STATE OF WISCONSIN

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

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

PLAINTIFF-APPELLANT'S REPLY BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 294-2907 (Fax)
latorracadv@doj.state.wi.us

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INTRODUCTION

This Court must decide whether Denise's out-of-court statements to a police officer and a forensic nurse examiner are testimonial under the Confrontation Clause.

Relying on *Davis v. Washington*, 547 U.S. 813, 829 (2006), Kevin J. McDowell and the State agree that an out-of-court declarant's statements may include both nontestimonial and testimonial components and that trial courts may redact a statement's testimonial portions. (McDowell's Br. 24, 33; State's Br. 28.)

McDowell concedes Denise's statements to Nurse Jill Fisher during a forensic medical examination for purposes of medical diagnosis and treatment are nontestimonial. (McDowell's Br. 38, 46.) McDowell acknowledges that Denise's statement, "'he bit my nipple so bad' could have a primary purpose of receiving medical treatment." (McDowell's Br. 46 n.6.) But McDowell contends the State forfeited its right to ask this Court to admit Denise's nontestimonial statements while redacting her testimonial statements because it did not ask the circuit court for redaction and because it failed to make an adequate offer of proof about the statements it wants admitted. (McDowell's Br. 30–36.) While the parties agree that Denise's statements to Officer Andre Lewis following McDowell's arrest are testimonial, they disagree as to whether Denise's initial statements to Lewis before McDowell's arrest are nontestimonial. (McDowell's Br. 25–30; State's Br. 41–44.)

In reply, the State demonstrates it made a sufficient offer of proof identifying Denise's statements that it wanted admitted. Next, the State explains why it did not forfeit its argument before this Court that testimonial statements can be redacted from the nontestimonial statements. Alternatively, it explains why forfeiture should not apply in this case. Then, the State addresses why Denise's statements

to Nurse Fisher are primarily nontestimonial and why Denise's initial statements to Lewis are nontestimonial.

ARGUMENT

I. The State's detailed offer of proof identified Denise's out-of-court statements it wanted admitted.

McDowell contends that the State failed to preserve its challenge to the circuit court's determination that Denise's statements to Fisher were testimonial because it failed to specify which statements it wanted admitted. (McDowell's Br. 30–34.)

To preserve a challenge to a ruling excluding evidence, the proponent must have made the substance of the evidence "to the judge by offer or was apparent from the context within which questions were asked." Wis. Stat. § 901.03(1)(b). Both the State's proffer and the context provided the court with an adequate basis for its evidentiary ruling and established a meaningful record for this Court's review. *State v. Brown*, 2003 WI App 34, ¶ 17, 260 Wis.2d 125, 659 N.W.2d 110.

To begin, McDowell overlooks the detailed offer of proof that the State made in its other acts motion about Denise's allegations, including references to the statements she made to Lewis and Fisher. (R.27:10–12.) The court had no problem deciding, based on this proffer, that the other acts evidence was admissible, while at the same time excluding certain statements Denise made because they were unfairly prejudicial. (R.115:17–21.) After the court admitted the other acts evidence, it *sua sponte* questioned whether the Denise's out-of-court statements were testimonial and, therefore, inadmissible. (R.82.) The parties disputed whether Denise's out-of-court statements to Fisher were testimonial, and the State asked to make an offer of proof concerning the forensic examination's purpose. (R.83; 85.)

In addition to the State's other acts proffer, Fisher's testimony at the hearing provided context for the court's assessment of the admissibility of Denise's statements for confrontation purposes. The State asked Fisher why she asked the kinds of question asked during a forensic examination, including statements that related to diagnosis, treatment, and follow-up care as well as evidence collection. (State's Br. 11–15; R.104:12–34.) After the State questioned Fisher about the report related to Denise's examination, including Denise's statements, (R.104:37–43), the court responded that "walking through the report" would not make "much of a difference in [its] *Crawford* analysis" because the report was already in evidence, (R.104:44–45). Further, the court's decision reflects that it reviewed and considered Denise's medical record. (R.109:8, 12–14.) In other words, Denise's statements to Fisher during her exam are part of the record and before the Court.

McDowell misplaces his reliance on *Brown* for the proposition that the State's offer here was inadequate. (McDowell's Br. 31–32.) Brown did not make an offer of proof or submit a statement detailing what he intended to say in support of his alibi. *Brown*, 260 Wis.2d 25, ¶ 19. Without more, this Court determined that the offer of proof was inadequate to conclude the testimony Brown wanted to give was not an alibi requiring statutory notice. *Id.* ¶ 20. In contrast, the State's proffer, which included the other acts motion, Denise's medical records, and Fisher's hearing testimony, provided the circuit court with a sufficient record to determine the admissibility of Denise's statements. That same record allows this Court to meaningfully review the circuit court's decision to exclude Denise's statements because they were testimonial.

II. The State did not forfeit its argument that Denise's testimonial statements could be redacted from her nontestimonial statements.

McDowell contends that the State forfeited its right to assert that the circuit court could redact and exclude the testimonial statements while admitting the nontestimonial statements during the medical examination because it did not ask the circuit court for redaction. (McDowell's Br. 34–36.) The State did not forfeit this argument. McDowell's case is not one where the State raised a theory "completely unrelated" to its earlier argument that Denise's statements were admissible because they were not testimonial. *See*, *e.g.*, *State v. Rogers*, 196 Wis.2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (additional theories for hearsay admissibility presented on appeal).

Based on the record, the court decided that Denise's out-of-court statements were testimonial as a whole and, therefore, inadmissible under the Confrontation Clause. (R.109:4–15, 27–30.) The State appealed the court's order, challenging its determination that Denise's statements were testimonial. Its theory of admissibility, that the primary purpose of her statements was for nontestimonial purposes of providing Denise with care or treatment and responding to an ongoing emergency, remains unchanged. (Compare R.83 with State's Br. 29–36, 38–43.)

The only difference in the State's position on appeal is that even when the primary purpose of an out-of-court declarant's statements serves nontestimonial purposes, *Davis* contemplates situations may arise when an otherwise nontestimonial statement becomes testimonial. (State's Br. 35 (citing *Davis*, 547 U.S. at 829).) When that happens, the parties agree, consistent with *Davis*, that trial courts should redact the testimonial portions of the declarant's

statement. (McDowell's Br. 24 (citing *Davis*, 547 U.S. at 829); State's Br. 35.)

In hindsight, the State could have specifically referenced *Davis*'s redaction discussion in the circuit court. But the core issue, i.e., whether Denise's statements were testimonial, before the circuit court and this Court remains unchanged. The State's limited concession on appeal that Denise's statements describing her assailant may be testimonial under this case's facts should not foreclose this Court's consideration of whether her other statements are nontestimonial and, therefore, admissible under the primary purpose test. The forfeiture rule is one of judicial administration designed to prevent sandbagging. *State v. Counihan*, 2020 WI 12, ¶ 27, 390 Wis.2d 172, 938 N.W.2d 530. It was not intended to prevent a party from narrowing its position before this Court on an issue litigated in the circuit court. Sandbagging did not occur here.

III. Even if the State did not preserve the redaction argument, this Court should exercise its discretion to decide it.

Even if the State forfeited its argument that Denise's statements can be saved by redacting the testimonial statements from the nontestimonial statements, this Court may exercise its discretion to address it because "doing so can clarify an issue of statewide importance." *State v. Long*, 2009 WI 36, ¶ 44, 317 Wis.2d 92, 765 N.W.2d 557. In considering whether to address a forfeited issue, this Court considers whether the issue involves a legal question the parties have briefed and that "is of sufficient public interest to merit a decision." *State v. Armstrong*, 2014 WI App 59, ¶ 20, 354 Wis.2d 111, 847 N.W.2d 860 (citation omitted).

McDowell's case satisfies these considerations for review of a forfeited claim. First, whether Denise's out-of-court statements are testimonial presents a question of law

that this Court independently reviews. *State v. Mattox*, 2017 WI 9, ¶ 19, 373 Wis.2d 122, 890 N.W.2d 256. Even if neither the parties nor the circuit court considered *Davis*'s redaction discussion, this Court cannot ignore it by restricting itself to determining whether Denise's statements were wholly testimonial or nontestimonial.

Second, the parties litigated the confrontation issues in the circuit court, which issued a detailed decision explaining why Denise's statements to Fisher and Lewis were testimonial. (R.82; 83; 85; 109:3–16.)

Third, the question of whether an out-of-court declarant's statements to a forensic nurse examiner and to a first-responding officer are testimonial presents an issue of significant public interest. While McDowell asserted that this case involves the application of "well-established law," (McDowell's Br. 9), the circuit court thought otherwise, noting that "it [did] not appear that Wisconsin courts have directly decided the question" of whether a declarant's out-of-court statements to a nurse examiner were testimonial, (R.82:2). While *Mattox*, 373 Wis.2d 122, ¶ 25, rests squarely on *Davis*'s discussion of the primary purpose test, the supreme court did not discuss *Davis*'s guidance related to redactions.

By declining to apply forfeiture and by exercising its discretion to decide an issue of significant public interest, this Court can guide circuit courts tasked with assessing when a person's out-of-court statements to a forensic nurse examiner and a first-responding officer become testimonial. And this guidance includes redacting testimonial statements from nontestimonial statements as *Davis* contemplates.

IV. The investigatory component of the forensic nurse examination did not detract from its primary purpose of providing medical care to Denise.

McDowell asserts that "Fisher's report should be excluded because it includes testimonial statements" and says that "the same purpose runs thorough an entire conversation." (McDowell's Br. 37.) But as McDowell acknowledges, "the Confrontation Clause applies to individual statements, not the conversation [at] large," and that forensic medical examinations may include statements that are nontestimonial because they relate to care and treatment, and testimonial because they relate to evidence collection. (McDowell's Br. 37–38.)

While recognizing a conversation may include both testimonial and nontestimonial statements, McDowell asserts, based on *State v. Nelson*, 2021 WI App 2, 395 Wis.2d 585, 954 N.W.2d 11, that a patient's statements during a forensic medical examination have a testimonial purpose. (McDowell's Br. 39.) This Court's discussion of statements during forensic examinations was, as the circuit court recognized, "dicta." (R.82:2.) *Nelson* concerned a challenge to the admissibility of a patient's statements to a medical provider conducting a follow-up examination *after* an earlier forensic medical examination; "a challenge to the SANE report . . .[was] not before [this Court]." (State's Br. 24–25 (discussing *Nelson*, 395 Wis.2d 585, ¶¶ 30, 38, 45).) Nothing in *Nelson* suggests this Court considered, consistent with *Davis*, 547 U.S. at 828–29, that a conversation during a forensic medical examination may include both testimonial and nontestimonial statements.

To begin, a patient's statements made to medical professionals providing medical treatment are generally nontestimonial. *See Giles v. California*, 554 U.S. 353, 376 (2008). While a forensic medical examination may involve

evidence collection, its primary purpose remains focused on providing care and treatment to the patient. (State's Br. 24–29.) In assessing whether a statement during a forensic examination is testimonial, "The primary thrust of the court's inquiry must be whether there is an objectively ascertainable medical reason for the inquiry." *United States v. Norwood*, 982 F.3d 1032, 1050 (7th Cir. 2020).

When considering both Fisher's questions and Denise's answers, most of Denise's statements about her assault were relevant to her medical treatment and care. For example, Fisher asks patients like Denise about their medical history because it guides what steps Fisher will take in the exam, including where to look for injuries and what care to provide. (R.104:21–22.) Those questions, as documented in Denise's medical record, reflect that Fisher asks both the open-ended question, "[w]hat happened," along with specific questions about the contact that occurred. (R.96:16–18.)

McDowell does not appear to challenge the nontestimonial nature of the specific, scripted questions that Fisher asked Denise about the contact that occurred. (R.96:17–18.) Rather, McDowell contends that Denise's responses to the open-ended, "what happened" question resulted in testimonial statements. (McDowell's Br. 45–47.) As Fisher explained, the "what happened" question is a question she asks any patient, not just forensic patients, because it informs how she will examine and treat the patient. (R.104:23–25.) Denise's statements in response to "[w]hat happened," including that she was drunk, about where they were, that he "grabbed my pants," and that she "ran into a gas station to get help," (R.96:16), provided information that allowed Fisher to assess Denise's condition and identify how to treat her. To be sure, her statement, "He bit my nipple so bad," might well have guided evidence collection, it still had a primary purpose related to treatment. (R.96:16; State's Br. 33–34; McDowell's Br. 46 n.6.)

In assessing the primary purpose, McDowell focuses only on Denise's statements and does not address other factors that inform the question of whether her statements served a primarily nontestimonial purpose. These other factors include the absence of police participation in the forensic examination and Fisher's emphasis that Denise had control over whether and to what extent the examination would occur. (State's Br. 29–30, 32–33.)

Here, Denise's only statements during the examination that were potentially testimonial were her statements describing her assailant. Under *Michigan v. Bryant*, 562 U.S. 344, 370 (2011), a court evaluates the primary purpose "by objectively evaluating the statements and actions of the parties to the encounter." From a forensic nurse's perspective, identification of a patient's assailant serves a nontestimonial purpose because it helps the nurse understand whether a patient has a safe place to go following discharge. (R.104:32, 43; State's Br. 34–35.) But from a patient who reports being assaulted by a stranger, identifying information about the assailant has less bearing on treatment and is more closely related to investigation, which is a testimonial purpose. *See State v. Burke*, 478 P.3d 1096, 1113 n.13 (Wash. 2021).

Should this Court determine that Denise's statement to Fisher is partly nontestimonial, McDowell asks this Court to remand the case to the circuit court for further determination of which statements require redaction. (McDowell's Br. 47–48.) Because this Court independently reviews whether a statement is testimonial and the record demonstrates that Denise's statements to Fisher were for treatment purposes, this Court can decide that Denise's statements were nontestimonial, except possibly for Denise's statements identifying her assailant.

V. Denise's initial statements to Officer Lewis were nontestimonial.

McDowell and the State generally agree on the principles guiding the assessment of whether a declarant's out-of-court statements to a police officer are testimonial. The parties agree: (1) Not all statements to law enforcement officers are testimonial; (2) Statements made with a primary purpose to allow police to respond to an ongoing emergency are not testimonial; (3) Courts apply an objective test that considers the statements and actions of the interrogator and questioner when applying the primary purpose test; (4) A conversation may include both testimonial and nontestimonial statements; and (5) Courts assess the primary purpose of each statement in light of the primary purpose. (McDowell's Br. 20–24; State's Br. 21–23, 28, 38–40.)

While the parties agree that Denise's statements to Lewis after McDowell was formally detained are testimonial, the State disagrees with McDowell's assertion that her initial statement was testimonial because neither Denise nor the public were endangered when officers arrived. (McDowell's Br. 26.) When viewed objectively, officers responding to a fight at a gas station were responding to an ongoing emergency and the absence of fighting upon their arrival does not mean that the public safety threat has dissipated. (State's Br. 41–43.) Neither McDowell nor the clerk, both of whom were evasive about what happened, provided Lewis with any information that would have allowed him to assess whether the persons who jumped McDowell still posed a threat to McDowell, Denise, or the public. (R.94:1–2.) Under these circumstances, Lewis's initial questioning of a distraught Denise about what happened was a prudent means of assessing whether an ongoing emergency remained. (State's Br. 41–44.) Denise's initial response to Lewis was less likely to be testimonial because Denise's emotional distress suggests that her attention was focused more on terminating a threating

situation than proving past events. *See Frye v. United States*, 86 A.3d 568, 573 (D.C. 2014) (citation omitted) (reasonableness is "assessed from the emotion-laden viewpoint of the declarant, not of a composed, after-the-fact observer").

McDowell contends that Denise's statement was testimonial after "Lewis *threatened* that the police 'were about to let McDowell go[.]'" (McDowell's Br. 28 (alteration in original) (emphasis added) (citing R.94:2).) Putting aside McDowell's characterization of Lewis's statement as a threat, Lewis's statements to Denise after Denise said, "he fucked," objectively reflected his interest in assessing whether McDowell presented a risk to her if officers vacated the scene. (State's Br. 42–43.) From an objective vantage point, Denise's statements, especially considering her condition, immediately after Lewis referenced McDowell's release more likely reflects a nontestimonial "cry for help," than a statement intended to aid prosecution. (State's Br. 42–43 (citing *Hammon v. Indiana*, 547 U.S. 813, 832 (2006)).)

While another officer stood next to McDowell when Lewis first spoke to Denise, there is no evidence that McDowell had been handcuffed, as McDowell suggests. (R.94:2; McDowell's Br. 29–30.) It was only after Denise reported that McDowell grabbed an intimate body part that officers detained McDowell, which terminated potential danger to Denise, and which made her subsequent statements testimonial. (State's Br. 43.)

CONCLUSION

This Court should reverse the circuit court's order excluding Denise's out-of-court statements to Fischer and Lewis.

Dated this 8th day of July 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 294-2907 (Fax)
latorracadv@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,986 words.

Dated this 8th day of July 2022.

Electronically signed by:

Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General

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 8th day of July 2022.

Electronically signed by:

Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General