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STATE OF WISCONSIN  
C O U R T O F A P P E A L S  
DISTRICT IV

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Case No. 2022AP164-CR

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STATE OF WISCONSIN,  
Plaintiff-Appellant,  
v.  
KEVIN J. MCDOWELL,  
Defendant-Appellant.

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APPEAL FROM AN ORDER SUPPRESSING EVIDENCE,  
ENTERED IN DANE COUNTY CIRCUIT COURT, THE  
HONORABLE DAVID CONWAY, PRESIDING

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**PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX**

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## ISSUES PRESENTED

The State charged Kevin J. McDowell with kidnapping and two counts of second-degree sexual assault that allegedly occurred in 2017. The State moved to admit other acts related to allegations that McDowell sexually assaulted other women. With respect to a 2008 incident related to “Denise,”<sup>1</sup> who subsequently passed away, the State sought to introduce Denise’s out-of-court statements to a responding police officer as an excited utterance and to a forensic nurse examiner as statements for the purpose of medical diagnosis and treatment. The court determined that Denise’s out-of-court statements to the officer and the nurse were testimonial and, therefore, inadmissible.

1. Were Denise’s out-of-court statements to a nurse during a sexual assault examination testimonial?

The circuit court answered: Yes.

This Court should answer: No. While the nurse collected and preserved evidence during the forensic examination, the examination’s primary purpose was to provide medical care and treatment to Denise. Therefore, her statements were nontestimonial.

2. Were all of Denise’s out-of-court statements to a responding police officer testimonial?

The circuit court answered: Yes.

This Court should answer: No. To the extent that the officer needed to determine whether an ongoing emergency existed, the officer’s initial questions and Denise’s responses were nontestimonial.

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<sup>1</sup> The State uses the pseudonym “Denise” to refer to the other acts victim known as “Victim D” in the State’s other acts motion. (R. 27:10–12.)

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State welcomes oral argument if it will assist the Court. The State believes that publication will provide guidance to trial courts tasked with deciding under what circumstances an out-of-court declarant's statements to a forensic nurse examiner and a first-responding officer are testimonial.

## STATEMENT OF THE CASE

This is a State's appeal under Wis. Stat. § 974.05(1)(d)2. from a pretrial order suppressing, on confrontation grounds, Denise's out-of-court statements to Nurse Jill Fisher and Officer Andre Lewis about Denise's 2008 encounter with McDowell. (R. 98:1; 99:1.)

### *The Charges*

The State charged McDowell with kidnapping and two counts of second-degree sexual assault, all as a repeater. (R. 3:1–2.) In August 2017, Janet<sup>2</sup> reported that an individual, who identified himself as “Kevin,” approached her, grabbed her forcibly on the arm, and told her that he wanted her to be his girlfriend. (R. 3:2–3.) Kevin, who was later identified as McDowell through DNA testing, told Janet that he would not let her go until she had sex with him and that he would take her to his home to have sex with her. (R. 3:3.) McDowell told Janet that she might get hurt if she acted out or tried to get away and made Janet board a bus with him. (R. 3:3.) While at an apartment, McDowell held Janet down on the bed, verbally abused her, touched and rubbed her genital area, and later demanded that she perform oral sex. (R. 3:3.)

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<sup>2</sup> While the State uses “V1” in the complaint to refer to the alleged victim of the charged offense, it uses the pseudonym “Janet” in this brief. (R. 2:1.)

Janet said that they left the apartment and walked to a wooded area. (R. 3:3.) When Janet asked McDowell to take her home, McDowell told her that he would not until she had sex with her. (R. 3:3.) McDowell then had penis-to-anus intercourse with Janet, who cried and asked to leave. (R. 3:3.) McDowell later denied having sex with Janet. (R. 3:3.)

### *Pretrial Proceedings*

McDowell demanded a speedy trial. (R. 16:1; 24:2–3.) The court decided several pretrial motions, including the State’s motion to admit other acts evidence, the focal point of this appeal. (R. 27; 75:13–17.)

In its other acts motion, the State alleged McDowell had sexually assaulted five other women, designated Victims A, B, C, D or “Denise,” and E, between 2003 and 2021. (R. 27:5–14.) The court admitted the other act evidence with respect to Victims A, C, “Denise,” and excluded it with respect to Victims B and E. (R. 75:17, 22.) Based on Victim C’s unresponsiveness to communications with the State, the court understood that the State would not likely be able to introduce the other acts related to Victim C. (R. 73; 75:17 n.4.)

### *The Decision to Admit Other Acts Related to Denise*

The State’s appeal relates to the court’s order excluding Denise’s out-of-court statements to a police officer and a nurse because they were testimonial and, therefore, inadmissible under the Sixth Amendment’s Confrontation Clause. (R. 98.) To provide context for the court’s order, the State discusses its other acts evidence related to Denise’s allegations, the court’s decision admitting the other act evidence, the parties’ subsequent litigation of the confrontation claim, and the court’s determination that the State’s proffer violated McDowell’s confrontation rights.

With respect to Denise, the State alleged that officers were dispatched to a gas station and interviewed Denise, noting that Denise cried, breathed heavily, and sobbed



throughout the interview. (R. 27:10.) Denise told officers that she had been drinking at a bar and said that a person later identified as McDowell took her keys. (R. 27:10.) Denise described how this person drove her to different locations and engaged in nonconsensual oral, vaginal, and anal sex with her while threatening and verbally abusing her. (R. 27:10–11.)

The State's motion alleges that Denise underwent a sexual assault nurse examination,<sup>3</sup> during which she described the assault. (R. 27:11.) The nurse observed multiple injuries to Denise, including to her vagina and anus, and noted that Denise reported rectal pain as well as pain to her left nipple where her assailant bit her. (R. 27:11.) McDowell was later determined to be the source of DNA detected on a sperm fraction of a vaginal swab. (R. 27:12.) The State later told the court that Denise was deceased and that it intended to prove Denise's allegations through her excited utterances to an officer, her statements to a nurse examiner, and DNA evidence. (R. 114:69–71.)

McDowell opposed admission of the other acts evidence, asserting that the circumstances of Denise's assault were too dissimilar to the charged crime and too remote in time. (R. 65:1, 8–9.)

In its order, the court determined that the other act allegations related to Victim A, Victim C, and Denise were admissible. (R. 75:1–18.) The other act evidence related to Denise's allegation was admissible because it was not remote in time to the charged offense and had "substantial probative value due [its] significant similarities to the charged sexual assaults." (R. 75:14.) The court noted that Denise was

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<sup>3</sup> The State's other acts motion uses SANE to refer to the sexual assault nurse examination. (R. 27:11.) The court granted McDowell's pretrial motion to require witnesses to use "forensic nurse" examiner or examination rather than "sexual assault nurse" examiner or examination. (R. 66:4; 114:54.)

deceased and that the State intended “to offer the testimony of a forensic nurse examiner and a police officer under the medical diagnosis and excited utterance hearsay objection. The defense is free to object to this testimony at trial.” (R. 75:18 n. 5.)

The court subsequently clarified its prior order concerning the admissibility of two of Denise’s out-of-court statements, including (1) “He fucked the shit out of me” to the officer and (2) “He fucked me like I wasn’t even human” to the nurse. (R. 27:10; 115:18–19.) The court excluded these statements, determining that they were unduly prejudicial under Wis. Stat. § 904.03 and because they did not “add to the plan, intent, motive, credibility component” of its other act analysis.” (R. 115:20.)

*The Court’s Determination that Denise’s Out-of-Court  
Statements were Testimonial*

The court later expressed its concern that the State’s introduction of Denise’s out-of-court statements to the responding officer and the nurse potentially violated McDowell’s confrontation rights. (R. 82:1–2.)

The State argued that Denise’s out-of-court statements were nontestimonial because they were “made with the primary purpose to notify the police about an ongoing emergency.” (R. 83:2.) With respect to Denise’s statements to the nurse, the State asserted that they were made for purposes of medical diagnosis and treatment and that they were nontestimonial because the primary purpose of the examination was for Denise’s care and treatment. (R. 83:2.) The State requested an evidentiary hearing to make an offer of proof through Nurse Fisher. (R. 83:3.)

McDowell asserted that Denise’s out-of-court statements to the officer and the nurse were testimonial. (R. 85:1–4.)

After the jury was selected but before it was sworn, the court conducted a hearing to determine whether Denise's out-of-court statements were testimonial. (R. 104:3.)

*Nurse Fisher's testimony.* Fisher testified that she spent her career in emergency and critical care, including in the med flight program. (R. 104:7.) Fisher said that she was initially trained to conduct forensic examination in 1994, that she was a certified forensic nurse examiner in 2008, that she received ongoing training to maintain her certification, and that she has forensically examined between 500 and 800 patients. (R. 104:7–8, 14.) Fisher explained that a forensic nurse examines patients who have been injured as a result of someone breaking the law and that the patients may come for an examination either on their own or by a referral through the Rape Crisis Center or law enforcement. (R. 104:11–12.)

Fisher agreed that the primary purpose of her exam was to diagnose injuries the patient has and provide medical treatment. (R. 104:46.) The court and Fisher later had the following exchange:

Q: So when asked what the primary purpose of a forensic exam is, is it to diagnose injuries and provide treatment, or is it to collect evidence?

A: It's diagnosis of injury . . . to present treatment, and it is also evidence collection if a patient wants evidence collection done.

(R. 104:46–47.) Fisher explained that the exam is called a forensic exam because of the possibility that a crime was committed and the need to collect evidence. (R. 104:46.) Although evidence collection was part of the exam in Denise's case, the collection of the evidence did not change the primary purpose of the exam. (R. 104:52.)

Fisher testified that during an examination, she conducts a verbal assessment, obtains the patient's medical history, asks the patient what happened and what the patient wants the nurse to do, and provides the patient with choices,

including having medical treatment to prevent sexually transmitted infections and a morning-after pill to prevent pregnancy. (R. 104:12.) Fisher said that the patient can decide to have an examination to look for injuries and get treated. (R. 104:13.)

Fisher explained that the purpose of the medical history is to determine if the patient has any medication or latex allergies, has a surgical history, has medical problems for which the patient is being treated, and the patient's medication usage. (R. 104:21–22.) Fisher said that the medical history, including information about past injuries, directs how she will do the physical exam. (R. 104:22.) Fisher noted that obtaining a history from a sexual assault patient is not different from obtaining a history when someone comes to the emergency room with another type of injury. (R. 104:24–25.) As Fisher explained, she needs information about how something happened to provide further care to the patient. (R. 104:25.)

Once the history is taken, Fisher tells the patient, “Now we’re going to talk about why you came here tonight.” (R. 104:23.) Fisher said that questions, which are intended to give her information needed to conduct the exam, are presented to the patient in a manner that gives the patient control. (R. 104:23.) Fisher asks the patient specific questions about the contact that occurred to help identify where to look for evidence and to determine the best medical treatment. (R. 104:24.) Fisher uses quotation marks around the patient's words in her notes. (R. 104:24.)

Fisher conducts a head-to-toe external examination, looking for lacerations, abrasions, contusions, ecchymosis, or deformity. (R. 104:25.) The head-to-toe assessment is done for all patients, not just forensic patients. (R. 104:29.) If Fisher observes a bruise or contusion, she will document it—either through photographs if the patient agrees or, if not, on an anatomical diagram. (R. 104:25–26.) Fisher also conducts an

internal examination, including a genital exam, which Fisher described as “the most invasive” and “the hardest” for the patient. (R. 104:27–28.) Fisher looks for “injury or bleeding or anything unusual” and collect swabs if needed. (R. 104:28.) Fisher will also conduct an anoscope examination if the patient reported being anally assaulted and the patient consents. (R. 104:28.) Fisher documents her observations during these examinations. (R. 104:29.)

If the patient consents to having evidence collected, Fisher will obtain swabs unless there is something that must “be dealt with emergently.” (R. 104:30.) Fisher said she looks for sperm and other things that are abnormal that need to be treated like a yeast infection. (R. 104:30.) Fisher also prescribes medication to treat the patient for sexually transmitted infections as well as conduct a pregnancy test to determine what medications may be appropriate. (R. 104:31.)

Fisher said that the examination also informs whether the patient will need additional follow-up with their physician for unusual drainage or pain, treatment for possible sexually transmitted infections, and a referral for mental health counseling. (R. 104:26–27, 32.) Fisher documents this information so that other healthcare professionals can access it later. (R. 104:27.) Fisher also provides discharge instructions that identifies the laboratory tests that were done and instructions for medications that were provided. (R. 104:33.) At the patient’s request, Fisher will contact the patient’s family physician or conduct follow-up herself. (R. 104:33.) If necessary, Fisher schedules a follow-up appointment for additional care. (R. 104:35.) Fisher also determines whether the patient has a safe place go at discharge. (R. 104:32.)

Fisher conducts the examination in a room in the emergency department away from its general activity. (R. 104:18.) The room includes equipment for conducting examinations, including vaginal speculums, anosopes,

magnifying lights, lighting to detect bodily secretions, a camera on a tripod for taking pictures, and sexual assault evidence collection kits. (R. 104:18–19.) A conference room is across the hall from the examination room where the nurse can speak to the patient. (R. 104:19.) Fisher said that medical staff will treat the patient’s injuries in the examination room to avoid moving the patient around. (R. 104:20–21.) Fisher said the patient decides whether there should be police involvement, whether an officer or family members are allowed in the examination room, whether an examination will be conducted, and whether evidence will be collected. (R. 104:15.)

Fisher met Denise on January 21, 2008, in her capacity as a forensic nurse examiner and provided her with medical care. (R. 104:36.) Fisher documented her examination of Denise in medical records. (R. 96; 104:36–37.) The records include the observations of a triage nurse, who noted Denise’s “tearful effect,” Denise’s comment that “my ass hurts,” observations of alcohol involvement, and vital signs. (R. 96:10; 104:38–39.) Fisher wrote the narrative assessment in the record, including that Denise came to the emergency department with the police, that Denise was upset that her car had been impounded, and that the patient agreed to a forensic examination after speaking to her mother. (R. 104:39.) A summary was provided that documented the treatment, including medications, that were prescribed. (R. 104:40.)

While a police officer and rape crisis advocate were present, Fisher said that the officer was not in the room during the exam with Denise. (R. 104:40–41, 45–46.) Fisher said it was Denise’s decision to have medical services, that Denise spoke to her husband and mother who helped her make this decision, and that law enforcement was not involved in this decision. (R. 104:41, 48.)

Fisher documented Denise's medical history. (R. 96:15; 104:41.) Fisher then gathered information about the "history of assault," which included questions about whether Denise had a loss of memory, information about where the assault occurred, and whether she knew her assailant. (R. 104:42–43.) Denise described her assailant and said that he was someone she met that night. (R. 96:16; 104:43.) Fisher asked Denise specific questions about the assault to obtain information so that she could provide appropriate follow-up treatment. (R. 96:16–17; 104:43–44.) The medical record includes descriptions of Denise's statements about what happened, standardized questions with Denise's answers about what happened, and additional documentation of Fisher's observations. (R. 96:16–18, 19.) The record reflects that Denise agreed to certain aspects of the exam including a colposcopy, woods lab, specimens collected for urinalysis, and wet prep, but she declined an anoscope exam and photographs. (R. 96:24.) Fisher noted Denise's behavior during the exam including Denise's comments. (R. 96:24.) The medical record includes anatomical diagrams on which Fisher documented her observations. (R. 96:19–22.)

Fisher assumed that officers wanted Denise "to have that evidence collection" but that the police knew that it was Denise's choice to have that done. (R. 104:47.) Fisher collected evidence and provided it to law enforcement because Denise "agreed for that to happen." (R. 104:48.)

With respect to billing, Fisher explained that if law enforcement brings the patient to the hospital and evidence collection is done, then law enforcement is billed. (R. 104:49.) If evidence is not collected, then grants or the patient's insurance will cover the costs. (R. 104:49–50.) In a consent form, Denise authorized her insurance provider to pay the hospital and agreed to pay expenses that insurance did not cover. (R. 96:6.)



*Lewis's Report.* Lewis did not testify at the hearing. (R. 104:53.) The parties agreed that the court could consider Lewis's report. (R. 94; 104:64.)

Lewis reported that he and other officers received a dispatch that three males were fighting in a gas station parking lot and that a female was inside crying. (R. 94:1.) On arrival, Lewis saw McDowell, a store manager, and a female outside the station, and noted that Denise was walking into the station. (R. 94:1–2.) Lewis spoke to the manager inside, who said that two other males jumped McDowell and that the males had left the area. (R. 94:1–2.) Denise, who was upset and crying, stood behind the counter with the manager. (R. 94:2.) Lewis spoke to McDowell, who claimed he did not know the two guys who jumped him or why he was jumped. (R. 94:2.) McDowell did not want to provide Lewis with identification. (R. 94:2.)

Lewis spoke to Denise, who “was crying into her hands” and “was breathing heavily.” (R. 94:2.) When Lewis asked her what happened, Denise replied “he fucked,” but would not finish the sentence. (R. 94:2.) When Lewis told Denise that they were about to let McDonnell go, Denise asked that they not let him go. (R. 94:2.) When Lewis asked her what happened, Denise “blurted out he pulled on my ‘clit’” and that he “fucked the shit out of me.” (R. 94:2.) Denise told Lewis that she did not know McDowell, that he had taken her car and driven her around. (R. 94:2.) After Lewis decided to detain McDowell, he obtained a more detailed statement from Denise about McDowell's alleged assault of her. (R. 94:2–3.)

Officer Lewis reported that he and another officer transported Denise to the hospital for a SANE, described Denise's reluctance to participate in the exam, noted Denise's fear that her husband would physically abuse her, and later transported her home. (R. 94:3.)



During the hearing, the court said that it knew of “no *Crawford* exception . . . for an excited utterance other than a doctrine surrounding 911 calls,” and that the only other exceptions were for “dying declarations and for forfeiture by wrongdoing.” (R. 104:54, 56.) The State asserted that statements to an officer at the scene are not “automatically testimonial” and should be assessed under the primary purpose test. (R. 104:55–56.)

*The circuit court’s decision.* The court reviewed each of the four factors the supreme court identified in *State v. Mattox*, 2017 WI 9, ¶ 29, 373 Wis. 2d 122, 890 N.W.2d 256, for assessing whether a statement is testimonial under the primary purpose test. (R. 109:5–6.)

The court made several findings related to the circumstances of Denise’s statement to Fisher, including about: (1) the officers’ transport of Denise to the hospital shortly after reporting the assault and from the hospital after the examination; (2) the examination room, including its location away from the activity of the emergency room and the equipment in the room, such as a cart with evidence collection material and a camera for taking forensic photos; (3) the presence of an adjacent conference room where the nurse takes a medical history and interviews the patient about the reasons for the visit; (4) Fisher’s substantial training and experience conducting forensic exams under a protocol; (5) the procedures Fisher used during the examination, including permission to examine Denise and collect evidence with her permission; (6) Fisher’s turning over the collected evidence to the police; (7) Fisher’s release of medical records to the police with Denise’s permission; (8) the presence of a rape crisis advocate; and (9) the presence of an officer outside the examination room, but who was not present during the examination. (R. 109:7–8.)

First, the court said that the setting had “many trappings of formality” because the exam was arranged by

police, the exam was conducted while the police waited outside, a rape-crisis counselor was present, the exam was conducted pursuant to a forensic nurse examination protocol, the exam was used to collect evidence, and the exam report was given to the police. (R. 109:9.) Based on these considerations, the court determined that an objective observer would conclude that Denise's statements would be available for use at a later trial. (R. 109:9.)

Second, the court concluded that while Fisher was a non-law enforcement individual, she was collaborating with law enforcement because law enforcement instigated Denise's exam, the exam was used to collect evidence, and Fisher was now participating in the case "as a witness for the prosecution." (R. 109:11.)

Third, because Denise was an adult and not a child, the court determined that her age had no bearing on its analysis. (R. 109:11.)

Fourth, the court determined that the circumstances in which Denise gave the statements to Fisher made her statements testimonial. (R. 109:11.) These considerations included law enforcement's referral of Denise for an exam, that Fisher was "acting under the auspices of law enforcement," the collection of evidence with an evidence collection kit, the state's payment of the hospital's cost of the exam, the collection of evidence, the availability of the nurse for testimony "in support of the prosecution," the presence of officers outside the exam room, Fisher's interview of Denise about her injuries and the examination of her body. (R. 109:12–13.) While acknowledging that Fisher provided medical care and follow-up, the court said that the examination's forensic nature set it apart from other medical examinations. (R. 109:14.)

The court did not decide whether Denise's statements to Fisher were admissible under an applicable hearsay exception. (R. 109:6.)

The court also determined that Denise's statements to Officer Lewis were testimonial. (R. 109:28–29.) Relying on Lewis's report, the court explained its belief that the police had been called “to respond to allegations of a sexual crime that had occurred.” (R. 109:28.) The court said that Denise and McDowell were separated during this encounter with Denise inside the gas station while McDowell was outside. (R. 109:28.) Relying on *Hammon v. Indiana*, 547 U.S. 813 (2006),<sup>4</sup> the court said that there was no longer an ongoing emergency and that Lewis's questions were intended “to establish the event of the criminal activity she was reporting.” (R. 109:29–30.)

In a written order, the court suppressed Denise's out-of-court statements to Nurse Fisher and Officer Lewis based on its determination that they were testimonial. (R. 98:1.).

The State appealed. (R. 99:1.)

### STANDARD OF REVIEW

Ordinarily, the decision to admit or exclude evidence rests within the circuit court's discretion. *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis. 2d 253, 759 N.W.2d 557. “A circuit court erroneously exercises its discretion when it bases its decision on a misstated fact or an incorrect view of the law.” *Id.* However, whether the admission of an out-of-court statement violates a defendant's confrontation rights presents a constitutional question subject to this Court's

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<sup>4</sup> The Supreme Court issued *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006) as a joint decision. Except when discussing *Hammon*'s specific facts, the State cites to the joint decision as *Davis*.

independent review. *State v. Mattox*, 2017 WI 9, ¶ 19, 373 Wis. 2d 122, 890 N.W.2d 256.

## ARGUMENT

**I. Denise’s out-of-court statements to Nurse Fisher were nontestimonial because their primary purpose was to diagnose and treat Denise.**

**A. Courts determine whether an out-of-court statement is testimonial by determining its primary purpose.**

The Sixth Amendment’s Confrontation Clause grants a criminal defendant with the right “to be confronted with the witnesses against him.” U.S. Const. amend VI.<sup>5</sup> The confrontation clause serves “to ensure the reliability of testimony by allowing the accused to challenge a witness’s statements ‘in the crucible of cross-examination.’” *State v. Reinwand*, 2019 WI 25, ¶ 25, 385 Wis. 2d 700, 924 N.W.2d 184 (citation omitted).

“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004). Under *Crawford*, the Confrontation Clause bars the admission of *testimonial* hearsay statements unless (1) the declarant is unavailable, and (2) the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 59. Thus,

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<sup>5</sup> Article 1, § 7 of the Wisconsin Constitution also guarantees a criminal defendant the right to confront witnesses. Wisconsin courts “generally apply United States Supreme Court precedents when interpreting” the Confrontation Clauses of the state and federal constitution. *State v. Reinwand*, 2019 WI 25, ¶ 17, 385 Wis. 2d 700, 924 N.W.2d 184 (citation omitted). Neither the court nor McDowell suggested that he had greater rights under the Wisconsin Constitution.

whether the admission of a declarant's out-of-court statement implicates the Confrontation Clause turns on whether the statement is testimonial or nontestimonial. *Reinwand*, 385 Wis. 2d 700, ¶ 23.

The Supreme Court expressly declined to provide a comprehensive definition of “testimonial.” *Crawford*, 541 U.S. at 68. Rather, it concluded that, “at a minimum,” “testimonial” statements include “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations.” *Id.*

**1. Whether a statement is testimonial is an objective test dependent on the circumstances.**

In a joint opinion in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006), the Supreme Court clarified the definition of a testimonial statement. “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Id.* at 822. The Supreme Court recognized that initial inquiries at a crime scene are not always testimonial, for example, when the police “need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.” *Id.* at 832 (citation omitted).

In contrast, statements “are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822. This is especially so when the statement's primary purpose is to provide a “narrative of past events . . . at some remove in time from the danger” described. *Id.* at 832. However, the Supreme Court cautioned that it was not “attempting to

produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial.” *Id.* at 822.

In *Michigan v. Bryant*, 562 U.S. 344, 349, 359–78 (2011), the Supreme Court determined that a victim’s identification of his shooter in response to officers’ questions as he laid on the ground with a gunshot wound were not testimonial because their primary purpose was to allow the police to respond to an ongoing emergency. Whether a statement is testimonial is an objective test, and it is not defined merely by the interrogator’s purposes. *Id.* 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. 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.” *Id.* at 364–65.

Most recently, in *Ohio v. Clark*, 576 U.S. 237 (2015), 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 “[b]ecause neither the child nor his teachers had the primary purpose of assisting in Clark’s prosecution,” the 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.” *Id.* at 245 (quoting *Bryant*, 562 U.S. at 366). *Clark* explained that statements to non-law enforcement officers like teachers are “much less likely to be testimonial

than statements to law enforcement officers.” *Id.* at 246. The context of the interview, including the interviewer’s identity, is “highly relevant.” *Id.* at 249. In determining that the statements were nontestimonial, the Supreme Court also considered the setting where the teacher spoke to the child, i.e., “the informal setting of a preschool lunchroom and classroom,” which stood in contrast to “formalized station-house question in *Crawford* or the police interrogation and battery affidavit in *Hammon*.” *Id.* at 247.

**2. Wisconsin courts apply a four-factor test when assessing whether a statement is testimonial.**

In *Mattox*, the Wisconsin Supreme Court relied on *Clark* when it adopted a four-factor test for determining whether a statement is testimonial. *Mattox*, 373 Wis. 2d 122, ¶ 32, (citing *Clark*, 576 U.S. at 244–48). These factors include: (1) the formality of the situation producing the statement, (2) whether the declarant makes the statement to law enforcement, (3) the declarant’s age, 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 *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.’” *Reinwand*, 385 Wis. 2d 700, ¶ 24 (quoting *Clark*, 576 U.S. at 245). Applying the *Mattox* factors, the court concluded a homicide victim’s statements to friends and family about his eventual killer’s threats to harm or kill him were not testimonial and, therefore, did not implicate the Confrontation Clause. *Reinwand*, 385 Wis. 2d 700, ¶ 3.



**3. Statements made while receiving medical treatment are generally *not* testimonial.**

The United States Supreme Court has categorically stated, albeit in *dicta*, that statements made to medical professionals providing treatment are not testimonial. It explained, “[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*).

That said, in the context of sexual assault and other forensic examinations, courts proceed more cautiously, recognizing that statements made during such examinations may be testimonial.

In *State v. Nelson*, 2021 WI App 2, ¶¶ 3–11, 395 Wis. 2d 585, a sexual assault victim received two examinations: a SANE conducted within hours of the assault and a follow-up examination at a child advocacy center eleven days after the assault. At trial, Nelson did not object when the State called the sexual assault nurse to testify about the first examination or a nurse practitioner who testified about another nurse’s findings in the follow-up examination. *Id.* ¶ 12. For the first time on appeal, Nelson asserted that the nurse practitioner’s testimony about the follow-up examination based on the other nurse’s report violated his confrontation rights and constituted plain error. *Id.* ¶ 25.

Applying *Mattox*’s primary purpose test, this Court determined that the surrogate nurse’s testimony about another nurse’s report of the follow-up examination was not testimonial. *Nelson*, 395 Wis. 2d 585, ¶ 30. Reviewing the nurse’s report, this Court observed that it was intended to document the nurse’s medical findings of the victim’s health



and provide a health plan and recommendations for future care. *Id.* ¶ 30. While noting that Nelson did not challenge the admissibility of the sexual assault nurse's testimony, *id.* ¶ 38, the Court contrasted the follow-up examination with the initial SANE: "While a strong argument could be made that the primary purpose of [the sexual assault nurse's] examination was for criminal prosecution, the primary purpose of the [nurse's follow-up] examination" was to evaluate, treat, and recommend a health care plan for the patient. *Id.* ¶ 45.

*Nelson* may provide some guidance in identifying factors that courts should consider in assessing whether a SANE is, in whole or part, testimonial under the primary purpose test. But *Nelson* did not decide the question because Nelson not challenge testimony about the SANE. *Id.* ¶ 38. *Nelson* is also different from this case in another respect: *Nelson* focused on whether a nurse's out-of-court statements were testimonial; it did not address the admissibility of a *patient's* out-of-court statements during either examination. Because no Wisconsin case is directly on point, this Court may find case law from other jurisdictions instructive. *See State v. Muckerheide*, 2007 WI 5, ¶ 37, 298 Wis. 2d 553, 725 N.W.2d 930.

In *State v. Burke*, 478 P.3d 1096, 1102 (Wash. 2021), *cert. denied*, 142 S. Ct. 182 (2021), the Washington Supreme Court determined that a sexual assault patient's out-of-court statements to a nurse conducting a SANE were, with one exception, nontestimonial. In framing the issue, the court asked "whether [the nurse] was principally acting as a medical provider or as someone charged with uncovering and prosecuting criminal behavior when she elicited [the patient's] statements." *Id.* at 1109.

Noting that a sexual assault nurse's duties include providing medical care and collecting evidence, the court said that sexual assault nurses are not "*principally* charged with

uncovering and prosecuting criminal behavior.” *Burke*, 478 P.3d at 1108 (quoting *Clark*, 576 U.S. at 249). The court acknowledged that sexual assault nurses “are medical professionals with specialized evidence-collecting skills and training that supplement their medical training.” *Id.* at 1109. But it explained, “this specialization does not transform a class of medical professionals into agents of the police, nor does it mean that their duty to provide medical care becomes a lower priority than their evidence-collecting responsibilities.” *Id.* In reaching this conclusion, the court noted the historical reasons for the development of SANE programs, including: (1) the waits sexual assault patients experienced in public emergency rooms because their injuries were viewed less seriously than those of other patients; (2) the lack of training medical providers had to conduct these examinations and provide testimony about them; and (3) the re-traumatization patients experienced during the examination process and the way providers treated them. *Id.* (citations omitted). “Though documenting and collecting evidence are some of the critical responsibilities of a sexual assault nurse examiner, so is providing medical care.” *Id.*

In *Burke*, the court concluded that the nurse did not act as a police agent but as a medical provider. *Burke*, 478 P.3d at 1110. The court observed that the nurse’s “forensic duties did not subordinate her medical responsibilities but, rather, supplemented them.” *Id.* It reached this conclusion based partly on the nurse’s medical background and the nurse’s articulation of the importance of taking a patient’s medical history which guides where to locate injuries and what medication may be appropriate. *Id.* While the nurse followed protocols to collect evidence, the court noted that law enforcement was not present during the exam and did not direct what steps she should take during the exam. *Id.*

Some of the nurse’s questions had both medical and forensic purpose. For example, a question about ejaculation

might provide information about where DNA evidence might be collected, but it was also necessary to determine if the patient needed medications to treat a sexually transmitted infection or prevent pregnancy. *Burke*, 478 P.3d at 1111. Likewise, questions about the force used on a patient may bear on the potential charges, but the patient's answers to such questions could also reveal where a patient had injuries that required treatment. *Id.* As the court explained, the patient's statements "were necessary to guide the medical component of the exam." *Burke*, 478 P.3d at 1112. As such, the patient's and the nurse's "statements and actions in the context of a sexual assault exam indicate that the primary purpose of nearly all of [the patient's] statements was not to provide an out-of-court substitute for trial testimony but to guide medical treatment for sexual assault." *Id.*

In *United States v. Norwood*, 982 F.3d 1032, 1041 (7th Cir. 2020), a district court admitted a sexual assault nurse's testimony about an older juvenile victim's out-of-court statements about her assaults but redacted the victim's references to the defendant. Recognizing that SANE examinations serve both medical and investigative functions, the Seventh Circuit noted the difficulties of assessing whether they are testimonial under the primary purpose test. *Id.* at 1045–46. After reviewing both federal and state cases, the court identified factors that courts should assess under the primary purpose test. *Id.* at 1046–48.

With respect to formality, the court observed that, "Police stations invoke formality, for purposes of the Confrontation Clause, in a way that hospitals do not." *Norwood*, 982 F.3d at 1049. The court cautioned, "Yet even if the place where the exam occurs has a special focus on victims, statements made during an examination should not be automatically or even presumptively labeled testimonial. Instead, further inquiry into the extent and manner of patient care is necessary." *Id.*

With respect to the questioner's identity, the Seventh Circuit noted that the absence or presence of officers in the examination may be determinative of the primary purpose. *Norwood*, 982 F.3d at 1049. If officers are present and question the victim, "the victim's responses are testimonial." *Id.* If officers are present but do not question the victim, the officer's "presence still weighs on the analysis . . . [as the victim is] objectively more likely to understand the statements to be part of an investigation." *Id.* "Finally, when the only people in the room are the medical provider and the victim, the analysis is more straightforward. . . . Absent additional evidence, physicians and nurses' primary concern is the treatment of their patients; criminal investigation is a secondary concern." *Id.* "The primary thrust of the court's inquiry must be whether there is an objectively ascertainable medical reason for the inquiry." *Id.* at 1050. The medical provider needs to know what happened and when to guide medical treatment. *Id.*

In *Burke* and *Norwood*, the courts determined that certain patient statements, including statements identifying or describing the assailant made during the examinations, were testimonial based on the facts of those cases. *Burke*, 478 P.3d at 1112; *Norwood*, 982 F.3d at 1052. Relying on *Davis*, 547 U.S. at 829, both the Washington Supreme Court and the Seventh Circuit agreed that the proper remedy is to redact the testimonial parts of the statement from the nontestimonial part of the statement. *Burke*, 478 P.3d at 1112; *Norwood*, 982 F.3d at 1049–50.

In *Thompson v. State*, 438 P.3d 373, 377 (Okla. Crim. App. 2019), an Oklahoma court observed: "It is the duality of the SANE nurse's role [i.e., providing medical treatment and collecting evidence] that calls into question the primary purpose of the sexual assault examination." *Id.* Based on its survey of the case law, the court stated, "Many courts have found a victim's statements made to medical personnel,

including sexual assault examiners, describing the attack and naming the perpetrator were non-testimonial because the primary purpose of the exam was for medical treatment.” *Id.* (collecting cases). It also noted that other courts have found a victim’s statement testimonial based on “evidence of the examiner’s relationship with police or involvement of the police in the exam process and the absence of any need for, or provision of, medical treatment during the exam.” *Id.* (collecting cases).

The *Thompson* court determined that the primary purpose of the examination was for medical purposes and that evidence collection was a secondary purpose. *Thompson*, 438 P.3d at 378. It reached this conclusion based on its assessment of several factors, including that the nurse followed a protocol, the patient consented to the examination, the nurse collected a medical history and vital signs, the questions about the assault helped to identify the location of injury, develop a diagnosis, assess the need for future referrals and prophylactic medication, and the lack of law enforcement involvement. *Id.*

**B. Denise’s statements were nontestimonial because the primary purpose of Nurse Fisher’s questions and Denise’s answers were to facilitate Denise’s medical care.**

When viewed objectively, the totality of the circumstances, including consideration of the four *Mattox* factors—the informality of the situation, the absence of police during the examination, Denise’s age, and the context in which Denise gave her statement—demonstrate that Denise’s statements were nontestimonial. *Mattox*, 373 Wis. 2d 122, ¶ 32; *Norwood*, 982 F.3d at 1045 (totality of the circumstances).

*The absence of police participation during the examination.* While officers accompanied Denise to the

hospital and took her home, she was not, as the court suggested, acting “under the auspices” of the police when Fisher examined Denise. (R. 109:11.) Rather, Fisher was a fulltime flight nurse with UW Hospital and a part-time forensic nurse at a hospital. (R. 95:1; 104:6.) While her specialized forensic training supplemented her medical training, it did not transform Fisher from a medical professional into a police agent or “mean that [her] duty to provide medical care [became] a lower priority than [her] evidence-collecting responsibilities.” *Burke*, 478 P.3d at 1109.

While officers remained outside the examination room, they were neither present during the exam nor otherwise participated in it. (R. 104:40–41, 45–46.) *Norwood* 982 F.2d at 1049. It was not the officers, but Denise, after conferring with her mother, who decided whether to allow Fisher to proceed with the examination. (R. 101:38, 41, 48.) Likewise, nothing in the record suggests that Fisher stopped the examination to confer with the officers or that the officers directed Fisher to ask Denise specific questions during the examination. Fisher and Denise were the only people in the room and, absent additional evidence, Fisher’s primary concern was treating her patient, Denise, while criminal investigation was “a secondary concern.” *Norwood* 982 F.2d at 1049.

*The context in which Denise gave her statements demonstrates a nontestimonial, medical purpose.* While Fisher collected some evidence during the examination, the totality of the facts demonstrates that it served primarily medical purposes. Fisher testified that patients decide whether to have an examination. (R. 104:15.) Here, Denise made the decision to have an examination and executed a consent for treatment form. (R. 96:6; 104:48.)

The examination primarily served medical purposes rather than evidence collection purposes. For example, a triage nurse took Denise’s vital signs and documented her “tearful affect” and her statement, “my ass hurts,”

information relevant to a medical examination, reflecting on trauma and pain. (R. 96:10; 104:38–39.)

To help guide how she conducts an examination, Fisher takes a medical history, that includes obtaining information about medication and latex allergies, past surgeries and treatment, medication usage, and identifies areas that may make parts of the examination painful. (R. 104:21–22.) Here, Fisher collected Denise’s medical history and medication information. (R. 96:15; 104:40.)

Fisher testified that she asks patients—forensic or otherwise—what happened because the patient’s answer may guide what care is provided. (R. 104:23–24.) With a forensic patient, questions about what happened also guide where to look for evidence. (R. 104:23.) Here, Fisher documented what Denise told her about the assault in Denise’s words, had her describe the types of sexual contact that occurred, whether she had memory lapses, where the assault occurred, and her assailant. (R. 96:16–18; 104:42–44.)

Fisher will document the patient’s injuries, as she did with Denise, because it informs what additional treatment may be necessary, including follow-up care, which includes monitoring for sexually transmitted infections, reporting unusual drainage or pain, and seeking mental health counseling. (R. 104:26.) As she does with non-forensic patients, Fisher conducts a head-to-toe examination, looking for lacerations, abrasions, contusions, ecchymosis, or deformity. (R. 104:25, 27, 29.) Here, Fisher documented that Denise had pain to her breast, vagina, and rectally, noting those injuries on anatomical charts. (R. 96:17, 19–21.)

With the patient’s consent, Fisher also conducts an internal examination of the vaginal and anal areas, which she described as invasive, to “look for injury or bleeding or anything unusual” and collect swabs. (R. 104:27–28.) Denise agreed to a vaginal examination, but not an anal examination,



which can be particularly uncomfortable. (R. 96:24; 104:27–28.) Fisher documented her observations of the pelvic examination on an anatomical chart. (R. 96:22.)

Fisher provides treatment during the examination, including providing medications to prevent sexually transmitted infections and pregnancy, as well as conduct a pregnancy test to determine what medications are appropriate. (R. 104:12, 30–31.) Denise’s medical records document the medications provided and lab work conducted as part of her examination. (R. 29:25, 30–36.) Both testing and treatment serve medical, not investigatory purposes.

Fisher discussed the importance of discharge instructions for all patients, including information about laboratory tests and medications and recommendations for follow-up care with the nurse or the patient’s primary care physician. (R. 104:32–35.) Denise’s discharge records reflected her pregnancy testing result, identified medications provided during the examination, informed her that Fisher would follow-up to provide her with test results and check on her, and directed Denise to seek “medical follow-up” with her primary care provider. (R. 29:25.)

The forensic aspects of this examination related to the collection of physical evidence but, as Fisher explained, the patient controls whether evidence will be collected, whether there will be a future legal action, whether the police will continue to be involved even if an officer brought the patient to the hospital. (R. 104:15.) Here, Denise allowed Fisher to collect swabs but refused to allow her clothes to be collected or photographs taken. (R. 96:26, 29.) While the collection of evidence itself may suggest a testimonial purpose, Fisher’s testimony and the medical records demonstrate that the examination’s primary purpose was nontestimonial, focused primarily on providing Denise with medical care and treatment.



Denise executed releases for her medical information, including to her primary care provider and the police, but she understood that her treatment was not conditioned on her consent to release this information and that she could revoke her consent. (R. 96:27–28). And while Denise also agreed to release her records related to the examination to the police, the execution of a release does not undermine the primary purpose of her examination: medical care and treatment related to a sexual assault that Denise reported.

*The formality/informality of the situation.* The circumstances surrounding Fisher’s interaction with Denise were informal, not formal. They interacted in a hospital setting, which does not invoke the formality of a station-house setting likely to provoke testimonial statements. *Mattox*, 373 Wis. 2d 122, ¶ 26; *Norwood*, 982 F.3d at 1049. Further, the medical record that Fisher created does not have the same formality as “affidavit-like” or certified laboratory reports created specifically for use in a criminal prosecution. *Mattox*, 373 Wis. 2d 122, ¶ 27 (citations omitted).

In assessing formality, the court considered the setting where Fisher examined Denise, a room that included equipment for evidence collection. (R. 109:12.) But as the Seventh Circuit cautioned, even if the place where the examination “occurs has a special focus on victims, statements made during an examination should not be automatically or even presumptively labeled testimonial.” *Norwood*, 982 F.2d at 1049. Instead, the court emphasized the that the inquiry should focus on the on the extent and manner of patient care, which in Denise’s case was significant and included taking vital signs, a medical history, testing, medications, and discharge instructions related to follow-up care. *Id.*

Likewise, in assessing whether Denise’s statements were testimonial, the court misplaced its focus on the presence of an evidence collection kits in the examination

room and Fisher's collection of evidence in Denise's case. (R. 109:9, 12.) Fisher's questions to Denise about what happened identified where Fisher should look for evidence; but more importantly, these questions inform how Fisher will examine a patient like Denise and what treatment to provide. (R. 104:23–25.) That Fisher asks any patient who presents at an emergency room, not just a sexual assault patient, about what happened demonstrates that the question is primarily focused on care and treatment. (R. 104:24–25.)

Denise was under no obligation to provide physical evidence, much less cooperate with the police as part of the examination process (R. 104:15), and nothing in the record suggests that Fisher would have examined or treated Denise differently had she declined. While preserving evidence was one aspect of the examination, it was secondary to Fisher's focus as a medical professional to medically evaluate and treat Denise. (R. 104:46.) *See Norwood*, 982 F.3d. at 1049. Fisher's evidence collection duties did not elevate her examination, including her conversations with Denise, to the formality of a station-house interrogation. *Id.*; *Burke*, 478 P.3d at 1112.

*Denise's age.* As an adult, Denise's age was "a neutral factor, making the statement neither more nor less likely to be testimonial." *Reinwand*, 385 Wis. 2d 700, ¶ 29.

*An ongoing emergency.* In addition to the four *Mattox* factors, the presence of an ongoing emergency makes it less likely that a statement's primary purpose is testimonial. *Bryant*, 562 U.S. at 349. Assessing the risks to a person on release, including to a potential abuser, is part of this inquiry. *Clark*, 576 U.S. at 246–47. When a "patient describes the assailant as an intimate partner, the statement's primary purpose might be to guide the provision of medical care or to address an ongoing emergency regarding the patient's safety upon discharge." *See Burke*, 478 P.3d at 738 n.13

As Fisher explained, part of the discharge process is to make sure that the patient has someplace safe to go. (R. 104:32.) Fisher's question to Denise about the assailant's identity—family, friend, acquaintance, stranger unknown—was relevant to determining whether she could be safely discharged. (R. 96:16; 104:43.) Because Denise described her attacker as a stranger, other descriptive information, including “black male,” “younger than me,” and “late 20s,” was less relevant to assessing Denise's injuries and potential danger to her on discharge and more likely to aid in prosecution. (R. 104:43.) Based on these circumstances, redaction of information identifying McDowell in Denise's statement rather excluding her statement in its entirety may be appropriate. *See Davis*, 547 U.S. at 829; *Burke*, 478 P.3d at 738; *Norwood*, 982 F.3d at 1049–50 (redacting identification statements because they were potentially testimonial).

*Payment for the exam.* In assessing the primary purpose, the court noted that the State paid for the examination. (R. 109:11.) But this factor has little, if any, bearing on whether Denise's statements were testimonial. As Fisher explained, the hospital bills law enforcement when officers bring the patient to hospital and collect evidence. (R. 104:49.) Under Wis. Stat. §§ 949.20 and 940.24, a provider may apply for an award to cover the costs of an examination associated with evidence collected in relation to a sex offense, procedures that test for and prevent sexually transmitted diseases, medications prescribed during the examination to prevent or treat a sexually transmitted disease that may be a consequence of the sex offense. Nothing in the statutory scheme suggests that the “forensic component overrides the medical treatment component of a sexual assault forensic exam.” *See Burke*, 478 P.3d at 1110 n.12

Further, as Fisher explained, when the patient does not want law enforcement involvement, outside organizations have grants that pay examination expenses. (R. 104:49.) If no

grant is available, the hospital will bill insurance with the patient's agreement. (R. 104:50.) If the patient cannot pay, the hospital has decided not to bill patients. (R. 104:50.) Fisher said that a patient will not be turned away and she does not even ask the patient these questions. (R. 104:50.) Nothing in the record suggests that Fisher had a financial incentive to promote a forensic examination. Likewise, Denise's authorization allowing the hospital to submit a claim to her insurance and agreeing to pay uncovered charges undermines any suggestion that Denise believed that she had to agree to evidence collection for her examination to be covered. (R. 96:6.) The intricacies of medical billing are not "determinative of whether statements a sexual assault patient makes to a medical professional specializing in sexual assault exams are testimonial." *See also Burke*, 478 P.3d at 1110 n.12.

Together, Denise's and Fisher's statements and actions in the context of the sexual assault examination indicate that the primary purpose of Denise's statement was not to provide an out-of-court substitute for trial testimony but to guide her medical treatment for sexual assault. *Burke*, 478 P.3d at 1112. After all, it was not Fisher's "principal duty to uncover and prosecute criminal behavior, even when [she] was tasked with collecting evidence as part of [her] specialized training." *Id.* While Fisher elicited Denise's statements for both medical and forensic purposes, Denise's statements "guided the medical component of the exam." *Id.* Thus, the primary purpose of Denise's statements was to facilitate medical care during the examination.

Therefore, Denise's statements are nontestimonial and their admission would not violate the Confrontation Clause. The circuit court erred as a matter of law in holding otherwise.

**II. Denise's initial out-of-court statements to Officer Lewis were nontestimonial because their primary purpose, in part, was to enable police to meet an ongoing emergency.**

While acknowledging that Denise's out-of-court statements to Officer Lewis were likely admissible as excited utterances,<sup>6</sup> the court excluded them based on its determination that they were testimonial. (R. 115:18; 104:54–55; 109:28–30.) Relying on *Hammon*, 547 U.S. 813, the court reasoned that because Denise and McDowell were separated, and the crime was no longer ongoing, the primary purpose of Lewis's interrogation was to establish criminal activity that she was reporting. (R. 109:29–30.) This reasoning was based partly on the court's incorrect assumption that Lewis was responding to a reported sexual assault. (R. 94:1; 109:28.)

As the State will demonstrate, not all on-the-scene questioning by law enforcement creates testimonial statements. Rather, that determination turns on identifying the primary purpose of the interrogation based on an objective assessment of the circumstances. Here, Lewis was dispatched to a disturbance, i.e., “reference a fight,” at a gas station. (R. 94:1.) Denise made two sets of out-of-court statements to Lewis, one set before and the other after officers detained McDowell. (R. 94:2–3.) While Denise's second, more extensive out-of-court statements were testimonial, the primary purpose of the first statements were nontestimonial, related partly to the officer's assessment of whether there was an ongoing emergency.

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<sup>6</sup> The court excluded one of Denise's statements, “He fucked the shit out of me,” based on its determination that it was unduly prejudicial under Wis. Stat. § 904.03. (R. 115:18.)

**A. Whether an ongoing emergency exists is one consideration in assessing whether the primary purpose of an interrogation is for testimonial purposes.**

While rejecting the suggestion that “virtually any ‘initial inquires’ at the crime scene will not be testimonial,” the Supreme Court declined to “hold the opposite—that *no* questions at the scene will yield nontestimonial answers.” *Hammon*, 547 U.S. at 832. For example, the court observed that officers responding to a domestic violence incident “‘need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.’ Such exigencies may often mean that ‘initial inquiries’ produce nontestimonial statements.” *Id.*, (quoting *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 186 (2004)). In *Hammon*, the court determined the victim’s statements were not testimonial because they were “neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation.” *Hammon*, 547 U.S. at 832.

In *Bryant*, the Supreme Court reaffirmed that an officer’s initial on-the-scene inquiries may produce nontestimonial statements. *Bryant*, 562 U.S. at 377. There, the court determined that a shooting victim’s statements to responding officers that identified and described the shooter, and the location of the shooting were nontestimonial because the interrogation’s primary purpose was to enable police assistance to meet an ongoing emergency. *Id.* at 349.<sup>7</sup>

While noting that *Davis* and *Hammon* concerned an “ongoing emergency” circumstance in the domestic violence

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<sup>7</sup> In *Bryant*, the lower courts determined that the shooting victim’s statements were admissible as excited utterances and did not address their admissibility as dying declarations. *Bryant*, 562 U.S. at 351 n.1.

context, *Bryant* provided the court with the opportunity to address an “ongoing emergency” in a different context, involving a nondomestic dispute that involved a victim, who was suffering from gunshot wound and found in public place, and a perpetrator whose location was unknown. *Bryant*, 562 U.S. at 359. While domestic violence cases have “a narrower zone of potential victims than cases involving threats to public safety,” the court observed that an “assessment of whether an emergency threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.” *Id.* at 364.

As the Supreme Court explained, the existence of an ongoing emergency is relevant to determining the interrogation’s primary purpose because its focus is on ending a threatening situation rather than on proving past events relevant to a subsequent criminal prosecution. *Bryant*, 562 U.S. at 359. Just as excited utterances “are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood , . . .[a]n ongoing emergency has a similar effect off focusing an individual’s attention on responding to the emergency.” *Id.* at 351–62. A conversation may evolve from one that is nontestimonial because it is intended to determine the need for emergency assistance, into testimonial statements. *Id.* at 365. However, “the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry” *Id.* at 374. Rather, the existence of an ongoing emergency is one factor that informs the ultimate inquiry regarding the interrogation’s primary purpose. *Id.* at 366.

Other factors may inform a court’s assessment of the interrogation’s primary purpose. One factor includes the “informality in an encounter between a victim and police.” *Bryant*, 562 U.S. at 366. In *Bryant*, the court contrasted “the formal station-house interrogation in *Crawford*” with



questioning that occurs “in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion.” *Id.* Acknowledging the mixed motives of both the declarant and the officers, i.e., first responders and investigators, the primary purposes “will be most accurately ascertained by looking to the contents of both the questions and answers.” *Id.* at 367–68.

Post-*Crawford*, few Wisconsin cases address whether a witness’s on-the-scene statements to a responding officer are testimonial. And those cases have limited precedential value in deciding McDowell’s case.<sup>8</sup> Therefore, the State relies on *Bryant* to assess whether the primary purpose of Lewis’s initial questions and Denise’s statements were testimonial.

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<sup>8</sup> In *State v. Beauchamp*, 2011 WI 27, ¶ 5, 333 Wis. 2d 1, 796 N.W.2d 780, the supreme court determined that the Confrontation Clause did not bar the admission of a victim’s dying declarations to first responders. In *State v. Rodriguez (Rodriguez I)*, 2006 WI App 163, ¶¶ 12–28, 295 Wis.2d 801, 722 N.W.2d 136, this Court determined that the out-of-court statements of Rodriguez’s domestic violence victims to responding officers were not testimonial. Rodriguez petitioned for review, and the WSC remanded the case back to this Court after deciding *State v. Jensen*, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518. *State v. Rodriguez (Rodriguez II)*, 2007 WI App 252, ¶ 3, 306 Wis. 2d 129, 131, 743 N.W.2d 460. A majority of this Court affirmed but based on the forfeiture-by-wrongdoing doctrine. *Id.* ¶ 20. The State does not rely on *Rodriguez I* because it is unclear what precedential value it retains after *Rodriguez II*. Likewise, *State v. Searcy*, 2006 WI App 8, ¶ 51, 288 Wis. 2d 804, 812, 709 N.W.2d 497, is of limited value since the witness’s statements were “spontaneous, unsolicited statements” following her cousin’s arrest at gunpoint. Finally, the supreme court expressly overruled this Court’s decision in *State v. Hemphill*, 2005 WI App 248, 287 Wis. 2d 600, 707 N.W.2d 313, overruled by *State v. Jensen*, 2007 WI 26, ¶ 24 n.8, 299 Wis. 2d 267, 727 N.W.2d 518.



**B. Denise's initial statements to Officer Lewis were nontestimonial as officers were not responding to a reported sexual assault.**

As the Supreme Court acknowledged in *Hammon* and demonstrated in *Bryant*, not all on the-scene-questions are testimonial in nature. Officers responding to police calls like Officer Lewis often perform dual responsibilities, acting both as first responders and as criminal investigators. *Bryant*, 562 U.S. at 368. The existence of an ongoing emergency is one factor that informs the ultimate inquiry regarding an interrogation's primary purpose. *Id.* at 366.

Here, the court determined that there was no ongoing emergency when Lewis arrived at the gas station. (R. 109:16, 30.) In its analysis, the court stated that Lewis's report "reflects a situation where Officer Lewis was called to the scene of a reported -- not even to the scene but called to respond to allegations of a sexual crime that had occurred." (R. 109:28.) This finding is clearly erroneous.

Lewis did not respond to a report of a sex crime. Rather, his report states, that he and other officers were dispatched to a gas station "reference *a fight*. While en-route, Dispatch advised that there were *three males in the parking lot fighting* and that there was a female inside of the store crying." (R. 94:1) (emphasis added.) Had Lewis been responding to a sexual assault complaint, his initial focus would have been on identifying the alleged sexual assault victim and tending to her needs rather than asking other people questions about the parking lot fight. (R. 94:1.)

Lewis was responding to a situation far more ambiguous than the circumstances in *Hammon*, when the officer was dispatched to a domestic violence incident at a home, the declarant and the defendant were separated, and questions about what happened occurred sometime after the described events were over. *Hammon*, 547 U.S. at 830. True,

no one was fighting when Lewis arrived, but, in contrast to the domestic dispute in *Hammon*, nothing in his report suggests that Lewis knew anything about the identities of the fighting males or what the fight was about. When viewed objectively, Lewis not only had an interest in investigating the disturbance at the station, but he also had a responsibility to make sure that the males involved in the fight did not present an ongoing danger to McDowell or other members of the public. Under the circumstances that Lewis encountered, questions about what happened not only inform what crimes he needed to investigate but also allow him to assess whether a continued threat to public safety remained.

Here, the clerk simply told Lewis that two males jumped McDowell. (R. 94:1.) McDowell was evasive, claiming he did not know who jumped him and what the fight was about, and was reluctant to provide identification. (R. 94:2.) When two strangers jump a person in a public place, it was objectively reasonable for Lewis to continue to ask questions to determine if these strangers posed an ongoing threat to McDowell or others in the area. It was only after speaking to the clerk and McDowell that Lewis turned his attention to a distraught Denise. (R. 94:2.) Unlike in *Hammon*, 547 U.S. at 819–20, where officers knew that the declarant and the defendant resided together when they responded, nothing in Lewis’s report suggests that Lewis had any information about Denise’s relationship to McDowell, the other unidentified males, or anyone else at the station when Lewis spoke to her.

When Lewis asked what happened, Denise stated, “he fucked,” but could not finish the sentence. (R. 94:2.) When Lewis told Denise that officers were about to let McDowell go, she asked them not to let him go and then told Lewis that McDowell pulled on her “clit” and made other statements that she did not know McDowell, that he took her car, and repeatedly said that he “fucked the shit out of her.” (R. 94:2.) Unlike in *Hammon* 547 U.S. at 832, the circumstances

objectively indicated that Denise's statements were a "cry for help," providing Lewis with information that enabled "officers to immediately end a threatening situation" to her. *Bryant*, 562 U.S. at 381. From an objective vantage point, Denise's initial statements alleging a sexual assault would have reasonably raised concerns about Denise's safety had Lewis left her and McDowell at the gas station. As in *Bryant*, Lewis's initial follow-up questions helped him assess whether an ongoing emergency existed, which is a nontestimonial purpose. *Id.* at 377.

Whether an ongoing emergency existed when Lewis initially questioned Denise is just one factor in assessing the primary purpose of his initial interrogation of her. *Bryant*, 562 U.S. at 366. The "informality of the situation and the interrogation" also support the conclusion that Denise's responses to Lewis's initial questions were nontestimonial. *Id.* at 377. This was not a "structured, station-house interview in *Crawford*," but a "situation that was fluid and somewhat confused" as in *Bryant*. *Id.* Like the responding officers in *Bryant*, Lewis "did not conduct a structured interrogation" of Denise or anyone else. The informality of the initial question, "what happened," that he posed to Denise suggests that Lewis's primary purpose was attempting to determine if an emergency existed that required police involvement. *Id.* "[T]he circumstances lacked any formality that would have alerted [Denise] to or focused [her] on the possible future prosecutorial use of [her] statements. *Id.* In contrast, once Lewis detained McDowell, safety concerns were no longer present, and Lewis's questioning of Denise was more formal and focused on Lewis's investigatory functions. (R. 94:1.)

The circumstances of their initial encounter as well as Denise's and Lewis's subsequent statements objectively indicate that the primary purpose of initial questioning enabled police to meet an ongoing emergency. Denise's initial statements about what McDowell did to her were not

testimonial. Their admission would not violate the Confrontation Clause.

### CONCLUSION

This Court should reverse the circuit court's order excluding Denise's out-of-court statements to Nurse Fisher and Officer Lewis because they were testimonial.

Dated this 2nd day of May 2022.

Respectfully submitted,

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### **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 10,971 words.

Dated this 2nd day of May 2022.

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### **CERTIFICATE OF EFILE/SERVICE**

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

Dated this 2nd day of May 2022.

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