STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2022AP164-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEVIN J. MCDOWELL,

Defendant-Respondent.

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

RESPONSE BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

In 2008, police were at a gas station investigating a fight involving three men, including the defendant, Kevin McDowell, when they saw a woman crying. After a police officer threatened to let McDowell go if the woman did not tell him "if something happened," the woman made numerous statements that, according to the State, amounted to an allegation of sexual assault against McDowell. Police then took the woman to a forensic nurse, who explained that one of her duties was to "collect the evidence" for law enforcement. The woman made various statements regarding McDowell to the nurse.

The State sought to introduce the woman's statements about McDowell as other act evidence in McDowell's current prosecution. However, the circuit court concluded that they were testimonial and barred by the Confrontation Clause due to the woman's unavailability. The State then appealed.

The issues on appeal are

1. Whether the woman's statements to the police officer were testimonial when the officer was investigating McDowell's role in an altercation and McDowell was ostensibly in police custody.

2. Whether the woman's statements to the forensic nurse regarding McDowell were testimonial when the nurse's role was to collect evidence for law enforcement.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is not warranted, as this case involves application of the facts to well-established law. Oral argument is not requested.

STATEMENT OF THE CASE

I. Introduction

The State is attempting to prosecute Defendant-Respondent Kevin J. McDowell for a purported 2017 sexual assault by introducing, as "other acts" evidence, hearsay allegations of a 2008 incident involving McDowell. The circuit court correctly held that the 2008 allegations were "testimonial," and excluded by the Confrontation Clause in light of the declarant no longer being available to testify. *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004) (holding that the Confrontation Clause bars introduction of "testimonial" statements not subject to cross-examination by the defendant).

The State appealed, putting the trial on hold, but now acknowledges that a significant number of statements were in fact testimonial. The first set of statements were to a police officer by "Denise."[1] While investigating McDowell's role in a fight at a gas station, the police saw Denise crying. Denise

[1] McDowell uses the same pseudonym as the State in its brief.

would not explain why she was crying until a police officer threatened to let McDowell go. (R. 94:2). Based on Denise's first few statements after this threat, the police "detained" McDowell. (*Id.*)

The State acknowledges for the first time on appeal that Denise's statements after McDowell was detained were testimonial, asserting that was when police shifted their attention from determining whether there was an on-going emergency to investigating McDowell's involvement in a crime, and there were no longer any safety concerns. (State Br. at 43). *Hammon v. Indiana*, 547 U.S. 813, 829 (2006) (holding victim's statements directly to police in her living were testimonial as there "was no emergency in progress.") However, Denise's statements were "testimonial" earlier than the State acknowledges. Police had already turned their attention to investigating McDowell when they threatened to let him go if Denise did not talk to the police officer. (R. 94:2). Further, McDowell was evidently detained earlier than the State represents, as police could not "let McDowell go" if he was not already in their custody. (*Id.*)

The second set of statements at issue were made by Denise to a forensic nurse examiner, Jill Fisher. The State at no point made a detailed offer of proof of the specific statements Denise made to Nurse Fisher. Wis. Stat. § 901.03(1)(b). Instead, the State just referred to 30-plus pages of medical records related to Nurse Fisher's examination of Denise. While the records ostensibly contain Nurse Fisher's

verbatim transcription of certain statements by Denise, the State has never articulated the specific statements it wishes to introduce. The handwriting is not always legible, and it is not clear if the State is asserting that other answers on the form portions of the medical record are statements that should be attributed to Denise. By failing to specify what statements are at issue, the State cannot now claim that the circuit's rulings were in error. Wis. Stat. § 901.03(1)(b).

Even if the issue is preserved, the State appears to acknowledge that Denise's statements to Nurse Fisher identifying McDowell are testimonial because they were not connected to her medical care, as the State argues that it "may be appropriate" to redact such statements instead of "excluding her statement in its entirety." (State Br. at 35). However, the State has forfeited any argument that parts of Denise's statement to Nurse Fisher can be saved by redacting the testimonial portions, by not making it in circuit court. The State cannot ask this court for a remedy it chose not to ask of the circuit court. In addition, there are numerous other statements by Denise that have no connection to Denise's medical care and are thus testimonial, such as allegations about what McDowell said to her.

This court should simply affirm the circuit court's order excluding Denise's statements to Nurse Fisher. However, if this court does conclude that Denise's testimonial statements can be redacted from the medical records, that redaction should be done in

the circuit court, after the State has identified the specific statements it seeks to introduce and explained why each is nontestimonial, and McDowell has had a chance to respond. *Davis v. Washington*, 547 U.S. 813, 829 (2006) (endorsing "*in limine* procedure" for redacting testimonial statements).

II. Procedural History

On October 11, 2021, the Dane County District Attorney's Office filed a criminal complaint charging McDowell with sexual assault in 2017. (R. 2). The State moved to admit several uncharged allegations of sexual assault as "other act" evidence. (R. 27). The court partially granted the motion with respect to the allegations at issue here, statements made by "Denise" regarding her interactions with McDowell in 2008. (R. 75).

McDowell had demanded a speedy trial (R. 16), and the trial was scheduled to begin with jury selection on January 31, 2022, and evidence the following day.[2] On January 24, 2022, the State disclosed that Denise had passed away, and that it intended to introduce her allegations through statements made to other individuals as exceptions to the rule against hearsay. (R. 114:68-71). On Friday, January 28, 2022, the circuit court sent the parties a

[2] The November 8, 2021 Notices of Hearing setting out the trial schedule were not included in the record on appeal, but are accessible online via CCAP. *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5, 346 Wis. 2d 635, 640, 829 N.W.2d 522, 524 (taking judicial notice of CCAP records).

letter questioning whether Denise's unavailability at trial created a Confrontation Clause issue. (R. 82). The same day the State requested a hearing to resolve the question prior to trial. (R. 83).

The hearing was held during the afternoon of January 31, 2022, after the jury was selected. (R. 104:3). The State called Jill Fisher, the forensic nurse who examined Denise, as its only witness at the hearing. (R. 104:5). The State did not call City of Madison Police Officer Andre Lewis, who had interviewed Denise, even though the State intended to introduce certain statements of Denise through Officer Lewis. (R. 104:53, 64). The State agreed with the circuit court's observation that Denise's statements to Officer Lewis would be irrelevant if the Court determined that the statements to Nurse Fisher were inadmissible. (R. 104:59). The State also reasoned that it could address any confrontation issues with Officer Lewis at the trial itself. (R. 104:58). However, the State then agreed with McDowell's suggestion that the court use Officer Lewis's police report as an offer of proof. (R. 104:64-65).

The circuit court took the matter under advisement. (R. 104:64-68). The next morning, the court issued a bench ruling that Denise's statements to Nurse Fisher and Officer Lewis were testimonial, and thus excluded under the Confrontation Clause. (R. 109:3-16). A written order was issued the same day. (R. 98).

The State then filed an appeal under Wis. Stat. § 974.05(1)(d)2, on the premise that the circuit court's order had the "substantive effect" of suppressing evidence. (R. 99, 103). The trial was stayed accordingly.

III. Factual Background

A. Denise's Statements to Officer Lewis

On January 21, 2008, Officer Lewis and two other City of Madison Police Officers were dispatched to a gas station due to a reported fight between three men. (R. 94:1). When Officer Lewis arrived, McDowell was standing outside the gas station convenience store. (*Id.*) Officer Lewis walked inside the store and spoke to the clerk. The clerk said that two men had "jumped" McDowell, and then left the area. (R. 94:2). Officer Lewis went outside to speak with McDowell, who said that two unknown men had attacked him for no reason. (*Id.*)

Officer Lewis asked two of the officers to stand by McDowell as Officer Lewis returned inside the store to speak with Denise, whom he had seen crying. (R. 94:2). Officer Lewis asked her what happened, and she responded "'he fucked.'" (*Id.*) Officer Lewis could not get Denise to elaborate until he said that the police "were about to let McDowell go." (*Id.*) Denise "immediately said something to the effect of please don't let him go." (*Id.*) Officer Lewis replied "that if something happened, she should tell me." (*Id.*) Denise then claimed that McDowell had "pulled on her 'clit'" and "'fucked the shit out of me." (*Id.*) She

also said that she did not know McDowell and "that he had taken her car and driven her around." (*Id.*)

At that point Officer Lewis asked his fellow officer to "detain" McDowell (*Id.*) The State acknowledges that any statements Denise made to the police subsequent to that point were testimonial (State Br. at 43), so they need not be addressed here.

B. Denise's statements to Nurse Fisher

Nurse Fisher explained at the motion hearing that "[a] forensic nurse examiner is someone who comes in [to examine someone] with an injury that may be due to some sort of… breaking of the law…. We talked to [University of Wisconsin] students on a regular basis so they come into see us, and then there can be law enforcement if some of the patients have called the law enforcement after something has happened to them, and then we will do the exam at the request of law enforcement." (R. 104:11-12).

According to Nurse Fisher, some patients "choose to just have medical treatment" for possible sexually transmitted diseases or pregnancy, others will "have their body examined to make sure there's no injuries," and "[s]ome will have the exam done and have evidence collection, but don't want to talk to law enforcement right away." (R. 104:12-13). Nurse Fisher would "collect the evidence," and either send it to the crime lab, or if the individual is "there with law enforcement, and we give the kit, the evidence collection kit, to law enforcement." (R. 104:13).

In addition, Nurse Fisher explained that while her program initially only treated sexual assault patients, their practice expanded such that for "anything that could have some sort of law enforcement implication, we would do a forensic exam." (R. 104:14).

When an individual first comes to the hospital, they are seen by a triage nurse. (R. 104:16). The triage nurse will treat the individual if they are "bleeding or have some obvious injury that needs to be dealt with right away," and then send the individual to the forensic nurse. (*Id.*)

During the forensic nurse's initial introduction to the individual, the nurse explains the individual's options, including the option to collect evidence. (R. 104:17). The exam is conducted in a special room away from the main activity of the emergency room. (R. 104:18-19).

The exam would begin with a medical history. (R. 104:21-22). Once that was complete, Nurse Fisher would say something to the effect of "Now we're going to talk about why you came here tonight." (R. 104:23). Nurse Fisher would begin with general, open ended questions, but would resort to specific questions if that would make patient seem more comfortable. (*Id.*) When the prosecutor asked Nurse Fisher "why is it important to get this information?," she responded:

> Because of the fact that it tells us where we can look for evidence if they're having evidence collection. You may be able to find secretions

> that don't belong to them. You may find hair. I've found leaves and grass if they were assaulted outside. So you're looking for something that you don't normally find on the body, and if you find something, then you may ask do you have any idea where this came from.

(R. 104:23-24). Nurse Fisher used Denise's responses to similar questions to fill out the "History of Assault" section of the report. (R. 96:16-18; 104:41-42).

The next step of the exam is a head to toe external exam. (R. 104:25). After that, Nurse Fisher would perform an exam of the genital area. (R. 104:27). Nurse Fisher would next perform a pregnancy test. Nurse Fisher would also find out if it is "safe to go home." (R. 104:32). Relatedly, Denise apparently told Nurse Fisher that "My husband is going to kill me" and "I'll be back here in a few hours when my husband gets done with me." (R. 96:24).

Denise signed the last page of the report. (R. 96:25). In the middle of the signature page is a section entitled "Evidence Collection," and checked off is the statement "While you were here, evidence was collected and given to law enforcement officers to become part of the legal record." (*Id*.)

When the circuit court asked "why do they call it a forensic exam?" Nurse Fisher testified that "[a] forensic exam, it means that there was possibly a crime committed and evidence needs to be collected to either prove or disprove what law enforcement wants[.]" (R. 104:46). The circuit court then asked if the "primary purpose of a forensic exam is … to

diagnose injuries and provide treatment, or … to collect evidence?" (R. 104:46-47). Nurse Fisher responded that "[i]t's a diagnosis of injury and … to present treatment, and it is also evidence collection if a patient wants evidence collection done." (R. 104:47).

ARGUMENT

I. Denise's statements to Officer Lewis regarding her encounter with McDowell were testimonial as the primary purpose of the officer's questioning was to gather evidence about McDowell's involvement in a crime.

A. The Confrontation Clause protects McDowell from testimonial allegations he cannot challenge with cross-examination.

1. *Crawford* prohibits the introduction of testimonial statements without an opportunity to cross-examine the declarant.

The Confrontation Clause guarantees the accused one of the basic features of the adversarial common law system: the right "in all criminal prosecutions … to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause reflects a practical consideration: the best test for the reliability of an allegation is the "crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004). It also reflects "that there is something deep in human nature that regards face-to-face confrontation

between accused and accuser as essential to a fair trial," to allow a person whose liberty is at stake to demand that the accuser "[l]ook me in the eye and say that." *Coy v. Iowa*, 487 U.S. 1012, 1017-18 (1988) (quotation marks omitted).

Crawford decoupled Confrontation Clause analysis from the historical rules of hearsay, and reoriented it towards the "principal evil" the Founders feared: "the use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50-51, 60. The Clause's reference to "*witnesses* against" the accused is an indication that it was aimed at out-of-courts that could be considered a substitute for "testimony." *Id*.

The *Crawford* court noted that there were many potential definitions of what constitutes a "testimonial" statement. *Id*. at 51-52. The Court did not have to settle on a specific formulation, because the case at hand involved a statement to a police officer and "[s]tatements taken by police officers in the course of interrogations are … testimonial under even a narrow standard." *Id*. at 52-53.

Crawford's progeny developed three aspects of Confrontation Clause analysis relevant here. First, the Court has refined when a police interrogation is testimonial. Second, statements can be testimonial even in the absence of a police interrogation altogether. Third, whether a statement is testimonial is an objective test that is highly context specific, to the point that the same conversation may include

both testimonial and nontestimonial statements. Each aspect is discussed in turn below.

2. When a police interrogation is testimonial.

Two years after *Crawford*, the Court explained that statements to the police are *not* testimonial when they are made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822 (2006). Thus, a victim's identification of her assailant during a 911 call was not testimonial as it was designed to help the police respond to an ongoing emergency, *i.e.* an at-large assailant who may attempt to injure the victim again. *Id.*

Similarly, when police found a man dying of gunshot wounds, his "identification and description of the shooter and the location of the shooting were not testimonial statements," because the "primary purpose" of the police questioning was locating an at-large gunman. *Michigan v. Bryant*, 562 U.S. 344, 349 (2011). And when teachers suspected that a three-year-old student was the victim of child abuse, the primary purpose of their questions was to address the ongoing emergency of child abuse. *Ohio v. Clark*, 576 U.S. 237, 249 (2015).

On the other hand, 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. In a companion case decided with *Davis*, the Court recognized that there was no on-going emergency when the victim made her statement to the police while they were in her living room, and so the statement was testimonial. *Hammon v. Indiana*, 547 U.S. 813, 831-32 (2006). The victim's "narrative of past events was delivered at some remove in time from the danger she described," and with police officers in her presence. *Id.*

3. Not all testimonial statements are the product of police interrogations.

Confrontation Clause jurisprudence often focuses on when police interrogations result in testimonial statements, as nowadays that is the primary form of evidence gathering in the criminal justice system. However, the Court has repeatedly cautioned that testimonial statements are not limited to responses to police questioning.

> Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from

> Lord Cobham that was plainly *not* the result of sustained questioning. *Raleigh's Case,* 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

Davis, 547 U.S. at 822, n. 1.

Accordingly, forensic laboratory reports may be "testimonial" even though they are not the products of any sort of police interrogation. *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011); *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009). *See also Bryant*, 562 U.S. at 370 (recognizing that "volunteered testimony" can implicate the Confrontation Clause). "[W]e decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment." *Ohio v. Clark*, 576 U.S. 237, 249 (2015).

4. Whether a statement is testimonial is context specific to the point that the same conversation may include testimonial and nontestimonial statements.

Finally, the Court has eschewed announcing any kind of bright-line rule for determining whether a statement is testimonial. "Courts must evaluate challenged statements in context," *Clark*, 576 U.S. at 249 (2015), and that context can include numerous factors.

In *State v. Mattox*, 2017 WI 9, ¶ 32, 373 Wis. 2d 122, 142, 890 N.W.2d 256, 266, the Wisconsin Supreme Court observed that "*some* factors relevant in the primary purpose analysis include: (1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant[7] and (4) the context in which the statement was given." (citing *Clark*, 576 U.S. at 244-249) (emphasis supplied). The State refers to these factors as the *Mattox* factors, as if they are exhaustive or dispositive, when the court clearly said that they were only "some" factors relevant to the case at hand. *Id*. Indeed, this list of factors is clearly not exhaustive, as it does not include the existence of an emergency, a critical factor in *Clark* itself. 576 U.S. at 246 (holding statements nontestimonial in part because the "statements occurred in the context of an ongoing emergency involving suspected child abuse.")

In any event, the "primary purpose" test should not be understood as limited to divining the subjective intent behind a police officer's questions. Instead, it is an objective test conducted by "examining the statements and actions of all participants[.]"*Bryant*, 562 U.S. at 370. The court considers not just the interrogator's goals in asking the questions, but the speaker's understanding of how the answers would be put to use. *Id*. Indeed, for this reason, in the most recent Supreme Court pronouncement on this point, the Court repeatedly articulated the test as the "primary purpose" of the

statement, rather than the primary purpose of the *interrogation*. *Clark*, 576 U.S. at 245 ("a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial.")

And while the same primary purpose may often run through an entire conversation, that is not always the case. A single conversation can include both testimonial and nontestimonial statements. In *Davis*, the Court recognized that "a conversation which begins as an interrogation to determine the need for emergency assistance [can] … evolve into testimonial statements once that purpose has been achieved." 547 U.S. at 828 (citations and quotation marks omitted). The Court was confident that trial courts could "recognize the point at which…statements in response to interrogations become testimonial," and advised them "[t]hrough *in limine* procedure … [to] redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence." *Id*. at 829.

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Putting it all together, the correct approach in Confrontation Clause cases is to determine the primary purpose of each statement in light of all the circumstances. As detailed in the following section, Denise's statements to Officer Lewis were testimonial from the jump. At the very least, Denise's statements after Officer Lewis threatened to "let McDowell] go" if

she did not speak with the officer were testimonial. And the State has acknowledged that Denise's statements after McDowell was formally retained were testimonial, and does not appeal that aspect of the circuit court's decision.

B. The primary purpose of Officer Lewis's questioning of Denise, and her responses, was to preserve evidence against McDowell.

1. Denise's statements to Officer Lewis were testimonial from the beginning, as Officer Lewis's initial question concerned his investigation of McDowell's altercation. Alternatively, Denise's initial comment was a voluntary testimonial statement.

Officer Lewis and two other officers were dispatched to the gas station to investigate a fight involving McDowell. When Officer Lewis was making his first approach to speak with Denise inside the gas station, two other officers were standing by McDowell outside the store. (R. 94:2). Denise was crying, and Officer Lewis made note that Denise had her back to the store window, outside of which were McDowell and the officers. According to the report Officer Lewis "asked [Denise] what happened [.]" (R. 94:2). Denise's only response was "he fucked."

The crux of the state's argument is that there was an ongoing emergency at this point, because the

officers did not know the location of the two men who ambushed McDowell. (State Br. at 41). However, the State's argument has several holes.

First, this is not an instance where the victim is in danger, such as the 911 caller in *Davis*. 547 U.S. 813 at 822. Both McDowell and Denise were surrounded by the police. Similarly, there was no emergency in *Hammon* when the victim's statements were made directly to police who had come to her home. 547 U.S. at 831-32.

Second, nor is this an instance when the *public* might be in danger. In *Bryant*, the victim was safely in the presence of the police when he made his statements, but there nonetheless was an on-going emergency because a gunman was at-large in the community. 562 U.S. at 370-372. There is no indication that guns or weapons of any sort were involved in McDowell's altercation.

Third, Officer Lewis did not ask Denise any questions related to the purported emergency, such as whether she saw the fight, could identify or describe the assailants, and so on.

Fourth, Officer Lewis's actual question -- "what happened?" – invited Denise to provide the officer with information about past events, not to aid officer Lewis in addressing an ongoing emergency. Similarly, the open-ended nature of the question invited any kind of statement about past events, whether it concerned McDowell's participation in a

fight or the reason why Denise was crying. It was not addressed to the supposed emergency.

As discussed above, the speaker's objective intent matters as well, and Denise clearly was not intending to assist Officer Lewis in an ongoing emergency, *i.e.* apprehending McDowell's assailants. Instead, her response – "he fucked" – was ostensibly aimed at making some sort of allegation about McDowell. Even if Officer Lewis was not fishing for some kind of statement implicating McDowell, "volunteered testimony" is still "testimonial," and Denise's unprompted accusation regarding McDowell (if that's what it was) was still "testimonial." *Bryant*, 562 U.S. at 370.

In short, the fact that police happened to be on the scene to investigate a fight where McDowell was the victim, rather than a sexual assault where Denise was the victim, is irrelevant to the testimonial nature of Denise's initial statement to police. There was no "ongoing emergency," and it was made to an officer in the context of their evidence gathering duties. It is a garden variety police interrogation that is "testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52-53.

2. Even if Denise's initial statement was nontestimonial, her statements about McDowell after Officer Lewis threatened to release him were testimonial.

Denise's initial statement ("he fucked") does not specifically refer to McDowell. However, Officer Lewis apparently believed that Denise was referring to McDowell, because when Denise would not finish her sentence, Officer Lewis threatened that the police "were about to let McDowell go[.]" (R. 94:2). With that context, it is clear that the primary purpose of Officer Lewis's subsequent questioning, and Denise's responses, was to gather evidence against McDowell. At best, the State is in the scenario proposed by *Davis*, where "a conversation which begins as an interrogation to determine the need for emergency assistance … evolve[s] into testimonial statements once that purpose has been achieved." 547 U.S. at 828 (citations and quotation marks omitted).

According to Officer Lewis's report, Denise responded to the threat of releasing McDowell with "something to the effect of please don't let him go." (R. 94:2). This has two implications. First, either McDowell had actually been detained at that point – police could not "let him go" if he had not been detained – or if he was not yet detained, Denise believed that he had been. *Bryant*, 562 U.S. at 370 ("The existence of an emergency or *the parties' perception that an emergency is ongoing* is among the most important circumstances that courts must take

into account in determining whether an interrogation is testimonial[.]") (emphasis supplied). Accordingly, there is no objectively reasonable basis for concluding that Denise's statements were being made to address an on-going danger of being a victim of McDowell.

The second implication is that the primary purpose of the subsequent exchange was to investigate what McDowell had done to upset Denise, not to respond to the "emergency" of the McDowell assailants still being at-large.

It was with this context that Officer Lewis then told Denise "if something happened, she should tell me." Denise then made several allegations about her encounter with McDowell. Based on those allegations, Officer Lewis "decided that McDowell needed to be detained," and instructed his fellow officers to do so. (R. 94:2).

The State properly acknowledges that once McDowell was detained formally, Denise's subsequent statements were testimonial. (State Br. at 43). There's no question that there was no emergency, and that the police were questioning Denise with the aim of gathering evidence against McDowell. However, nothing magical happened when police slapped the cuffs on McDowell to make Denise's allegations go from nontestimonial to testimonial. Whether the police officers were merely standing next to McDowell, or had him in handcuffs, he did not pose a threat to Denise or anyone else. It is also clear that Officer Lewis's questioning of Denise

was focused on gathering evidence against McDowell when he warned her that they would be releasing McDowell if she did not give them a reason to detain him. Indeed, Denise's comments were designed to ensure that McDowell was taken into custody. Accordingly, her statements to Officer Lewis were testimonial.

II. Nurse Fisher's report of Denise's forensic exam must be excluded under the Confrontation Clause because it includes numerous testimonial statements by Denise.

A. The State has failed to make an adequate offer of proof of the specific statements of Denise to Nurse Fisher that it seeks to introduce.

As a threshold matter, the State has never identified the specific statements of Denise that it was seeking to introduce through Nurse Fisher's report. Instead, the State's position (in the circuit court, at least) was that *any* statement by Denise to Nurse Fisher was nontestimonial, and thus admissible. (R. 83; 104:61-66). The State entered into evidence 30-plus pages of medical records related to Nurse Fisher's examination of Denise, and scattered throughout these records are what appear to be Nurse Fisher's handwritten transcriptions of statements by Denise. (R. 96). However, the State has never specified which of these handwritten notes it intended to offer, let alone set out what the sometimes illegible notes actually say. Nor has the

State indicated whether it intended to offer any of the answers on the pre-printed form portions of the record, which Nurse Fisher ostensibly filled in based on Denise's statements to her.

Without knowing what specific statements are at issue, this court cannot determine whether a particular statement's "primary purpose … [was] to establish or prove past events potentially relevant to later criminal prosecution," and thus inadmissible, testimonial hearsay. *Davis*, 547 U.S. at 822. In other words, there has been an inadequate "offer of proof." Wis. Stat. § 901.03(1)(b).

To preserve an error based on a ruling that excludes evidence, the appellant must make an offer of proof of the "substance of the evidence" that it sought to introduce. Wis. Stat. § 901.03(1)(b). "Two purposes are served by an offer of proof: first, [to] provide the circuit court a more adequate basis for an evidentiary ruling and second, [to] establish a meaningful record for appellate review." *State v. Dodson*, 219 Wis.2d 65, 73, 580 N.W.2d 181 (1998). An insufficiently detailed offer of proof prevents an appellate court from reviewing a claimed error. *State v. Brown*, 2003 WI App 34, ¶ 19, 260 Wis. 2d 125, 137, 659 N.W.2d 110, 116.

To be clear, the "substance of the evidence" requirement does not allow the proponent to get away with just offering the general character of the excluded evidence. Wis. Stat. § 901.03(1)(b). The offer of proof must provide the court with the details

necessary for the court to make the appropriate decision. For instance, in *Brown*, the defendant appealed the circuit court's exclusion of alibi evidence. 2003 WI App 34, ¶ 19. However, Brown "did not submit an affidavit or other statement detailing what he planned to say." *Id.* The court of appeals concluded that "[w]ithout a proper offer of proof, neither we nor the trial court can know with certainty what the contours of Brown's testimony would have been, or whether his testimony and the cross-examination it would necessarily invite, taken as a whole, would constitute an alibi defense." *Id.* Accordingly, Brown failed to preserve the issue, and the court gave it no further consideration. *Id.*

The State here has similarly never detailed the specific statements of Denise that it wishes to introduce through Nurse Fisher. The State introduced 30-plus pages of medical records related to the examination. (R. 96). The medical records include numerous handwritten notes by Nurse Fisher as well as the triage nurse. (R. 104:37-38). Nurse Fisher explained that certain handwritten notes with quotation marks around them were statements made by Denise to the triage nurse; presumably other notes with quotation marks were statements made by Denise to Nurse Fisher. (R. 104:38). The records also include numerous form entries, presumably based on Denise's statements to one of the two nurses. (R. 96).

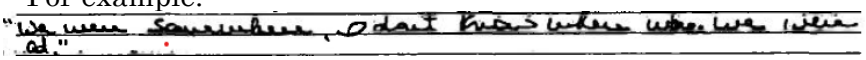
At no point has the State articulated the statements by Denise that it is deriving from the records and is seeking to introduce through Nurse

Fisher. For instance, does the State intend to introduce only Denise's statements to Nurse Fisher, or also the statements to the triage nurse? Does the State intend to introduce the statements offset by quotation marks, or also statements implied by the form entries? In some instances, it is difficult to read Nurse Fisher's handwriting, and thus determine Denise's precise statement.[3]

The State's lack of specificity is likely because the State's theory before the circuit court was that *any* statement by Denise to Nurse Fisher during the examination was nontestimonial. (R. 83; 104:61-66). However, as discussed above, the Supreme Court recognized in *Davis* that a conversation can include both testimonial and nontestimonial statements. 547 U.S. at 828. The *Davis* Court thus advised trial courts "[t]hrough *in limine* procedure … [to] redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence." *Id*. at 829.

The bottom line is that the State failed to detail the specific statements it sought to introduce notwithstanding the Confrontation Clause. Without knowing the precise statements that are at issue, the court cannot assess whether or not they are testimonial. Because the State failed to make a

[3] For example:



(R. 96:16).

sufficient order of proof, the State has failed to preserve this issue for appeal.

B. The State has forfeited any argument that Nurse Fisher's report can be saved by redacting Denise's testimonial statements.

On appeal the State has rightly backed off the all-or-nothing approach, appearing to acknowledge that "information identifying McDowell" in Nurse Fisher's report is testimonial by suggesting that such information be redacted from the report rather than excluding the report altogether. (State Br. at 35). However, the State's proposal is too little, too late.

The proposal to redact identifying information from Nurse Fisher's report is too little for multiple reasons. The State does not specify which statements in the report it is referencing, a re-run of its failure to make an offer of proof. Nor does the State indicate *who* will do the redacting, the court of appeals or the circuit court upon remand. And, as discussed below, the report includes other testimonial statements of Denise besides her identification of McDowell.

The redaction proposal is too late because it was not made in the circuit court. "The oft-repeated rule of Wisconsin appellate practice is that issues not raised in the circuit court will not be considered for the first time on appeal." *Apex Elecs. Corp. v. Gee*, 217 Wis. 2d 378, 384, 577 N.W.2d 23, 26 (1998). "The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal

disruption of the judicial process, eliminating the need for appeal." *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 670, 761 N.W.2d 612, 620.

As the proponent of Denise's statements to Nurse Fisher, the State had "the burden to show why the evidence [was] admissible." *State v. Jenkins*, 168 Wis. 2d 175, 187–88, 483 N.W.2d 262, 266 (Ct. App. 1992) (citation omitted); *State v. Peters*, 166 Wis. 2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991) (Observing that "it is the proponent's burden to prove that the evidence fits into a specific exception to the hearsay rule.")

Accordingly, it was the State's burden to show that some or all of Nurse Fisher's report was admissible. If the State wanted to argue in the alternative that some portions of Nurse Fisher's report included nontestimonial statements that could be left unredacted from the report, it was incumbent upon the State to do so in circuit court. After hearing arguments from both parties about specific statements, the court could decide which statements should be redacted because they were testimonial, and which statements could be safely shown to the jury. Indeed, this was the *in limine* procedure envisioned by the Supreme Court in *Davis*. 547 U.S. at 829.

The State instead put all its eggs in one basket, and chose to argue that the entirety of the report was admissible. (R. 83; 104:61-66). It did not give McDowell or the circuit court any opportunity to

consider whether certain portions of the report were nontestimonial.

Finally, it cannot be ignored that if the State had made in circuit court the argument that it makes here – including its acknowledgements that Denise's statements to Officer Lewis after McDowell's arrest and her statements to Nurse Fisher identifying McDowell were testimonial – the circuit court likely would have found that the remaining nontestimonial statements were not relevant and/or were unduly prejudicial. First, much of the State's other acts motion regarding this incident relies on statements Denise made to Officer Lewis after McDowell's detention. *Compare* R. 27:10 and 94:2. Second, in circuit court the State conceded that Denise's statements to Officer Lewis were only relevant if Nurse Fisher's report was admitted, because McDowell was identified through Nurse Fisher, *the very same statements that the State now concedes are testimonial*. (R. 104:59). Thus, if the State had presented these arguments in circuit court, it is likely that the appeal would not have been necessary, the precise reason for the forfeiture rule. *Ndina*, 2009 WI 21, ¶ 30.

The State has forfeited any argument that the admissibility of Nurse Fisher's report can be saved by redacting the testimonial statements. Because Nurse Fisher's report includes Denise's testimonial statements, it is inadmissible under the Confrontation Clause.

C. Nurse Fisher's report should be excluded because it includes testimonial statements barred by the Confrontation Clause

1. Forensic exams may produce both testimonial and nontestimonial statements.

The State argues that "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." (State Br. 29). It is certainly true that *some* of Denise's statements, such as those describing her medical history and current symptoms, were to facilitate medical care. But facilitating medical care was not the purpose of *all* of her statements. Even the State acknowledges that statements identifying McDowell had no connection to Denise's medical care. But neither did her statements narrating her travels that evening, or relating what McDowell said to her. The primary purpose of those statements was to collect evidence, rendering them testimonial and inadmissible.

Once again, the Supreme Court has repeatedly stressed that the Confrontation Clause applies to individual statements, not the conversation writ large. *Clark*, 576 U.S. at 245. Of course, often the same purpose runs through an entire conversation, making it unnecessary to parse individual statements. But that is not always the case. A "conversation which begins as an interrogation to determine the need for emergency assistance [can] …

evolve into testimonial statements once that purpose has been achieved." *Davis*, 547 U.S. at 828 (citations and quotation marks omitted).

Just by the nature of a forensic medical exam, the patient and the examiner will discuss both medical and evidentiary issues. McDowell concedes that statements whose primary purpose is strictly for medical diagnosis and treatment – such as a description of medical history and current symptoms – are not testimonial. However, all other statements not for the purpose of medical diagnosis and treatment are for the purposes of evidence collection, and thus testimonial.

Neither the United States Supreme Court nor the Supreme Court of Wisconsin has addressed when a forensic exam includes testimonial statements. In *State v. Nelson*, 2021 WI App 2, ¶ 45, 395 Wis. 2d 585, 611, 954 N.W.2d 11, 23, the Wisconsin Court of Appeals addressed the issue in a roundabout way, contrasting statements in a forensic exam[4] report with statements in the report of a medical examination conducted more than ten days later. Only the statements in the latter medical report were at issue. The Court of Appeals held that these were

[4] The report at issue in *Nelson* was from a "SANE," i.e. a Sex Assault Nurse Examiner. 2021 WI App. 2, ¶ 3. Nurse Fisher explained that she used the term "forensic" rather than SANE once her practice expanded to "anything that could have some sort of law enforcement implication[,]" not just sex assaults. (R. 104:14). To be consistent, this brief refers to them as forensic reports and exams rather than SANE reports and exams.

not testimonial, as the primary purpose of the examination "was to evaluate [the victim's] health condition … , treat her as needed, and recommend a health care plan for her going forward." 2021 WI App 2, ¶ 45. This was in contrast to the forensic exam, which "was clearly focused on collecting evidence for potential criminal prosecution." 2021 WI App 2, ¶ 45. Thus, "a strong argument could be made that the primary purpose of [the forensic] examination was for criminal prosecution," and statements made in the forensic examination should be considered "testimonial." *Id.*

Likewise, there is no Wisconsin case addressing when a forensic examination may include both testimonial and nontestimonial statements. However, as the State points out, the Washington Supreme Court has addressed this issue. *State v. Burke*, 196 Wash. 2d 712, 737–38, 478 P.3d 1096, 1112–13, *cert. denied*, 142 S. Ct. 182, 211 L. Ed. 2d 74 (2021).

The Washington court had no problem following the general guidance of *Davis* and *Clark* to address the statements separately. *Burke*, 478 P.3d at 1112–13. The court concluded that many of the victim's statements in a forensic report were nontestimonial because they were aimed at "provid[ing] guidance for medical treatment." *Id.* On the other hand, the victim's description of "the assailant's height, skin color, and clothing … had no bearing on her injuries but would be highly relevant to identifying the person responsible for the rape for further prosecution." *Burke*, 478 P.3d at 1112–13.

Such statements were testimonial and barred under the Confrontation Clause, and should have been redacted from the report. *Id*.

And although the State's brief mostly continues with the wrongheaded conceit that the primary purpose test looks at the purpose of the interrogation as a whole, when it discusses *Burke*, the State acknowledges that redaction of identifying statements would be appropriate here too.

> 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.

(State Br. at 35).

So, as the State tacitly acknowledges in the end, a forensic exam can generate both testimonial and nontestimonial statements. The following section sets out some of the testimonial statements in Nurse Fisher's report, in addition to the statements identifying McDowell, that make the report inadmissible under the Confrontation Clause.

2. Nurse Fisher's report includes numerous testimonial statements of Denise, including statements identifying McDowell and statements narrating her evening with McDowell.

When all the relevant factors are considered, it is evident that the primary purpose of numerous "out-of-court statement[s] 'was to gather evidence for [the defendant's] prosecution.'" *Mattox*, 2017 WI 9, ¶ 32 (quoting *Clark*, 576 at 247) (brackets added by *Mattox*).

Ongoing emergency. Any emergency was well over by the time that Denise gave her statements to Nurse Fisher. Indeed, the State correctly acknowledges that any emergency was over by the time McDowell was detained. This is in contrast to the case in *Clark*, where a teacher's questioning of the origin of a student's injuries "occurred in the context of an ongoing emergency involving suspected child abuse." 576 U.S. at 246.

Formality. There was a high degree of formality with Denise's statements, as the exam seemed more like a special exam on the behalf of law enforcement than a normal medical examination. She was taken to the hospital by a police officer. While the officer was not present for the examination, neither was Denise alone with Nurse Fisher in the examination room. A representative from the Rape Crisis Center was present as well, making it less like a normal

exam. Similarly, the exam was paid for by law enforcement, not Denise or her insurance.

Adding to the formality of Denise's statement is that she signed off on a part of the statement with an acknowledgment that evidence had been collected. Included in the 36 pages of medical records that comprise Exhibit 1 is an 8-page document entitled "Sexual Assault Nurse Examiner (SANE) / Forensic Nurse Examiner (FNE) Program Adult/Adolescent Sexual Assault Report" (bold, underlining, and caps omitted). (R. 96:15-26)[5]. This 8-page report was filled out by Nurse Fisher during her examination of Denise, and includes numerous statements ascribed to Denise. Denise signed the report on page 8, which also states that "[w]hile you were here, evidence was collected and given to law enforcement officers to become part of the legal record." (R. 96:25). Thus, the record is similar to witness statements physically written by police but signed by the witness, which clearly are testimonial.

The interrogator's understanding. Nurse Fisher repeatedly testified that a primary purpose of the forensic exam was to collect evidence for law enforcement. Nurse Fisher explained to the court that a "forensic exam … means that there was possibly a crime committed and evidence needs to be collected to either prove or disprove what law

[5] Confusingly, as assembled in Exhibit 1, page 7 comes after page 8 (R. 96:25-26), and several pages of diagrams are inserted between pages 4 and 5. (R. 96:18-23).

enforcement wants[.]" (R. 104:46). Nurse Fisher would "collect the evidence," and either send it to the crime lab, or if the individual is "there with law enforcement, … we give the … evidence collection kit to law enforcement." (R. 104:13). Finally, when asked point-blank if the "primary purpose of a forensic exam is … to diagnose injuries and provide treatment, or … to collect evidence," her response was essentially that it's both: "[i]t's a diagnosis of injury and … to present treatment, and it is also evidence collection if a patient wants evidence collection done." (R. 104:47).

With respect to specific questions, Nurse Fisher testified that after obtaining a medical history, she would say something to the effect of "Now we're going to talk about why you came here tonight." (R. 104:23). Nurse Fisher would begin with general, open ended questions, but would resort to specific questions if that would make patient seem more comfortable. (*Id.*) When the prosecutor asked Nurse Fisher "why is it important to get this information?," she candidly explained that it assisted with collecting evidence:

> Because of the fact that it tells us where we can look for evidence if they're having evidence collection. You may be able to find secretions that don't belong to them. You may find hair. I've found leaves and grass if they were assaulted outside. So you're looking for something that you don't normally find on the body, and if you find something, then you may ask do you have any idea where this came from.

(R. 104:23-24).

Based on Denise's responses to similar questions about why she "came here tonight," Nurse Fisher filled out the "History of Assault" section of her report. (R. 96:16-17; 104:41-44). The pre-printed form has spots to write down a description of the "assailant," "where [the] assault occurred," and also "what happened." There questions are clearly designed to gather evidence, rather than document medical issues.

The understanding of the speaker. Denise would have understood that many of her statements would have been collected as evidence by law enforcement, rather than used for medical treatment. Denise was taken to the hospital by the police. Nurse Fisher explicitly told Denise that she would collecting evidence that would be given to the police. (R. 104:17). Indeed, as discussed above, a portion of the forensic report is actually signed by Denise, with a form statement saying "While you were here, evidence was collected and given to law enforcement officers to become part of the legal record" checked off. (R. 96:25).

Thus, while Denise's statements were not directly to law enforcement, her statements to Nurse Fisher were given with the express purpose of Nurse Fisher collecting evidence to give to law enforcement (who was sitting in the next room). This is in stark contrast to the statements a student made to his teacher in *Clark*, where the Court explicitly pointed out that the fact that the student was not told that the statements could be used to prosecute his abuser

was a factor against finding the statements testimonial. 576 U.S. at 247.

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It is with all these contextual factors that Denise's individual statements to Nurse Fisher should be evaluated to determine whether the primary purpose was to gather evidence or to receive medical treatment. McDowell will not endeavor to identify all of the testimonial statements within the 30 pages of medical records. As discussed above, the burden was on the State to specify what statements it intended to offer, and to argue in circuit court that if the medical records could not be admitted wholesale then a redacted version could be submitted instead. The State cannot shift to the defendant the burden of translating the various preprinted form questions and handwritten annotations into Denise's statements.

Still, it is clear that certain statements within the medical records were made with the primary purpose of gathering evidence rather than receiving medical care, and are thus testimonial.

First, there are statements by Denise identifying her "assailant" (in the words of the form), such as by his race and age. (R. 96:16). The State has already acknowledged that these statements do not have a primary purpose for receiving medical treatment, and are thus testimonial. (State Br. at 35).

Second, written next to where the form states "Where assault occurred" is handwritten "Parking Lot [illegible] Fitchburg." (R. 96:16). There is no discernable medical purpose for characterizing the encounter as an "assault" or relating the location of the encounter. Accordingly, these statements are testimonial as well.

Third, the bottom one-third of page two of the report contains 19 preprinted blank lines to write down "What happened". (R. 96:16). On those lines Nurse Fisher wrote seven statements that Denise ostensibly made to her. With one exception[6], they do not have any conceivable connection to Denise's medical condition or treatment. For instance, according to the report, Denise said "We were somewhere, I don't know [illegible] were at" and "He says I am going to do what he wants me to do." (R. 96:16).

Nurse Fisher did not explain how these specific statements related to Denise's medical care.[7] Nor

[6] McDowell concedes that the statement "he bit my nipple so bad" could have a primary purpose of receiving medical treatment. (R. 96:16).

[7] The State may argue that the Court prevented the State from asking Nurse Fisher about the medical purposes of these specific statements. The Court did no such thing. The Court did point out that having Nurse Fisher simply read the report would not help him make his ruling, and that the hearing had already taken over an hour. (R. 104:44-45). However the court also clearly stated that he would allow the state to make its record. (*Id*.) The State had every opportunity

does the State argue in its brief that these specific statements relate to Denise's medical care. In light of all the circumstances, these specific statements were collected in Nurse Fisher's role as a *forensic* nurse, assisting the State in its gathering of evidence to use against McDowell. As such, the statements are testimonial, and not admissible under the Confrontation Clause.

D. Any redaction of testimonial statements should be done by the circuit court using the *in limine* procedure contemplated in *Davis*, with the circuit court reassessing whether the unredacted nontestimonial statements may be admitted as other acts evidence.

In its opening brief the State floats the idea of redacting Denise's statements identifying McDowell, because they are testimonial, rather than excluding all of her statements. (State Br. at 35).

As discussed above, the State forfeited this argument by not presenting this option to the circuit court. The State asked the circuit court to admit Nurse Fisher's report, not individual statements of Denise in the report. (R. 83; 104:61-66). This court should simply affirm the circuit court's decision denying the State's request, and let trial proceed on the basis of the other evidence marshalled by the State.

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to ask Nurse Fisher about the medical purposes of these statements.

But, if this Court were to allow redaction of the testimonial statements from Nurse Fisher's report, it should be done by the circuit court using the *in limine* procedure envisioned in *Davis*. 547 U.S. at 829. That is, rather than this court poring over the 30 plus pages to discern which statements are testimonial, the case should be remanded with instructions for the circuit court to resolve.

More specifically, on remand the State should identify the specific statements of Denise in the medical records that it wishes to introduce at trial, and explain why each statement is nontestimonial. McDowell could then address each statement, conceding or offering counterarguments as appropriate. The circuit court would then be in a position to determine which statements are nontestimonial and therefore admissible. The circuit court would also be in a position to determine whether the nontestimonial statements are still admissible as other acts evidence. These kinds of detailed evidentiary decisions should be made in the first instance by the circuit court, not the court of appeals.

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Denise was taken by the police to visit a forensic nurse, Nurse Fisher, who told Denise that she was collecting evidence for the police. Denise even signed a document acknowledging that Nurse Fisher was collecting evidence for the police. Denise made numerous statements to Nurse Fisher that had

no connection to her medical treatment, such as a description of her "assailant," the location of the "Assault," and a general narrative of what happened that evening. These statements were made with the primary purpose of "gathering evidence" for a criminal prosecution, and are thus testimonial. The circuit court was right to rule Nurse Fisher's report inadmissible under the Confrontation Clause.

CONCLUSION

For the reasons stated above, this Court should affirm the circuit court's ruling excluding Denise's statements. If the Court does not affirm the circuit court's ruling, the case should be remanded to the circuit court for a determination of the admissibility of Denise's individual statements.

Respectfully submitted,

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Dated this 23rd day of June, 2022.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,123 words.

Dated this 23rd day of June, 2022.

Signed:

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