. 462:96–97.) Cynthia told the nurse that she had come home earlier that night to find the door locked, broke down the door, then saw her husband coming out of M.G.'s bedroom pulling

up his pants, and M.G. on the toilet with a bad look on her face. (R. 462:97.)

The nurse testified that she began the examination by asking M.G. if she was in any pain and doing a general physical exam. (R. 462:100–01.) The nurse said that, after spending probably "30 to 45 minutes" building a rapport with the "frightened" eight year old, she began to ask about the assault. (R. 462:100–01.)

In response, M.G. disclosed that "her dad had taken off her pants and [then] he took off his pants, and she was laying on her belly on the bed." (R. 462:102.) The child said that Ramirez then "put his pee-pee by her butt . . . like on top of her." (R. 462:102.) M.G. said that, afterword, "she felt something by her butt, so she went into the bathroom and . . . wiped herself with some tissue and threw it in the wastepaper basket." (R. 462:102–03.) The nurse testified that Cynthia reacted by "crying" and "[h]ugging" M.G., and encouraging her to "tell us the truth." (R. 462:102.)

The nurse asked M.G. if this was the first time something like this had happened. (R. 462:104.) M.G. said that it was not. (R. 462:104.) According to the nurse, Cynthia then asked her daughter if, "when she went to [the hospital] for her vaginal bleeding [in November 1998,] did she really hurt herself on the bathtub," as M.G. had said. (R. 462:104.) "[M.G.] said: No, she hadn't." (R. 462:104.)

The nurse continued: "[W]hen [M.G.] finally said, no, that it didn't happen that way, she started crying and then mom started crying." (R. 462:104.) "[T]he child . . . said" to her mother "that dad had—was trying to put his pee-pee inside of her and that's how she got cut. That it wasn't the bathtub." (R. 462:104.) M.G. also said that Ramirez threatened to hurt "her little brother, her mom or her grandma" if she told anyone about what he had done. (R. 462:105.)

Nurse Karpowicz-Halpin testified that a police officer was at least initially present in the examination room (R. 462:95) but did not mention the officer engaging with anyone in the room during the examination. After M.G. was discharged, the nurse gave a statement to police. (R. 462:98; 491:1.)

Dr. Siegel's examination of M.G. Emergency Physician Suzanne Siegel testified that she evaluated M.G. after Nurse Karpowicz-Halpin's examination. (R. 551:21.) Dr. Siegel said she entered the examination room and spoke with M.G. and her mother. (R. 551:21.) The doctor said that Cynthia recounted breaking down the door and finding M.G. in the bathroom "wiping herself" and her husband leaving M.G.'s room pulling up his pants. (R. 551:22.) The doctor said she then asked M.G. what happened, and M.G. responded that her father had "put his pee-pee by her. And she pointed to her buttock area." (R. 551:23.) Nurse Karpowicz-Halpin was also present for the doctor's examination. (R. 462:105.)

Dr. Siegel said she "[i]nitially . . . started with a general exam; her ears, her mouth, her chest, abdomen and then we proceeded to the vaginal exam." (R. 551:24.) The doctor testified that she observed "a milky discharge coming from [the child's] vaginal area" not normally seen in a small child, and that the child's vaginal area was "irritated" and "red." (R. 551:24.) The doctor testified she used a "Woods lamp" to test for the presence of seminal fluids. (R. 551:24.) She said that when she applied the lamp's blue light, M.G.'s "legs . . . lit up and that suggests seminal fluids." (R. 551:24.) The doctor said she obtained swabs from the child's vaginal and rectal areas and "sent some as evidence and we sent some to our hospital laboratory." (R. 551:24–25.)

Based on the unusual vaginal discharge, irritation in the vaginal area, the results of the Woods lamp test, and M.G.'s report, the doctor concluded that the examination from that night was consistent with sexual misuse. (R. 551:28.)

Dr. Siegel said that, on the night that she examined M.G., she also reviewed medical records from M.G.'s November 1998 visit that were transmitted to her from St. Catherine's Hospital. (R. 551:25, 31.) Dr. Siegel said that the vaginal tear described in those records was also "consistent with sexual misuse." (R. 551:25.) Dr. Siegel testified that M.G.'s November 1998 injury was inconsistent with M.G.'s self-report of falling in the tub. (R. 551:34.) Had she suffered a "straddle" injury in which she had fallen on an object, the doctor explained, "I would expect . . . [to] see bruising, swelling. And there is no record of that here." (R. 551:35.)

Dr. Siegel testified that M.G. and Cynthia were present when she entered the examination room (R. 551:21), and she did not reference a police officer in her testimony.

The responding officer's involvement in the examinations. Police Officer George Larsen testified that he was dispatched to a residence in the city of Kenosha where he met Cynthia Ramirez and another woman. (R. 551:126.) The officer said the women were excited and crying. (R. 551:126–27.) The officer testified that Cynthia told him she believed that, within approximately the past hour, her husband had sexually assaulted her daughter. (R. 551:127.) She described breaking the chain lock to get into the apartment, then finding Ramirez coming out of M.G.'s bedroom pulling up his shorts and seeing M.G. on the toilet. (R. 551:127–28.) According to the officer, Cynthia also said that her son, A.R., told her that "daddy had [M.G.] on the bed face down, and there were boogers on the bed." (R. 551:128.)

Officer Larsen testified that Cynthia wished to pursue a complaint regarding Ramirez's physical assault of her (Cynthia) that night and consented to a search of the family's apartment. (R. 551:129.) The officer then told Cynthia that they needed to go to the hospital "to do a rape kit," and he drove M.G. and Cynthia to the emergency room for the child to be examined. (R. 551:129, 138.) At the hospital—the officer

did not specify when this occurred in relation to the nurse's and doctor's examinations—he gave M.G. a "Shoney bear" to calm her down, and she showed him on the bear where Ramirez had touched her. (R. 551:130, 132.) He said she told him that her father had put her face down on the bed, "and that he put his private by her pooh-pooh." (R. 551:130.) She also said that she went to the bathroom to wipe herself afterword "and there was brown stuff on there." (R. 551:130.) Upon receiving this information, the officer said he stepped out ("she was in the hands of Miss Halpin") to advise officers to check for evidence of the wiping in the bathroom garbage can. (R. 551:130.)

At various points in his testimony, Officer Larsen indicated that he was not present for much of the examinations. When asked if he was there when M.G. disclosed that Ramirez was responsible for her November 1998 injuries, the officer said that he received this information second-hand from Cynthia, who relayed what M.G. had said. (R. 551:130.) When asked if he was there when the Woods lamp was used, he said he was not "because her clothes were off and I stepped out for that." (R. 551:132–33.)

DNA evidence of the September 1999 assault. Vaginal and rectal swabs from Dr. Siegel's examination, as well as the child's underwear, and tissues recovered from the bathroom wastebasket, were submitted to the Wisconsin State Crime Lab. (R. 463:100–01.) All tested positive for the presence of semen, sperm cells, or both. (R. 463:101–06.)

Laura Kwart, a forensic scientist in the DNA analysis unit of the crime lab, testified that the semen and sperm cell DNA matched Ramirez's DNA. (R. 463:96, 106–110.) Kwart testified that there was a one in 20 trillion chance that the DNA evidence from the tissues and the underwear belonged to a Hispanic male other than Ramirez, and a one in 400,000 chance that the DNA found on the vaginal swab belonged to a Hispanic male other than Ramirez. (R. 463:106–10.)

Dr. Guinn's and Dr. Schellpfeffer's testimony about the November 1998 assault. Dr. Judy Guinn of the Child Protection Center of Children's Hospital of Wisconsin, an expert in the medical examination and treatment of child victims of sexual abuse, testified about the nature of M.G.'s November 1998 injuries. (R. 463:119–20.) She explained that a "straddle injury" occurs when a person falls onto an object with their legs spread out. (R. 463:123–24.) She testified that straddle injuries are typically external injuries, usually to the upper genital area, and one-sided. (R. 463:124.)

Examining Dr. Schellpfeffer's treatment records, Dr. Guinn testified that M.G.'s vaginal laceration described therein was "inconsistent with a straddle injury." (R. 463:125–26, 130.) Rather, she testified that M.G.'s injury was "internal," and indicative of "penetrating trauma." (R. 463:126.) She testified that the injury was "diagnostic for sexual abuse." (R. 463:127.) The doctor added that the injury was inconsistent with the child's self-report of falling on the lip of the bathtub, which would have resulted in "more external injury" to the genitals. (R. 463:127.)

Dr. Michael Schellpfeffer, an obstetrician and gynecologist, testified that he treated M.G. in the emergency room on November 8, 1998. (R. 551:141–42.) The doctor recalled that the child was accompanied by her mother. (R. 551:142.) The report the doctor received about M.G.'s case was that Cynthia "had been called from work to come to attend to [an] injury to her daughter, which was said to be a straddle injury on a bathtub." (R. 551:146.)

When Dr. Schellpfeffer initially examined the child, she was "active[ly] bleeding" from a laceration to the perineum, and there was "a significant amount of blood" on a hospital pad that had been placed under her. (R. 551:142–43.) The doctor said he knew that the cut would require surgery. (R. 551:142–43.) After the child was placed under anesthesia, the doctor conducted a fuller examination and discovered a

second laceration of "2 to 2-and-a-half centimeters" "into the vagina." (R. 551:144.) The doctor surgically repaired the lacerations. (R. 551:144–45.)

Dr. Schellpfeffer testified that the lacerations were "not at all typical of . . . straddle injures that [he had] . . . taken care of," which usually involved external bruising. (R. 551:149–50.) M.G. had lacerations, which the doctor testified were "very much like an episiotomy" and "certainly consistent possibly with a penetrating injury." (R. 551:144–45.) But the doctor had asked Cynthia if her daughter could have been sexually abused, and Cynthia said she knew of no such abuse. (R. 551:145, 146, 152.) The family reported that M.G. had fallen in the bathtub. (R. 551:146, 148.) So, the doctor explained, he wrote at the time that M.G. had a "perineal laceration from straddle injury" sustained in the purported bathtub accident. (R. 551:148.)

On cross-examination, Dr. Schellpfeffer acknowledged that, if he was convinced that M.G. had been sexually abused at the time, he would have reported the suspected abuse to authorities, consistent with his duties as a mandatory reporter. (R. 551:157.)

Detective Gregory's testimony about his interviews of Cynthia, M.G. and A.R. Detective John Gregory, the State's final witness, testified that he interviewed Cynthia on the night of September 5, 1999. (R. 551:162.) The detective testified that Cynthia was "very upset, crying," and said that she had learned from M.G. that her husband had caused the vaginal lacerations to M.G. in 1998. (R. 551:162.) The detective said that Cynthia also described forcing open the door and breaking the chain link to get into her home, finding her husband coming out of the child's bedroom pulling up his shorts, and seeing her daughter in the bathroom. (R. 551:163–64.) Detective Gregory said that, on September 6, he obtained a more detailed statement from Cynthia that was consistent with the previous night's statement. (R. 551:164.)

The detective also interviewed M.G. on September 6 and testified that she reported the following. (R. 551:167–68.) Ramirez told M.G.'s brother A.R. to watch television in Cynthia's room, then took M.G. into her own bedroom. (R. 551:168, 173.) Ramirez took off his clothes and had M.G. do the same. (R. 551:174–75.) Ramirez then had M.G. lie face down on the bed and rubbed his private parts against her butt. (R. 551:174–75.) When the detective asked about her November 1998 injuries, M.G. responded simply, "Dad did it." (R. 551:188.)

Detective Gregory testified that he also interviewed A.R. (R. 551:175–78.) The detective said that A.R. told him that he saw his father take off his shorts when M.G. was with him in Ramirez's bedroom. (R. 551:178.) A.R. also said that he saw "white boogers on the bed." (R. 551:178–79.)

Cynthia's recantation. Cynthia Ramirez testified that she made up the September 5, 1999 allegation of sexual assault because her husband's ex-girlfriend had called the house that night. (R. 463:64–68.) When shown a photo of the broken chain on the front door, Cynthia denied forcing open the door and breaking the chain on the evening of September 5. (R. 463:46–56.) When asked about M.G.'s statement during the nurse's examination that Ramirez caused her November 1998 injuries, Cynthia responded (remarkably) that M.G. "never said anything about '98." (R. 463:82–83.) Cynthia also denied telling Officer Larsen that A.R. said he saw his father on top of M.G. and that there were "boogers" on the bed. (R. 463:177; 551:65.) She also said that A.R. never said those things to her. (R. 551:65.)

Cynthia testified that she and her husband had sex on the morning of September 5, 1999, and she threw the used condom in the bathroom wastebasket afterwards. (R. 551:79, 114.) But Cynthia repeatedly denied planting Ramirez's semen on M.G.'s body and underwear. (R. 551:91, 93, 100–03.)

Despite a subpoena for M.G. to appear at trial, Cynthia did not bring nine-year-old M.G. to court. (R. 462:8–9.) Cynthia then promised to do so, however, if her testimony became necessary. (R. 462:20–21.) M.G. did not testify at trial.

The jury returned guilty verdicts on the four counts related to the sexual assaults. As to the November 1998 incident, the jury found Ramirez guilty of first-degree sexual assault of a child, and first-degree sexual assault causing great bodily harm. (R. 416:1; 417:1; 430:1.) As to the September 1999 incident, the jury found Ramirez guilty of first-degree sexual assault of a child under the age of 13 and child enticement. (R. 418:1; 419:1; 430:1, 3.)

The court imposed concurrent, indeterminate sentences of up to 40 years of imprisonment on the counts associated with the November 1998 assaults. (R. 430:1.) The court imposed a sentence of 10 years of imprisonment on the child enticement count, to be served consecutively to the other counts. (R. 430:1.) The court imposed and stayed a sentence of 30 years of imprisonment on the September 1999 count of first-degree sexual assault. (R. 430:3.)

Prior postconviction proceedings

The state and federal postconviction proceedings in this case are long and complex. The State provides only those details necessary to explain how we got here.

Following a series of delays involving Ramirez and his first two appointed postconviction attorneys, in March 2005, third appointed postconviction counsel Lynn Hackbarth timely filed a Wis. Stat. § (Rule) 809.30 motion raising several claims. (R. 561:1–19.) The circuit court denied the motion following a hearing in an October 2005 order. (R. 55:1.) Ramirez appealed, and this court affirmed in a *per curiam* opinion. *State v. Antonio G. Ramirez, Jr.*, No. 2005AP2768-CR, 2007 WL 1217881 (Wis. Ct. App. Apr. 25, 2007) (unpublished). (A-App. 113–28.)

In 2010, Ramirez filed a Wis. Stat. § 974.06 postconviction motion, arguing, among other claims, that Attorney Hackbarth rendered ineffective assistance for not pursing a claim that Ramirez was denied his right to confront his accusers at trial. (R. 571:5.) Following many delays, the circuit court denied Ramirez's motion without hearing in a 2013 order. (R. 533:1–7.)

Ramirez appealed, and this court affirmed in a *per curiam* opinion. *State v. Antonio G. Ramirez, Jr.*, No. 2013AP563, 2014 WL 1226076 (Wis. Ct. App. Mar. 26, 2014) (unpublished). (A-App. 129–33.) The Court noted that the Supreme Court in *Whorton v. Bockting*, 549 U.S. 406, 417–21 (2007), held that the new confrontation rule of *Crawford v. Washington*, 541 U.S. 36 (2004), did not have retroactive application. (A-App. 132.) The Court appeared to rely on *Whorton* in disposing of Ramirez's claim that postconviction counsel was ineffective for not raising a *Crawford* confrontation claim on direct review. (A-App. 132.)

In 2014, Ramirez timely filed a federal habeas petition pursuant to 28 U.S.C. § 2254 alleging that his custody pursuant to his Kenosha County conviction was contrary to constitutional principles. In federal court, Ramirez renewed his claim that Attorney Hackbarth rendered ineffective assistance of postconviction counsel for not raising a *Crawford* claim in her 2005 Wis. Stat. § (Rule) 809.30 motion initiating direct review of Ramirez's conviction.

In 2019, the United States District Court for the Western District of Wisconsin, the Honorable Chief Judge James D. Peterson, issued a decision and order granting Ramirez's petition for a writ of habeas corpus. *Ramirez v. Tegels*, 413 F. Supp. 3d 808 (W.D. Wis. Sept. 26, 2019). Applying the standard for ineffective assistance of appellate counsel in the selection of claims, the federal court concluded that postconviction counsel rendered ineffective assistance because the unraised *Crawford* claim was "clearly stronger"

than the claims that Attorney Hackbarth raised on direct review. *Ramirez*, 413 F. Supp. 3d at 816–22 (citing *Shaw v. Wilson*, 721 F.3d 908, 914 (7th Cir. 2013)).

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, likewise concluding that Attorney Hackbarth had rendered ineffective assistance in the selection of direct review claims because the unraised *Crawford* claim was clearly stronger than the claims actually raised in counsel's 2005 postconviction motion. *Ramirez v. Tegels*, 963 F.3d 604, 614–616 (7th Cir. 2020). In their respective analyses of the "clearly stronger" issue, both courts noted that it was essentially undisputed that the claims Attorney Hackbarth actually raised were weak. *See Ramirez*, 963 F.3d at 613; *Ramirez*, 413 F. Supp. 3d. at 816.

As to the merits of the unraised, underlying *Crawford* claim itself, the Seventh Circuit decided only that Ramirez had shown a "reasonable probability of success" had counsel raised the claim—the standard for prejudice on a claim of ineffective assistance in claim selection. *Shaw*, 721 F.3d at 918. *See Ramirez*, 963 F.3d at 618. The court explained: "What we conclude here is simply that an attorney exercising reasonable professional judgment would have raised a confrontation claim under *Crawford* while Mr. Ramirez's conviction was still pending on direct review." *Ramirez*, 963 F.3d at 616.

The federal appellate court appropriately left it to the state courts to decide the merits of the underlying *Crawford* claim, ordering that Ramirez be granted "a new appeal in which he may advance his confrontation claim." *Ramirez*, 963 F.3d at 618–19. Accordingly, on the State's motion, this Court in September 2020 reinstated Ramirez's direct appeal rights from his 2001 conviction. (R. 249:1–2.)

Present Wis. Stat. § (Rule) 809.30 motion

In May 2021, Ramirez, by appointed counsel, filed a motion for a new trial, alleging two grounds for relief. First, Ramirez argued that he was denied his right to confrontation at trial. (R. 583:1.) Second, he argued that the trial court erred in preventing him from eliciting the fact that Dr. Schellpfeffer had been granted immunity prior to testifying. (R. 583:1.) The State filed a response brief in opposition to Ramirez's motion, and Ramirez filed a letter reply. (R. 588:1–24; 590:1–4.)

The circuit court, the Honorable David P. Wilk, held a hearing on the motion at which the parties presented argument that focused primarily on the confrontation issue. (R. 614:1–21.) Ramirez reiterated arguments that M.G.'s statements in the emergency room were testimonial. (R. 614:2–5.) The State, accompanied by the now-adult victim, argued that the statements were not testimonial, and that Ramirez had forfeited his claim.[2] (R. 614:7–13.) It also conceded that M.G.'s statements to Detective Gregory the day after the September 1999 assault were testimonial, insofar as answers from an eight year old can be testimonial. (R. 614:12.)

On July 29, 2021, the court issued a bench ruling granting Ramirez's new trial motion. (R. 598:1–12, A-App. 101–12.) The court's analysis of the confrontation issue was brief, and emphasized Officer Larsen's role in the emergency room examinations. (R. 598:4, 6–7, A-App. 104, 106–07.) The court found that Officer Larsen "was present for some of the examination" and that he "participated in the questioning of M.G." (R. 598:4, A-App. 104.) The court concluded: "M.G.'s statements to Larsen and Karpowicz-Halpin regarding M.G. going to the bathroom and wiping herself are clearly testimonial," and thus barred by *Crawford*. (R. 598:6, A-App. 106.)

[2] The State does not renew the forfeiture claim here.

Regarding Dr. Schellpfeffer, the court concluded that the trial court erred by denying trial counsel the opportunity to impeach the doctor with the grant of immunity. (R. 598:7, A-App. 107.) The court said that this also entitled Ramirez to a new trial. (R. 598:7, A-App. 107.)

The State appeals.

ARGUMENT

I. Ramirez is not entitled to a new trial on his confrontation claim.

A. Standard of review

Whether the admission of out-of-court statements "violates [a defendant's] Sixth Amendment right to confrontation is a question of constitutional law subject to independent review." *State v. Mattox*, 2017 WI 9, ¶ 19, 373 Wis. 2d 122, 890 N.W.2d 256.

Whether the admission of a statement in violation of the confrontation right is harmless error is a question of law that is also reviewed *de novo*. *State v. Magett*, 2014 WI 67, ¶ 29, 355 Wis. 2d 617, 850 N.W.2d 42.

B. Courts determine whether an out-of-court statement is barred as "testimonial" under the Confrontation Clause by determining its primary purpose under the circumstances, based on the motives and actions of the interviewer *and* the declarant.

1. *Crawford* and *Davis*

The Confrontation Clause of the Sixth Amendment to the United States Constitution grants every criminal defendant the right "to be confronted with the witnesses against him."[3] In 2004, the United States Supreme Court decided *Crawford* and reoriented Confrontation Clause analysis from the reliability of an out-of-court statement to whether it was "testimonial." *Crawford*, 541 U.S. at 59–63. The Supreme Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68–69. Under *Crawford*, testimonial statements are admissible against a criminal defendant only when (1) the declarant is unavailable to testify, and (2) the defendant has had a prior opportunity to cross-examine the declarant. *Id.* at 64–68.

Crawford expressly declined to provide a comprehensive definition of "testimonial." *See* 541 U.S. at 68. Rather, it concluded that, "at a minimum," "testimonial" statements include "prior testimony at a preliminary hearing,

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[3] Article 1, Section 7 of the Wisconsin Constitution likewise provides that "the accused shall enjoy the right . . . to meet the witnesses face to face . . ." Wisconsin courts "generally apply United States Supreme Court precedents when interpreting" the Confrontation Clauses of the state and federal constitutions. *State v. Jensen*, 2007 WI 26, ¶ 13, 299 Wis. 2d 267, 727 N.W.2d 518.

before a grand jury, or at a former trial; and . . . police interrogations." *Id.*

In 2006, in a joint opinion in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006) (*Davis*), the Court first clarified the definition of "testimonial." In *Davis*, a domestic abuse victim called 911 in the middle of a dispute with her abuser. *Davis v. Washington*, 547 U.S. 813, 817–18 (2006). During the call, the 911 operator asked the victim several questions, and the victim's answers identified her abuser as Davis and described his offenses against her. These statements were later used in Davis's prosecution. *Id.* at 817–19.

Adopting what has become known as the "primary purpose" test, the court concluded that the victim's statements were not testimonial. *Davis*, 547 U.S. at 826–27. The *Davis* Court held that statements made in response to law enforcement interrogation are not testimonial when the circumstances objectively indicate that the "primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822.

2. *Bryant* and *Clark*.

The Court further developed the primary purpose test in two more cases involving out-of-court statements of crime victims.

In *Bryant*, a victim identified his shooter in response to questions from officers while lying on the ground with a gunshot wound. *Michigan v. Bryant*, 562 U.S. 344, 349 (2011). Citing *Davis*, the Court concluded that the victim's statement was not testimonial because its primary purpose was to allow police to respond to an ongoing emergency. *Id.* at 359–78.

The *Bryant* decision explained that whether a statement is testimonial is an objective test, and it is not defined merely by the interrogator's purposes. *See Bryant*,

562 U.S. at 360, 367–68. Rather, a court objectively examines what reasonable participants—*both* interrogator *and* declarant—would view as the primary purpose of the statement based on the circumstances in which the encounter occurred. *Id.* This "combined inquiry," the Court explained, will best ascertain the statement's primary purpose. *Id.* at 367.

The court further explained that a victim-declarant's "medical condition . . . is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." *Bryant*, 562 U.S. at 364–65.

Bryant also noted that *Davis* "did not 'attemp[t] to produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial.'" *Bryant*, 562 U.S. at 357 (quoting *Davis*, 547 U.S. at 822). "[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 562 U.S. at 357.

Most recently, in *Clark* the Supreme Court concluded that a three-year-old child's statement to his teachers identifying his mother's boyfriend as his abuser was not testimonial. *Ohio v. Clark*, 576 U.S. 237 (2015). "Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution," admission of the child's statements at trial did not violate the Confrontation Clause. *Id.* at 240.

Clark reiterated that the existence or nonexistence "of an ongoing emergency is . . . simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Clark*, 576 U.S. at 245 (quoting *Bryant*, 562

U.S. at 366). Another factor, *Clark* explained, "is 'the informality of the situation and the interrogation.'" *Id.* (quoting *Bryant*, 562 U.S. at 377). The fact that the child in *Clark* made the statements to teachers, not police, in an informal setting of a preschool, suggested a nontestimonial purpose. *Clark*, 576 U.S. at 246. *Clark* explained that statements to non-law enforcement officers like teachers, nurses, and doctors, are "much less likely to be testimonial than statements to law enforcement officers." *Id.* The context of the interview, including the interviewer's identity, is "highly relevant." *Id.* at 249.

Another factor *Clark* identified as relevant to the primary-purpose inquiry is the age or mental capacity of the declarant. The Court explained: "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." *Clark*, 576 U.S. at 247–48. "[H]av[ing] little understanding of prosecution . . . . it is extremely unlikely that a 3-year-old child . . . would intend his [or her] statements to be a substitute for trial testimony." *Id.* at 248.

The Court noted that the child's statements were also made in the context of an ongoing emergency involving suspected child abuse. *Clark*, 576 U.S. at 246–47. The child had visible marks of abuse, and teachers needed to know if it was safe to return the child to the home. *Id.*

3. *Giles*: statements made in receiving medical treatment.

The United States Supreme Court has categorically stated, albeit in *dicta*, that statements made to medical professionals in receiving treatment are not testimonial. The Court explained in *Giles*: "[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules." *Giles v. California*, 554 U.S. 353, 376 (2008). *See also Bryant*, 562 U.S. at 362 n.9 (noting that "by

their nature," statements made to medical professionals are generally not testimonial, citing *Giles*).

C. Wisconsin courts apply a four-factor test based on *Clark* in assessing whether a statement is testimonial.

In *Mattox*, the Wisconsin Supreme Court relied on *Clark* in adopting a four-factor test for determining whether a statement is testimonial. *Mattox*, 373 Wis. 2d 122, ¶ 32. These factors are: (1) the formality of the situation producing the statement, (2) whether the declarant makes the statement to law enforcement, (3) the age of the declarant, and (4) the context in which the declarant makes the statement. *Id*. Applying these factors, the court determined that a toxicology report relied upon by a pathologist in determining a victim's cause of death was not testimonial. *Id*. ¶¶ 33–40.

More recently, in *State v. Reinwand* the supreme court explained: "A statement is testimonial only if 'in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "create an out-of-court substitute for trial testimony."'" 2019 WI 25, ¶ 24, 385 Wis. 2d 700, 718–19, 924 N.W.2d 184 (quoting *Clark*, 576 U.S. at 245). Applying the *Mattox* factors, the court concluded that statements a homicide victim made to friends and family about threats his eventual killer made to harm or kill him were not testimonial and thus did not implicate the Confrontation Clause. *Reinwand*, 385 Wis. 2d 700, ¶ 3.

D. Nearly all the out-of-court statements at issue are not testimonial under the *Mattox* test and Supreme Court caselaw.

Ramirez's confrontation claim appears to challenge the admission of the following out-of-court statements:

- M.G.'s statements in the emergency room about the November 1998 and September 1999 assaults in response to questions from Nurse Karpowicz-Halpin, Dr. Siegel, and M.G.'s mother, Cynthia (R. 462:93–105; 551:21–31);
- M.G.'s statements in the emergency room about the September 1999 assault and wiping herself on the toilet in response to questions from Officer Larsen (R. 551:130, 132); and
- M.G.'s and A.R.'s statements the day after the September 1999 assault to Detective Gregory (R. 551:167–68, 173–79, 188).

Having identified the statements at issue, the State turns to the issue of whether these statements were made for the primary purpose of creating an out-of-court substitute for trial testimony. *See Reinwand*, 385 Wis. 2d 700, ¶ 24. This analysis focuses first and primarily on M.G.'s statements in the emergency room but later also addresses A.R.'s statements to Detective Gregory.

1. M.G.'s emergency room statements

As an initial matter, the State acknowledges that the emergency room examinations of M.G. had *multiple* purposes. For his part, Officer Larsen was cognizant of the opportunity to preserve evidence of the very recent assault—he testified that he told Cynthia that they were going to the hospital "to do a rape kit." (R. 551:129, 138.)

But the officer's motives (or those of a reasonable officer in his position) are not dispositive of whether the statements of the eight-year-old victim were testimonial. *See Bryant*, 562 U.S. at 360, 367–68. As detailed below, the *main* motive of the primary interviewers in the emergency room, Nurse Karpowicz-Halpin and Dr. Siegel, was to provide appropriate care to a child who had just been sexually assaulted—not to secure from her an out-of-court statement to use in a prosecution. And whatever can be said of M.G.'s own motive in making the statements, there is little evidence M.G. offered them to make a record for later use at trial.

Application of ***Mattox*'s four-factor test** to the facts demonstrates that the primary purpose of M.G.'s statements was not testimonial. Because the first factor is less important than the other three in this case, the State takes the factors out of order.

Whether the declarant makes the statement to law enforcement. The trial testimony of Nurse Karpowicz-Halpin, Dr. Siegel, and Officer Larsen collectively demonstrates that nearly all of M.G.'s statements in the emergency room were made in response to questions from Nurse Karpowicz-Halpin, Dr. Siegel, or Cynthia. (R. 462:96–105; 551:21–31, 130, 132.) In their testimony describing their examinations of and exchanges with M.G., neither Nurse Karpowicz-Halpin nor Dr. Siegel mentioned Officer Larsen. (R. 462:96–105; 551:21–31.) The nurse merely noted that the officer was present at the start of her examination of M.G. (R. 462:95.) The doctor said that M.G. and Cynthia were there when her exam began, making no mention of an officer. (R. 551:21–31.)

And Officer Larsen testified about only one exchange he had with M.G. in the exam room. (R. 551:130, 132.) The officer said that he gave M.G. a "Shoney bear" to calm her down, and she used the bear to show where Ramirez had touched her. (R. 551:130, 132.) M.G. described the facts of the assault, and

that she went to the bathroom to wipe herself afterword. (R. 551:130.) The officer then left the exam room ("she was in the hands of Miss Halpin") to advise other officers to look for the wiping in the bathroom garbage. (R. 551:130.) Thus, while Officer Larsen was present for "some" of the examination and "participated" in some manner, as the circuit court found, the trial transcript shows that his role was limited. (R. 598:4, A-App. 104.)

Moreover, the fact that neither the nurse nor the doctor mentioned the officer in their descriptions of the examinations indicates their exams were not directed by the officer. The nurse and doctor were not primarily evidence collectors working on behalf of the officer, seeking to obtain statements from M.G. for use at trial against Ramirez. Rather, a reasonable ER nurse and doctor in the position of Nurse Karpowicz-Halpin or Dr. Siegel would have had another professional motive in conducting the examinations in these circumstances: To provide appropriate medical care to a young child who had just been sexually assaulted.

In sum, because the vast majority of M.G.'s statements were made to Nurse Karpowicz-Halpin and Dr. Siegel (and Cynthia), this factor indicates that M.G.'s statements were not testimonial.

Age of the declarant. M.G. was eight years old when she made her statements in September 1999. Of course, M.G. was not a preschooler like the three year old in *Clark*, who was so young that the court could not see him making a testimonial statement under any circumstances. *Clark*, 576 U.S. at 248.

But an eight year old still lacks an adult's "understanding of the legal system" and "of prosecution." *Clark*, 576 U.S. at 248. Therefore, by virtue of M.G.'s youth alone, it is less likely that the primary purpose of her statements in the emergency room on the night of the

September 1999 assault were testimonial. The following statement about the *Clark* victim's likely purposes in making his statements may apply to a grade-school-age child in M.G.'s position, too: "[A] young child in these circumstances would simply want the abuse to end . . . or would have no discernible purpose at all." *Id.*

Moreover, a young person in M.G.'s circumstances at the time of her statements may have lacked the capacity to intend to make a testimonial statement for another important reason: the trauma of having just been assaulted. It is no exaggeration that this would be its own kind of "emergency" for a child in M.G.'s position—albeit a different kind than the emergencies in *Davis* and *Bryant*. Nonetheless, *Bryant* seems apropos here: "[M]edical condition . . . is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." 562 U.S. at 364–65.

Likewise, a child in M.G.'s position would likely lack the ability "to have any purpose at all in responding" to an interviewer's questions given the combination of the child's young age and the trauma of having just been sexually abused by her stepfather. *Bryant*, 562 U.S. at 364–65. M.G. responded to her assault by shutting down, refusing to talk to the nurse for the first 30–45 minutes of the exam. An eight-year-old victim in her position would not primarily be concerned with a future legal proceeding against her abuser. M.G. was just coping at the time, and thus her statements in response to the nurse and doctor did not have a testimonial purpose.

Thus, this factor—age, or more broadly, the ability to make a testimonial statement—indicates that the primary purpose of M.G.'s statements was not testimonial.

The context in which the declarant makes the statement. The context in which M.G. made her statements was an emergency room examination triggered by Ramirez's sexual assault of M.G. earlier that night, and Cynthia's report of the assault to police.

Again, M.G.'s primary interviewers in the emergency room were her treatment providers, Nurse Karpowicz-Halpin, Dr. Siegel, and Cynthia. The identity of these interviewers—especially that they were not law enforcement—is relevant to context. *See Clark*, 576 U.S. at 249. The motive of the interviewer is likewise relevant. Here, as argued, an emergency room doctor and nurse in the position of these providers would have a primary motive of providing appropriate medical care and treatment to a young child who arrived with her mother and an officer shortly after having been sexually assaulted.

The trial transcript demonstrates that Nurse Karpowicz-Halpin's and Dr. Siegel's actions were consistent with the primary motive of providing appropriate medical treatment and care. As noted, the providers conducted their examinations with no apparent interference from the officer. They were independent from the officer because, in part, their motives—starting with providing appropriate treatment and care—would not have been the same as the officer's. Nurse Karpowicz-Halpin began her examination by asking M.G. if she was in pain and conducting a general physical exam. (R. 462:100–01.) Because the child was "frightened," the nurse spent "30 to 45 minutes" building rapport so that the child might be able to talk about what happened to her. (R. 462:100–01.) Finally, the child disclosed what happened: who hurt her, and what he did—information that was highly relevant to the child's health and safety, and to the nurse's purpose of providing appropriate care to a sexual assault victim. (R. 462:100–03.)

Then, to ascertain the extent of M.G.'s physical injuries and psychological trauma, the nurse asked whether this was the first time this had happened, and M.G. disclosed the November 1998 assault. (R. 462:104.)[4] This question was entirely consistent with a reasonable nurse's primary purpose of providing appropriate medical care to a child sexual assault victim. Indeed, it is difficult to imagine a competent medical professional *not* asking this question under the circumstances.

The State notes here that the Supreme Court has counseled that statements made in the course of receiving medical treatment are not testimonial. *See Giles*, 554 U.S. at 376; *Bryant*, 562 U.S. at 362 n.9. Of course, this general guidance is not *dispositive* here, given that M.G.'s medical examination was also the result of a criminal act that was under investigation. But it indicates that, but for the fact of the investigation, these statements would categorically not implicate the Confrontation Clause. *See id.*

Additionally, Nurse Karpowicz-Halpin and Dr. Siegel were "regular" medical providers without close professional ties to law enforcement. Ramirez may attempt to analogize the nurse's and doctor's roles to that of a sexual assault nurse examiner ("SANE nurse"). But though Nurse Karpowicz-Halpin had received some training in sexual assault examinations—at trial, she referenced a "rape protocol" in passing (R. 462:105)—she was not a SANE nurse, a nurse with specialized training who works frequently with law

[4] Actually, Cynthia, not Nurse Karpowicz-Halpin, asked the question that elicited M.G.'s disclosure that Ramirez caused her November 1998 injuries. (R. 462:104.) But the nurse's question immediately prompted Cynthia to ask M.G. about the November 1998 incident. (R. 462:104.)

enforcement. *State v. Nelson*, 2021 WI App 2, ¶ 44 n.6, 395 Wis. 2d 585, 954 N.W.2d 11.[5]

Also relevant to context are the declarant's motives. As argued, an eight-year-old child suffering the trauma of having just been sexually assaulted might well lack the wherewithal to intend any statement, much less one "intend[ed] . . . to be a substitute for trial testimony." *Clark*, 576 U.S. at 245. What's clear is that M.G.'s motive, if she had one, was not to seek justice. Again, M.G. refused to talk about the assault for the first 30–45 minutes of the exam. She had none of the righteous anger toward her abuser that another, likely older, victim might have. Under these circumstances, it is difficult to see how she had the purpose for her statements to be used in a future prosecution of her stepfather. *Id.*

Thus, the context in which M.G.'s statements were made also indicates that they were not testimonial.

Formality/informality of the situation. This factor is not as relevant here as the other three factors are. The exams occurred in an institutional setting, a medical examination room, and the interviewers were medical professionals likely in medical uniforms. A presumably

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[5] By this, the State does not mean to suggest that the outcome of this case would be different if M.G. had been examined by a SANE nurse instead. Courts considering challenges to statements made during a SANE exam have reached conflicting results. *Compare, e.g., Dorsey v. Cook*, 677 F. App'x 265, 267 (6th Cir. 2017) (per curiam) (upholding state court's holding that victim's statements to SANE were not testimonial); *United States v. Barker*, 820 F.3d 167, 171–72 (5th Cir. 2016) *with State v. Bennington*, 264 P.3d 440, 453–54 (Kan. 2011) (holding that victim's statements to a SANE were testimonial where law enforcement was also present and participating); *State v. Cannon*, 254 S.W.3d 287, 304–05 (Tenn. 2008) (holding victim's statements to SANE, who was trained by police in gathering evidence for future trials, were testimonial).

uniformed police officer was present for "some" of the examination. (R. 598:4, A-App. 104.)

To the extent this situation was not "a 'formal station-house interrogation' . . . more likely to provoke testimonial statements," *Clark*, 576 U.S. at 245 (quoting *Bryant*, 562 U.S. at 366, 377), this factor somewhat favors a determination that M.G.'s emergency room statements are not testimonial.

In sum, application of the *Mattox* factors leads to one conclusion: M.G.'s emergency room statements on the night of the assault were not testimonial.

* * * *

The postconviction court, which addressed only M.G.'s emergency room statements, erred in multiple ways in concluding that those statements were testimonial. For example, it did not apply the controlling *Mattox* and *Reinwand* four-factor test to the facts, resulting in an analysis that is out-of-step with recent decisions of the United States Supreme Court. (R. 598:4–7, A-App. 104–07.) The court based its analysis on Officer Larsen's motives without addressing those of the medical providers and M.G., contrary to *Bryant*. (R. 598:4–7, A-App. 104–07.) And it ignored the issue of M.G.'s ability to make testimonial statements, given her age and the trauma of the assault, contrary to *Clark* and *Bryant*. (R. 598:4–7, A-App. 104–07.)

Moreover, the court's decision did not expressly address whether the admission of M.G.'s statements was harmless error—even as to the two counts stemming from the 1999 conviction, which were proven in part by DNA evidence. (R. 598:4–7, A-App. 104–07.) The court appeared to make a brief nod to harmless error by stating that Cynthia's recantation meant M.G.'s out-of-court statements were the only version of what happened that night. (R. 598:7, A-App. 107.) But this is not so. The State's narrative was supported by Cynthia's initial story, which was presented repeatedly through other

witnesses and at length on the State's examination of Cynthia. (R. 463:46–90; 514 Ex. 39; 551:55–72.) The jury was not required to accept Cynthia's recantation, and apparently did not by finding Ramirez guilty of the sexual assaults.[6] (R. 551:91, 93, 100–03.)

The court's bench ruling was inadequate to address the issue in this case and should be set aside.

2. A.R.'s statements to Detective Gregory

The State's final witness, Detective John Gregory, provided testimony based on his interviews of Cynthia, M.G., and A.R. As to M.G., M.G. made the same statements to the detective that she had made the night before in the ER, and so the detective's testimony duplicated that of Nurse Karpowicz-Halpin and Dr. Siegel. But as to A.R., Cynthia denied at trial that A.R. ever told her he saw Ramirez on top of M.G., or that there were "white boogers" on the bed.[7] (R. 551:65–66.) According to the detective's testimony, A.R. said that he saw Ramirez take his pants off with M.G. on the bed, and there were "white boogers." (R. 551:178–79.) The State therefore briefly addresses whether A.R.'s statements to the detective were testimonial under the *Mattox* test.

The ***age of the declarant*** is the dispositive factor as to A.R.'s statements. *Mattox*, 373 Wis. 2d 122, ¶ 32. The State doubts that the basic knowledge of a five year old in A.R.'s

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[6] This recantation was also incredible. Despite Nurse Karpowicz-Halpin's and Dr. Siegel's testimony about M.G.'s statements to them about the November 1998 assault, Cynthia testified that M.G. never said anything in the examination about the November 1998 incident. (R. 463:82–83.) She also claimed to have made up the entire September 1999 assault but still insisted at trial that she did not plant Ramirez's semen on M.G.'s body. (R. 551:91, 93, 100–03.)

[7] Officer Larsen testified that Cynthia told him that A.R. said these things to her. (R. 463:177.)

position would be so much greater than the knowledge of the three year old in *Clark* as to change the analysis. *See Clark*, 576 U.S. at 247–48. The age of a Kindergartner, A.R. would not have had much "understanding of prosecution." *Id.* at 248. It is therefore "extremely unlikely that a [5]–year–old child in [A.R.]'s position would intend his statements to be a substitute for trial testimony." *Id.* At five, A.R. was still young enough that *Clark*'s general rule regarding "very young children"—their statements "rarely, if ever, implicate the Confrontation Clause"—would apply. *Id.*

Thus, though the interview was conducted by law enforcement, and was apparently in a more formal setting (the Kenosha police department), the primary purpose of A.R.'s statements was not testimonial because he lacked the ability to make such a statement due to his age. *Clark*, 576 U.S. at 247–48.

* * * *

To summarize Section D., the primary purpose of M.G.'s statements and A.R.'s statements was not to create an out-of-court substitute for trial testimony. *See Clark*, 576 U.S. at 245. Application of the *Mattox* factors results in the conclusion that the primary purpose of the examinations was not to obtain from M.G. (and A.R.) such statements to be used in a future prosecution. For these reasons, and those fully stated above, M.G.'s and A.R.'s statements were not testimonial, and the order granting a new trial on this basis should be reversed.

E. Admission of statements in violation of the Confrontation Clause was harmless error.

A violation of the Confrontation Clause "does not result in automatic reversal, but rather is subject to harmless error analysis." *State v. Stuart*, 2005 WI 47, ¶ 39, 279 Wis. 2d 659, 695 N.W.2d 259 (citation omitted). An error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury

would have found the defendant guilty absent the error.'" *State v. Harris*, 2008 WI 15, ¶ 43, 307 Wis. 2d 555, 745 N.W.2d 397 (citation omitted).

In postconviction proceedings, the prosecutor conceded that M.G.'s statements to Detective Gregory, which were made in a formal interview at the Kenosha police department the day after the assault, were testimonial under the totality of the circumstances. The State on appeal accepts this concession, though it shares the prosecutor's stated doubts about whether an eight year old in M.G.'s position would sufficiently understand prosecution to make a testimonial statement. *See Clark*, 576 U.S. at 247–48.

Admission of M.G.'s statements to Detective Gregory was harmless error, however. Detective Gregory's testimony about his interview with M.G. duplicated similar testimony already given by Nurse Karpowicz and Dr. Siegel about M.G.'s statements to them the night before. From the detective's testimony, M.G. said that Ramirez "rubbed his private parts against her butt" as "she was face down and he had laid on top of her" (R. 551:174–75.) This duplicated Nurse Karpowicz-Halpin's testimony of M.G.'s description of the same incident: "[S]he was laying on her belly on the bed" and then he "put his pee-pee by her butt . . . like on top of her." (R. 462:102.) And M.G.'s description to Dr. Siegel as well: Ramirez "put his pee-pee by her. And she pointed to her buttock area." (R. 462:102; 551:23.) As to the November 1998 assault, the detective testified that M.G. merely said "Dad did it" when he asked about her injuries—testimony duplicated by the nurse's testimony. (R. 551:188.) *See Mereness v. Schwochert*, 375 F. App'x 612, 615–16 (7th Cir. 2010) (admission of statements in violation of Confrontation Clause was harmless beyond a reasonable doubt where statements merely duplicated other, properly admitted evidence).

Likewise, if M.G.'s statement to Officer Larsen describing the September 1999 offense and wiping herself in

the bathroom were testimonial, given his identity as a member of law enforcement, admission of these statements would be harmless beyond a reasonable doubt for the same reason. (R. 551:130, 132.) The testimony of Nurse Karpowicz-Halpin and Dr. Siegel shows that M.G. made similar statements to them in the emergency room examinations.[8] (R. 462:102; 551:23.)

Finally, as to the counts of first-degree sexual assault of a child and child enticement relating to the September 1999 assault, *even if* M.G.'s statements to the nurse and doctor on the night of the assault were also testimonial, admission of these statements would be harmless error because of DNA evidence identifying semen or sperm cells found on the vaginal and anal swabs, M.G.'s underwear, and bathroom tissue. To the extent a narrative is necessary to show that Ramirez's semen and sperm cells found on M.G.'s private areas was the result of an assault, Cynthia's initial story—coming home to find the door locked, breaking the chain link lock to get in (see photo of the broken lock presented during Cynthia's testimony, (R. 463:47; 499 Ex. 10), and finding Ramirez pulling up his pants in the doorway of M.G.'s bedroom and M.G. upset on the toilet—was presented through other witnesses and on the State's examination of Cynthia.

* * * *

Finally, to summarize Section I., nearly all of M.G.'s statements were not testimonial under the *Mattox* test and Supreme Court precedents. A.R.'s statements to Detective Gregory were not testimonial. Though M.G.'s statements to the detective were testimonial, admission of these statements

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[8] For example, the nurse testified M.G. told her that "she felt something by her butt, so she went into the bathroom and . . . wiped herself with some tissue and threw it in the wastepaper basket." (R. 462:102–03.)

was harmless error. Accordingly, this Court should reverse the order granting a new trial on Ramirez's confrontation claim.

II. The circuit court's order prohibiting Ramirez from impeaching Dr. Schellpfeffer with the grant of immunity was harmless error.

A. Standard of review

"The extent and scope of cross-examination allowed for impeachment purposes is a matter within the sound discretion of the circuit court." *State v. McCall*, 202 Wis. 2d 29, 35, 549 N.W.2d 418 (1996). A circuit court does not erroneously exercise its discretion in limiting cross-examination "if a reasonable basis exists for the circuit court's determination." *Id.* at 36.

"Whether a circuit court's erroneous exclusion of evidence is harmless is a question of law [this Court] review[s] de novo." *State v. Monahan*, 2018 WI 80, ¶ 31, 383 Wis. 2d 100, 913 N.W.2d 894.

B. Though the circuit court did not have a discernible basis to prohibit cross-examination on the grant of immunity, the error was plainly harmless.

In his postconviction motion, Ramirez argued that the circuit court's ruling barring impeachment of Dr. Schellpfeffer about his immunity violated his right to a fair trial, citing *State v. Nerison*, 136 Wis. 2d 37, 46, 401 N.W.2d 1 (1987). (R. 583:13–14.) In *Nerison*, the supreme court concluded that, when an accomplice receives a grant of immunity or other inducements the defendant's right to a fair trial is safeguarded by the opportunity to cross examine the witnesses about these agreements. *Id.* at 45–46.

In arguing that Dr. Schellpfeffer's immunity grant should be off limits at trial, the State relied on *State v. Heft*,

185 Wis. 2d 288, 300–04, 517 N.W.2d 494 (1994), which upheld evidentiary rules requiring that a witness's invocation of the privilege against self-incrimination occur outside the jury's presence. (R. 460:28–29, 31.) The court accepted this argument, appearing to conclude that rules of evidence pertaining to grants of use immunity after a witness invokes the right against self-incrimination barred Ramirez from cross-examining Dr. Schellpfeffer about his grant of immunity. (R. 460:34.)

But Dr. Schellpfeffer was not granted use immunity after invoking his Fifth Amendment right at trial, (*see* R. 551:141–51); he struck an immunity agreement before trial in exchange for his testimony. The evidentiary rules discussed in *Heft* do not appear to apply here.

Further, the circuit court did not identify any other ground on which to restrict impeachment of the doctor using the grant of immunity. (R. 460:30–34.) And the State has been unable to identify another reasonable ground on which to restrict cross-examination on this issue. Accordingly, the State believes that the circuit court erroneously exercised its discretion in prohibiting reference to the immunity agreement. *See McCall*, 202 Wis. 2d at 35.

Nonetheless, Ramirez is not entitled to relief on this ground because the circuit court's error was harmless and thus did not affect Ramirez's "substantial rights." *See Monahan*, 383 Wis. 2d 100, ¶¶ 31, 33.

In its one-paragraph decision granting a new trial for the circuit court's evidentiary error, the postconviction court did not address whether that error was harmless. (R. 598:7, A-App. 107.) But, of course, a circuit court's erroneous exclusion of evidence is subject to the harmless error rule. *State v. Hunt*, 2014 WI 102, ¶¶ 21, 26, 360 Wis. 2d 576, 851 N.W.2d 434. "Harmless error analysis requires [the court] to look to the effect of the error on the jury's verdict." *Id.* ¶ 26.

"For the error to be deemed harmless, the party that benefited from the error . . . must prove 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (citation omitted). "Stated differently, the error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* (citation omitted).

Here, it is clear beyond a reasonable doubt that a rational jury would have reached the same result even if Ramirez had impeached Dr. Schellpfeffer with the State's grant of immunity.

Dr. Schellpfeffer, with Dr. Guinn and Dr. Siegel, was but one of the medical experts who addressed the same issue at trial: What caused M.G.'s November 1998 injuries? Were those injuries consistent with the family's original report that she had fallen and landed on the edge of the bathtub? Or were they consistent with her later report that Ramirez sexually assaulted her? The experts' answers to these questions were necessarily bound by the particular and awful facts of M.G.'s injuries.

All the medical experts' opinions were based on the same source: Dr. Schellpfeffer's examination and treatment of M.G., memorialized in his records and reviewed by the doctors before trial. (R. 463:125; 551:20–21.) In these records, Dr. Schellpfeffer described M.G.'s vaginal injury as a 2 to 2 ½ centimeter laceration inside of M.G.'s vagina. (R. 551:144.) As each of the doctors testified, Dr. Schellpfeffer described the laceration to the perineum in his records as "an episiotomy like laceration." (R. 463:126; 492:14; 551:26.)

Given these facts, each of the doctors ultimately reached similar conclusions as to the cause of these lacerations: They were likely caused by a penetrative injury or sexual misuse, not a "straddle"-type injury as the family reported. Dr. Siegel and Dr. Guinn testified that the injuries

were "consistent with" and "diagnostic of" sexual misuse, respectively. (R. 463:127; 551:26.) Dr. Guinn and Dr. Schellpfeffer testified about the difference between "straddle" injuries and penetrative injuries. (R. 463:126–27; 551:145–50.) Dr. Guinn then concluded that M.G.'s injuries were "inconsistent with a straddle injury" like that originally reported by the family because there was no bruising on the outside of the genitalia. (R. 463:126–27.) Instead, Dr., Guinn said that M.G. suffered "penetrating trauma" to the vagina. "[S]omething had to penetrate inside," she said. (R. 463:124–26.) For his part, Dr. Schellpfeffer testified that M.G.'s injury was "certainly consistent possibly with a penetrating injury." (R. 551:145.) He said that it was also "atypical" of straddle injuries he had seen in the past. (R. 551:149.)

Again, given the specific facts of the injuries, the relative unanimity of the experts' opinions should be unsurprising. M.G. did not have bruises to her external genitalia one would expect from a fall onto the edge of a bathtub. Rather, her injuries were two significant cuts to her vagina and perineum more consistent with M.G.'s later report of Ramirez penetrating her.

In his postconviction motion, Ramirez argued that he was denied the opportunity to explore Dr. Schellpfeffer's potential bias toward the State in his testimony. (R. 583:13–14.) He notes that the doctor "did not report abuse in 1998." (R. 583:14.) But, of course, as Dr. Schellpfeffer testified at length, he had asked the family about potential abuse (the records confirm this) and they insisted that the injury was caused by an awkward fall in the bathtub. (R. 492:9; 551:146, 148.) At the time, no family member had offered another, ultimately more plausible explanation for these injuries: That M.G. was sexually abused.

Moreover, the transcript shows that, if anything, Dr. Schellpfeffer's opinions at trial as to the cause of M.G.'s injuries were hedged and less certain than Dr. Guinn's and

Dr. Siegel's, plainly not evincing bias. (see examples above). Moreover, Dr. Schellpfeffer admitted on cross-examination that, had he believed then that M.G. was the victim of abuse, he would have reported the suspected abuse to authorities—testimony that belies claims of pro-State bias. (R. 551:157.)

Under these circumstances, admission of impeachment evidence attempting to show Dr. Schellpfeffer was biased in the State's favor would not have made a difference. The doctor was but one of three doctors who offered testimony about the cause of M.G.'s injuries. The particular and sad facts of those injuries necessarily limited the range of potential reasonable professional opinions about their cause, leading to relative unanimity among the three doctors. The circuit court's error in barring impeachment testimony on the immunity grant was therefore harmless. Accordingly, the order granting a new trial on this ground should be reversed.

CONCLUSION

The order granting a new trial should be reversed, and the case remanded with directions to reinstate the judgment of conviction.

Dated this 3rd day of February 2022.

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 10,993 words.

Dated this 3rd day of February 2022.

Electronically signed by:

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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.

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Electronically signed by:

Jacob J. Wittwer
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Appendix
State of Wisconsin v. Antonio G. Ramirez, Jr.
Case No. 2021AP1590-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § (Rule) 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the court of appeals: (2) the findings or opinion of the circuit court, and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues; (4) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b).

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 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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