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.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

Seven-year-old M.G. was taken to the emergency room in November 1998 with severe vaginal bleeding. M.G. and her mother Cynthia told Dr. Michael Schellpfeffer that she had fallen onto the edge of a bathtub. But the doctor observed no external bruising to the affected area. Instead, he found two internal cuts requiring surgical repair, including a 2 to 2½ centimeter "episiotomy like" cut to the perineum. The doctor asked about potential abuse in the home, and Cynthia said she knew of none. Based on the family's report, the doctor recorded the cause of injury as a bathtub fall.

Ten months later, M.G. was back in the emergency room, this time after Cynthia suspected that M.G.'s stepfather Antonio Ramirez had sexually assaulted M.G. that evening when Cynthia stepped out to run an errand. Cynthia called police, and Officer George Larson drove M.G. and Cynthia to the hospital. M.G. was examined in the emergency room by Nurse Donna Karpowicz-Halpin and Dr. Suzanne Siegel. M.G. told the nurse and doctor that Ramirez "put his pee-pee" by her buttocks. Asked if this was the first time something like this had happened, M.G. said it was not. She said that the time when she got cut, Ramirez "was trying to put his pee-pee in her." Though present for "some" of the examination, Officer Larson was not present when M.G. made this disclosure.

DNA testing identified Ramirez as the source of semen and sperm cells found on rectal and vaginal swabs taken during M.G.'s examination. The day after the assault, M.G. repeated the emergency-room statements to Detective John Gregory in a police station interview.

M.G. (and her little brother A.R.) did not testify at trial. Their out-of-court statements were presented through the testimony of the medical providers and law enforcement. DNA evidence from the September 1999 assault was also

presented. Three doctors, including Dr. Shellpfeffer, testified that M.G.'s November 1998 injuries were consistent with sexual abuse.

Cynthia recanted at trial. Incredibly, Cynthia testified that she made up the September 1999 assault and coached her children (including five-year-old A.R.) to lie to authorities. Cynthia even denied that M.G. said anything to the emergency room nurse and doctor about Ramirez causing her November 1998 injuries. But Cynthia's original story about coming home to discover Ramirez had assaulted M.G. was presented repeatedly through other witness' testimony about Cynthia's out-of-court statements.[1]

Cynthia testified that she did not plant DNA evidence on M.G.'s body. This testimony has forced Ramirez's various attorneys to argue, without evidence, that Cynthia *did* plant the DNA evidence—she just "hadn't been able to admit [this] worst transgression" at trial. (Ramirez's Br. 13.) The jury found Ramirez guilty of all counts related to the sexual assaults.

* * * *

The State renews the arguments made in its opening brief. Unless expressly conceded, the State opposes Ramirez's arguments made in his response brief.

On the confrontation issue, M.G.'s statements to the emergency room nurse and doctor on the night of the second assault implicating Ramirez in the assaults were not testimonial, and thus did not violate the Confrontation Clause. They were not made for the primary purpose of "creat[ing] an out-of-court substitute for trial testimony."[2] No

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[1] These statements do not implicate the Confrontation Clause, *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004), and Ramirez does not argue otherwise.

[2] *Ohio v. Clark*, 576 U.S. 237, 245 (2015).

"mind-reading" (Ramirez's Br. 6, 27–29) is required to determine from the record that M.G.'s and the medical providers' purposes were not primarily testimonial under the Wisconsin Supreme Court's *Mattox*[3] test—which Ramirez chooses not to apply in his brief (Ramirez's Br. 20 n.1). A.R.'s statements—he told Detective Gregory that he saw Ramirez taking off his clothes in M.G.'s room and saw "white boogers" on the bed—were also nontestimonial under *Clark* because A.R. was only five when he made them.

Granted, as previously conceded, M.G.'s statements made the next day in a formal police interview were testimonial under *Mattox*. But admission of these statements was harmless error. The station house statements merely duplicated, and were less detailed than, M.G.'s admissible, nontestimonial emergency-room statements.

But *even if all* of M.G.'s emergency room statements were testimonial, admission of these statements would be harmless as to the September 1999 counts. As argued (Opening Br. 35), these counts were proven by DNA evidence collected from M.G.'s private areas and underwear. And Cynthia's initial narrative about discovering Ramirez had assaulted M.G., which was presented repeatedly to the jury despite Cynthia's recantation, was the *only* logical explanation for Ramirez's bodily fluids being found on M.G.'s underclothes and privates. Ramirez's attorneys' explanation—that Cynthia planted the DNA evidence on M.G.—was denied by Cynthia and unsupported by evidence.

As to the counts from the November 1998 assault, even if some of M.G.'s emergency room statements were testimonial, M.G.'s disclosure that Ramirez caused her November 1998 injuries was not. As argued below, the

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[3] *State v. Mattox*, 2017 WI 9, 373 Wis. 2d 122, 890 N.W.2d 256.

statement was *not* made to law enforcement; the officer was not present for this portion of the interview. And the primary purpose of an emergency nurse in asking whether this was the first time something like this had happened was to provide appropriate patient care, *not* to obtain a statement from the child to be used in a prosecution.

Finally, on the claim relating to Dr. Schellpfeffer's immunity grant, the court erred in restricting cross-examination on this topic. But, as argued, the error was harmless. The doctor was but one of three doctors who offered very similar expert opinions regarding the cause of M.G.'s November 1998 injuries based on the particular facts of those injuries. There is no reasonable chance that impeachment of Dr. Schellpfeffer with the grant of immunity would have affected the outcome of the trial.

This Court should reverse the circuit court's new trial order and reinstate the judgment of conviction on all counts.

ARGUMENT

I. Most, if not nearly all, of the out-of-court statements at issue are *not* testimonial under *Mattox* and Supreme Court caselaw, and admission of testimonial statements duplicative of admissible statements was harmless error.

A. M.G.'s statements to the emergency room nurse and doctor were not testimonial.

As argued (Opening Br. 28–35), M.G.'s emergency room statements made to Nurse Karpowicz-Halpin and Dr. Siegel were not testimonial under *Mattox*. All four of the *Mattox* factors support this conclusion. *State v. Mattox*, 2017 WI 9, ¶ 32, 373 Wis. 2d 122, 890 N.W.2d 256.

First, M.G.'s statements in the emergency room were not made primarily to law enforcement. *Mattox*, 373 Wis. 2d 122, ¶ 32. Of course, Officer Larson was present for "some" of

the emergency room examination. (R. 598:4.) But together, the testimonies of the nurse, doctor, and officer establish that, as part of their examination of M.G., the medical professionals, not the police officer, asked M.G. questions about what happened that night and the nature and extent of the abuse. (R. 462:96–105; 551:21–35, 126–38.) In fact, the officer did not come up at all in the nurse's and doctor's accounts of the examination. The officer's only involvement was to have M.G. point on a stuffed bear where Ramirez touched her. (R. 551:130, 132.) It is unclear from the trial record when this occurred, contrary to Ramirez's attempt to place it in the middle of the medical examination. (Ramirez's Br. 9–10.) At any rate, the record shows that M.G.'s statements were made largely to the nurse and doctor.

Second, on balance, the context in which M.G. made her statements supports the conclusion that they were not created to be an out-of-court substitute for trial testimony. *Mattox*, 373 Wis. 2d 122, ¶ 32. True, Officer Larson was investigating a reported crime and took M.G. to the hospital "to do a rape kit." (R. 551:129, 138.) But the context suggests the exchange between the medical professionals and M.G. had nontestimonial purposes.

Perhaps the most important fact to the context in which M.G. made her statements is that, by her own, credible account, she was assaulted earlier that night by her stepfather. It is not "mind reading" (Ramirez's Br. 6, 27–29) to argue that an eight-year-old who has just been sexually assaulted by a parent must be suffering profound trauma. Indeed, the trial testimony established that M.G. appeared "very distraught, scared." (R. 462:96.) A "very, very frightened" M.G. said little in the first 30–45 minutes of the nurse's examination. (R. 462:96.) From these facts, it is reasonable to infer that M.G. lacked the purpose in that moment to make a testimonial statement. *See Michigan v. Bryant*, 562 U.S. 344, 364–65 (2011).

Further, an emergency room nurse and doctor examining an eight-year-old who has credibly asserted that she was just assaulted by her stepfather would have professional duties of patient care separate from any obligation to obtain a statement for use at trial. These duties include conducting a physical examination of the child *and* asking questions to ascertain what happened and the nature and extent of the abuse. As argued, it is difficult to imagine a competent medical professional *not* asking a child victim (as Nurse Karpowicz-Halpin did, R. 462:104) whether this was the first time this had happened. That's *not* because such information would be relevant to a prosecution; it's because the information is necessary to patient care.

Third, the youth of the declarant—a factor that may be read to include the declarant's capacity to intend a testimonial statement, *see Bryant*, 562 U.S. at 364–65—also supports the conclusion that M.G.'s statements were not testimonial. *Mattox*, 373 Wis. 2d 122, ¶ 32. M.G. was only eight years old, and, by her credible account, she had just been sexually assaulted by her stepfather. These circumstances would affect the ability of a person in her circumstances to intend to make a testimonial statement. (R. 462:96.)

Finally, the fact that the examination occurred in an emergency room and not in the more formal setting of a station house interrogation room further supports the conclusion that M.G.'s emergency room statements were not testimonial. *Mattox*, 373 Wis. 2d 122, ¶ 32.

In sum, the primary purpose of M.G.'s statement to emergency room personnel on the night of the second sexual assault was not testimonial under the *Mattox* test.

B. Ramirez's confrontation analysis is not grounded in current law.

Ramirez chooses not to analyze his claim under *Mattox*. (Ramirez's Br. 20 n.1.) Rather, he relies on the federal courts' decisions in his habeas proceeding, perhaps to suggest that the issues here have already been resolved. (Ramirez's Br. 26–27, 29–31.) But the Seventh Circuit merely determined that his underlying confrontation claim was "clearly stronger" than the claims postconviction counsel did raise. *Ramirez v. Tegels*, 963 F.3d 604, 616 (7th Cir. 2020) ("For present purposes . . . we need not determine precisely which statements would not have been admitted under the Confrontation Clause as it was interpreted in 2007."). It did not purport to address the merits of those claims, leaving that for this proceeding. Regardless, the federal court's analysis would have, at most, only persuasive effect here. *See State v. King*, 205 Wis. 2d 81, 93, 555 N.W.2d 189 (Ct. App. 1996).

More importantly, the federal courts applied the law of 2007 (the year in which Ramirez's direct appeal was resolved), not current law, in determining whether postconviction/appellate counsel was ineffective for not raising a *Crawford* claim. *Ramirez*, 963 F.3d at 616. As a result, the Seventh Circuit relied primarily on *Davis v. Washington*, 547 U.S. 813 (2006), in analyzing Ramirez's confrontation claim. It did not consider *Bryant* (2011) or *Clark* (2015), cases Ramirez does not dispute apply to his present claim. *See id.*

As discussed (Opening Br. 24–26), *Bryant* and *Clark* further developed the meaning of "testimonial" in important ways. These decisions establish that whether a statement is testimonial depends on the intent of the *declarant* as well as the interviewer. *Bryant*, 562 U.S. at 367–68. And *Clark* suggested a multi-factor approach to assessing the primary purpose of out-of-court statements, which our supreme court adopted in *Mattox*. The differences between *Davis* and more

recent decisions are meaningful. *Compare Davis*, 547 U.S. at 822 (statement is testimonial when "the primary purpose *of the interrogation* is to establish or prove past events *potentially relevant* to later criminal prosecution" (emphasis added)) *with Ohio v. Clark*, 576 U.S. 237, 246 (2015) (declarant's statements were not testimonial because they "were *not made with the primary purpose of creating evidence* for [the defendant's] prosecution" (emphasis added)).

As a result of his reliance on his federal habeas decisions, Ramirez grounds his analysis in 2007 law. But under *Mattox* and recent Supreme Court decisions, M.G.'s statements to medical providers were not testimonial because they were not made for the primary purpose of creating a substitute for trial testimony. *See Clark*, 576 U.S. at 245.

C. Admission of M.G.'s station house interview statements was harmless error; admission of any other statements deemed testimonial is subject to harmless error analysis.

As argued, M.G.'s statements to Detective Gregory at the station house the day after her emergency room statements *were* testimonial, but admission of these statements was harmless error because they were duplicative of M.G.'s prior, admissible statements. The State disputes, however, Ramirez's assertion that this constitutes its entire harmless error argument.[4] (Ramirez's Br. 30.)

For example, as argued (Opening Br. 39), *even if* all of M.G.'s statements to the nurse and doctor are deemed testimonial, admission of these statements would be harmless error as to the charges relating to the September 1999

[4] Regardless, as argued later, courts have a statutory duty to determine whether an error is harmless. *See State v. Harvey*, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189 (citing Wis. Stat. § 805.18(2)).

assault. These charges were proven by DNA evidence showing that Ramirez's semen and sperm cells were collected from M.G.'s private areas, M.G.'s underwear, and a bathroom tissue. Cynthia's original narrative of discovering that Ramirez had assaulted M.G., told through other witnesses at trial and the State's impeachment of Cynthia, provided the only reasonable explanation for the presence of the biological material: Ramirez assaulted M.G. (R. 462:96–105; 463:46–56.) Again, Cynthia repeatedly denied planting DNA evidence on M.G.'s body. (R. 551:91, 93, 100–03.) Thus, Ramirez's attorneys' insistence that Cynthia *did* plant DNA evidence on M.G. (but couldn't admit to it) was unsupported by evidence. Admission of M.G.'s emergency room statements, even if error, was harmless as to convictions for the September 1999 assault.

As to the convictions for the November 1998 assault, the State reasserts that M.G.'s statement to the nurse and doctor that Ramirez caused her injuries was not testimonial. This statement was *not* made to law enforcement; it is undisputed that Officer Larson was not present for this portion of the examination. (Ramirez's Br. 11.) Further, as argued, the primary purpose of an emergency room nurse in Nurse Karpowicz-Halpin's position in asking M.G. whether the assault that evening was the first time this happened was to provide appropriate patient care—not to obtain a statement for use in a prosecution. And a child experiencing the trauma M.G. was then experiencing would not have had a testimonial purpose in answering the nurse's question. Thus, even if other statements (such as those occurring in the presence of the officer) were testimonial, this statement regarding the November 1998 assault was not.

Accordingly, even if the admission of some portion of M.G.'s statements to medical providers was error, this Court should conclude that the error was harmless as to the convictions associated with both assaults.

II. The order prohibiting cross-examination of Dr. Schellpfeffer on his grant of immunity was harmless error.

As an initial matter, the Court should reject Ramirez's argument that the State's harmless error argument is forfeited for not being presented below. (Ramirez's Br. 32.) Forfeiture does not apply because "[t]he harmless error rule . . . is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do." *State v. Harvey*, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189 (citing Wis. Stat. § 805.18(2)).

Ramirez's objections to the substance of the State's harmless error argument fare no better. Dr. Shellpfeffer was but one of three doctors who offered expert opinions as to the cause of M.G.'s November 1998 injuries. These opinions were based on some terrible, undisputed facts: M.G. suffered two internal cuts to her vaginal area, including a 2 to 2½ centimeter cut into her perineum that Dr. Schellpeffer wrote resembled an episiotomy. (R. 463:126; 492:14; 551:26.) M.G. had no external bruising. On these facts, all three doctors concluded that the injuries were likely not caused by a fall onto the side of the bathtub. Rather, they were likely caused by a penetrative injury and were consistent with sexual misuse. (R. 463:127; 551:26, 145.)

Ramirez complains about the State's "rhetoric" regarding the "potential reasonable professional opinions" under the circumstances. (Ramirez's Br. 33.) But once M.G. disclosed that Ramirez assaulted her, the bathroom-fall explanation ceased to be plausible. It does not require medical

expertise to recognize that these were not bathroom-fall injuries.[5]

Dr. Schellpfeffer's testimony was duplicated by two other experts, and Ramirez does not explain how the jury might have reached a different result had it had the opportunity to assess Dr. Schellpfeffer's credibility in light of the immunity grant. For these reasons, and those argued in the opening brief, the court's refusal to allow impeachment of the doctor with the immunity grant was harmless error.

CONCLUSION

The order granting Ramirez's motion for a new trial should be reversed, and the matter remanded with instructions to reinstate the judgment of conviction.

Dated this 21st day of June 2022.

Respectfully submitted,

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[5] Ramirez presented no expert evidence at trial (or postconviction) suggesting that these injuries were consistent with a bathtub fall.

FORM AND LENGTH 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 2,980 words.

Dated this 21st day of June 2022.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER

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 21st day of June 2022.

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