STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Appeal No. 2009AP1540-CR
No. 2009AP1541-CR
No. 2009AP1542-CR
No. 2009AP1543-CR

Plaintiff-Respondent,

v.

SCOTTIE BALDWIN

Defendant-Appellant

APPEAL FROM THE JUDGMENTS OF CONVICTION AND SENTENCES ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HON. CLARE L. FIORENZA PRESIDING

BRIEF OF DEFENDANT-APPELLANT SCOTTIE BALDWIN

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Table of Contents

TABLE OF AUTHORITIES

Cases Cited

Statues

ISSUES PRESENTED

1. Did the trial court err in assessing the DNA surcharge, even in the absence of requiring a DNA sample from the Defendant/Appellant, solely on the grounds that the surcharge funds the State's DNA program?

   Trial Court: No.

2. Did the trial court offend the Defendant/Appellant's 6th Amendment right to confrontation of his accuser when it allowed the State to introduce a victim-witness's hearsay statements into evidence at trial in lieu of having her appear, testify, and be subject to cross-examination?

   Trial Court: No.

3. Did the trial court fail to utilize the proper legal standard regarding authentication of recorded telephone calls when it admitted certain recorded calls into evidence?

   Trial Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This matter presents no unique issues of law that would warrant either oral argument or publication. While the facts are somewhat unique, proper resolution is dependent upon the application of settled law to those facts.

STATEMENT OF THE CASE

Note: This appeal is the consolidation of four Milwaukee County cases, therefore, there are four records that comprise the consolidated record on appeal. For purposes of this brief, the Record for case 07CM1803, 09AP1541CR, is referenced as R1. The Record for case 07CM2031, 09AP1540, is referenced as R2. The Record for case 07CF2984, 09AP1543, is referenced as R3. The Record for case 07CF3514, 09AP1542, is referenced as R4. This notation

reflects the chronological order of the issuance of the cases in the circuit court.

On March 13, 2007, the Defendant/Appellant, Scottie Baldwin, was charged with one count of Disorderly Conduct, as an Habitual Offender, in violation of §§947.01 and 939.62, Wis. Stats. in Milwaukee County case number 07CM1803 as the result of an incident allegedly involving his girlfriend. R1:2. The initial appearance in that matter was held on that same day. R1:24.

After being released on bail, on March 23, 2007, the Defendant/Appellant was charged in Milwaukee County case number 07CM2031with one count of Misdemeanor Bail Jumping in violation of §946.49(1)(a), Wis. Stats., in a criminal complaint alleging a violation of the no-contact order that was a condition of the bond set in case number 07CM1803. R2:3.

Again after being released on bail, on June 14, 2007, the Defendant/Appellant was charged in Milwaukee County case number 07CF2984 with Aggravated Battery as an Habitual Offender in violation of §§940.19(4) and 939.62, Wis. Stats., False Imprisonment as an Habitual Offender in violation of §§940.30 and 939.62, Wis. Stats., and four counts of Misdemeanor Bail Jumping as an Habitual Offender in violation of §§946.49(1)(a) and 939.62. R3:3. All six counts concerned allegations involving his girlfriend. R3:3.

The felony matter was set for a preliminary hearing on June 21, 2007. R3:1, §6. It began on that day, but was adjourned until June 26, 2007, after Milwaukee Police Officer Jay Jackson testified, because the victim, R. Z. did not appear. R3:1, §6.

On June 26, 2007, when R.Z. again failed to appear, the charge of Aggravated Battery as an Habitual Offender was amended to Misdemeanor Battery as an Habitual Offender in violation of §§940.19(1) and 939.62, Wis. Stats., the charge of False Imprisonment as an Habitual Offender was dismissed, as was one count of Misdemeanor Bail Jumping. R3:1,§§9-11.

On July, 24, 2007, the State filed a complaint charging the defendant with a felony count of intimidation of a witness as an habitual offender, in violation of §§940.42, 940.43, 940.46, and 939.62, Wis. Stats., and twenty-three (23) misdemeanor charges (all as an habitual offender). R4:5. Those counts included fifteen (15) counts of bail jumping based on violating the various No-Contact Orders that were issued in these pending cases, as well as other prior cases, one count of battery, one count of battery while armed, one count of disorderly conduct, one count of disorderly conduct while armed, one count of criminal damage to property, one count of criminal damage to property while armed, and two counts of misdemeanor intimidation of a witness. R4:5.

The gravamen of the felony charge was that the Defendant/Appellant wrote to D.Z. prior to the preliminary hearing in case 07CF2984, instructing her to call Judge Conen (who was presiding over the preliminary hearing) and tell the Judge that she was bi-polar, that he had previously issued a body attachment for her in another matter, that she had not taken her medication on the day the Defendant/Appellant was alleged to have committed the offenses set forth in case 07CF2984, and that she was not coming to court. R4:5. The Defendant/Appellant also was alleged to instruct D.Z. to leave her telephone number so that the judge could call her back if he wanted to do so. R4:5.

The Defendant/Appellant was also alleged to have spoken the D.Z. on the telephone on several occasions prior to the preliminary hearing in 07CF2984, telling her to send a notarized recantation to the court. R4:5. On June 26, 2007, Judge Conen received a letter dated June 21, 2007 (purportedly signed by D.Z.) recanting statements made to the police with regard to the allegations in case 07CF2984, and containing allegations of being bi-polar and off her medications. R4:5.

The two misdemeanor charges of intimidation of a witness related to two prior cases, 05CM7326, and 06CM299 R4:5.

On August 2, 2007, the State filed an amended complaint with the same charges, with minor changes to parts of the penalty section of the complaint that it originally filed. R4:7.

The preliminary hearing was held on August 2 and 3, 2007. R4:1,§§ 9-11. At the conclusion of the hearing, after finding probable cause and binding the defendant over for trial, the court consolidated all four cases (07CF3514, 07CF2984, 07CM1803, and 07CM2031) and the entered an order rescinding the Defendant/Appellant's mail, telephone, and visitation privileges while in custody, with the only exception relating to contact between the Defendant/Appellant and his trial attorney. R4:41, pp. 9-30.

Following the preliminary hearing that was held on August 3 and 4, 2007, the State filed a Motion for Forfeiture by Wrongdoing Hearsay and Confrontation Clause Petition and Legal Analysis. R4:12. In that Motion, the State outlined its evidence that the Defendant/Appellant had, in 2005 and 2006, been charged with domestic abuse related charges that ultimately were dismissed on the scheduled date of trial when the victim (D.Z. the same alleged victim in these cases) did not appear to testify[1]. R4:12, pp. 2-4. The State also outlined its evidence that D.Z. did not appear to testify at the trial on those charges because of actions taken by the Defendant/Appellant to dissuade her from appearing in court to testify.[2] R4:12, pp. 6-9.

The State then reviewed its evidence concerning the events surrounding the preliminary hearing in case 07CF2984, and its evidence that D.Z. did not appear because of actions taken by the Defendant/Appellant to dissuade her from appearing to testify at that hearing.[3] R4:12, pp. 8-9.

The State then offered its legal analysis concerning the doctrine of forfeiture through wrong-doing, concluding its analysis by explaining the Wisconsin Supreme Court's

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[1] The allegations in those complaints were the basis for counts 2-5 of the Amended Information filed in Case 07CF3514.

[2] Those acts form the basis for the misdemeanor intimidation of a witness charges, counts 6 and 7 of the Amended Information filed in case 07CF3514.

[3] Those actions formed the basis for the felony intimidation of a witness charge, count 1 of the Amended Information filed in case 07CF3514.

decision in *State v. Jensen*, 299 Wis.2d 267, 727 N.W.2d 518 (2007). R4:12, pp. 16-20.

The relief sought by the State was then requested, specifically

> a finding that the defendant, through his own actions and based on a preponderance of the evidence presented, has forfeited his State and Federal Constitutional [Confrontation] Clause protections and right to object under hearsay to the evidence to be provided by law enforcement in lieu of the victim's unavailability to the State based on this defendants [sic] own misconduct and malicious intimidation.

R4:12, p. 25.

Thus, on August 8, 2007, the State argued that the trial court should find that the past actions of the Defendant/Appellant were the basis for D.Z.'s unavailability at the trial yet to be held, therefore allowing the State to introduce hearsay statements made by D.Z. instead of having her present to testify and be cross-examined. R4:12.

At this point in time, the trial was set for September 5, 2007. R3:34, p. 4. Due to the filing of that motion by the State, and a defense suppression motion, the trial date was changed to October 29, 2007, with a hearing date for the motions set for September 21, 2007, after the defendant entered a speedy trial demand. R3:34, pp. 7-12.

On September 21, 2007, the hearing on the State's motion, and a defense motion to suppress the fruits of the search warrant that the State's motion was partially based on, was adjourned to November 16, 2007, and a new trial date of January 7, 2007, was set. R4:42, 5-22.

On November 16, 2007, the defense responded to the State's motion, arguing to the court that, because the trial was still two months off, it was premature to declare D.Z. was unavailable to testify, and that there was no evidence introduced by the State to indicate was efforts were being made to secure the presence of the witness. R4:43, pp. 12-13.

In response, the State argued that because D.Z. had not appeared after being subpoenaed in a prior case (06CM299) and a body attachment was issued, she could be found to be unavailable at the trial in this case. R4:43, p. 17.

Specifically, the State argued:

> The State's established, therefore, that it's not only exhausted the subpoena system in the past, but it has exhausted every resource of the powers of the courts to secure warrants for people's arrests to overcome the defendant's efforts to intimidate individuals.
>
> The State's demonstrated an extremely long history of, not only the repeated abuse, but the repeated attempts to thwart the criminal justice system through crimes of intimidation as filed by the State. And so I think the State's pattern has shown, at the very minimum, that we've satisfied a preponderance of the evidence that, for these proceedings and others, the defendant's engaged in this pattern and forfeits his right by his own misconduct.

R4:43, p. 18.

Initially, the Court appeared to share the concern that it was premature to declare that D.Z. was not available for trial so far in advance of the trial date. R4:43, pp. 26-27.

> The Court: As I said before, I don't have a crystal ball as to if she's going to appear or not, but the Court has to set a deadline.
>
> The State shall use all its proper resources to secure a subpoena upon that individual . Does the State have any idea where she is?
>
> The State: No.

R4:43, p. 27.

> The Court: I totally understand your position that in this case, you know, in 2007, the State has not attempted to subpoena [D.Z.].
>
> Correct?
>
> The State: We have been making efforts to communicate with her and subpoena her, but we cannot locate her.
>
> …
>
> The Court: I don't know what attempts the State – the State has made to secure her cooperation in this case thus far, and Mr. Greipp is advising me they have and – tried to secure cooperation; and, to date, they haven't found her. And what – that's news to me and probably to you also 'cause I wasn't aware of that.
>
> R4:43, pp. 30-31.

Then there was more discussion about "availability" and the State's duty and efforts to secure the witness.

> The State: I would only posit that the case law and the -- and the information before the Court in the briefings of both federal and state law have to do with the defendant's conduct as it relates to his rights of confrontation and does in no way apply to the state's efforts to secure that witness. It's a strict analysis of the defendant's behavior and whether or not the defendant's behavior waives the right. Therefore, the efforts to secure the witness is [sic] a separate issue.

R4:43, p. 32.

> The Court: Would you agree -- …forfeiture by wrongdoing really does not tie in with the

> State's attempt to try to get that witness here. … It does not tie in with respect to due diligence on the State's part to get anybody here to trial. Do you agree with that?
>
> Defense: Well, the - - the – I believe that the State still -- They're the ones who have to produce the witnesses. They're the ones who -- who brought the charges. It's up to the State to prove their case -- not up to the defendant to prove himself innocent.
>
> The Court: … I am not aware of any requirement that the State has to show everything they've done to produce that witness before the motion could be granted, I guess, is what I'm saying.

R4:43, pp. 33-34.

A ruling on the State's motion was put over until December 10, 2007. R4:43, pp. 36-39.

On December 10, 2007, the State told the court that it had served a subpoena on a woman who was in the courthouse hallway, with the Defendant/Appellant's and D.Z.'s child, with the understanding that this woman would, in turn, give the subpoena to D.Z. R3:35, pp. 5-6. The State indicated to the Court that it interrogated the woman to determine her address and telephone number. R3:35, p. 6. The State did not indicate if she was interrogated as to when and where she was going to meet D.Z., or if she knew D.Z. address, telephone number, place of employment, or current whereabouts. *See* R3:35, pp. 1-42.

The court reviewed its analysis of the relevant law, relying on *Jensen* as the controlling case. R.:12/10/07, pp. 11. The court came to the conclusion that the first step in determining if the unavailability of a witness is due to circumstances that would lead to a forfeiture of the right to confrontation because of wrong-doing of a defendant would be to determine that the witness is unavailable. R3:35, p. 12-13.

The State then argued that D.Z. should be found to be unavailable *even if she were present in court on the day of trial*. R3:35, pp. 24-25.

> The State: So the only other aspect I would proffer to this Court is, in many respects, that this victim is, per se, unavailable not only in the history, but in the fact that [the defendant] solicited her to falsely swear.
>
> In that respect, clearly demonstrated by a preponderance of the evidence, even if this witness is here in court, the damage he has done to the prosecution's case makes her, per se, unavailable as our criminal justice system was designed. …
>
> If we adopt any different standard, meaning that their actual, physical appearance is the only thing that determines whether or not their available, I think we do a disservice for what -- the whole premise to our confrontation clause analysis. In many respects, the defendant is no longer going to have -- whether this victim is here or not -- a person that he needs to confront.

R3:35, pp. 24-25.

The court concluded that it would issue a final decision on the trial date if D.Z. did not appear in court and there was "a proper showing of the attempts the State has made to produce her for trial. R3:35, pp. 36-37.

On January 7, 2008, the date set for trial, the State moved to adjourn the trial because it alleged that the Defendant/Appellant had, despite being held without telephone, mail, or visitation privileges, intimidating D.Z., through third parties, into not appearing in court. R4:44, pp. 1-6.

The State indicated that it had personally served D.Z. with a subpoena the week prior. R4:44, p. 5. However, at no time did the State request a body attachment in response to D.Z.'s

non-appearance. *See* R4:44, pp. 1-30. The matter was set for a status hearing on January 22, 2007. R4:44, p. 29.

On January 22, 2008, the status conference was held, a jury trial date of April 14, 2008 was set, as was a final pre-trial date of February 21, 2008; again the State did not request a body attachment to secure the presence of D.Z., who had not appeared earlier in response to the subpoena served on her. R4:45, pp. 1-20.

On February 21, 2008, at the final pre-trial, the State indicated that it had hundreds of minutes of recordings relating to the allegations of intimidation by the Defendant/Appellant, but that it only anticipated introducing extremely brief portions of them at trial. R4:46, pp. 4-17.

The defense, however, had concerns regarding the doctrine of completeness regarding those calls. R4:46, pp. 14-16.

> Defense: Well, it's our position that if any part of any phone call is going to be played to the jury, then it should not be up to the District Attorney to pick and choose two minutes out of a ten-minute phone call -- conversation. I think the jury should hear the whole thing so they know what the whole context is.

R4:46, p. 15.

After some discussion, the court held that the defense could introduce any portion of a conversation the State was using a portion of, after first establishing that the portion it wanted introduced was relevant. R4:46, pp. 16-28.

The Defendant/Appellant also addressed the fact that before any of the tapes could be introduced as evidence, the State had the burden of authenticating that the persons on the recordings were indeed the Defendant/Appellant and D.Z.. R4:46, pp. 21-25.

The matter was set for a status conference on February 28, 2008. R4:46, p. 30.

At the February 28, 2008 status conference, the Defendant/Appellant again raised the issue of identification and authentication of the taped telephone conversations, specifically noting that, "Nobody ever identified him as being a -- a speaker on those phone calls…And, as far as the destination calls that were played, they were made to a phone number that is not that of D.Z…." R4:48, pp. 12-13.

At the status conference held on April 4, 2008, the State filed an Amended Information in case 07CF3514 relating to the charges in that proceeded to be tried, those being,

1. Felony Intimidation of a Witness as an Habitual Offender in violation of §§ 940.42, 940.43(7). 940.46, and 939.62, Wis. Stats. (on or about June 20, 2007),

2. Disorderly Conduct as an Habitual Offender in violation of §§947.01 and 939.62, Wis. Stats. (on or about August 5, 2005),

3. Criminal Damage to Property as an Habitual Offender in violation of §§943.01 and 939.62, Wis. Stats. (on or about August 5, 2005),

4. Battery as an Habitual Offender in violation of §§940.19 and 939.62, Wis. Stats.,

5. Disorderly Conduct as an Habitual Offender in violation of §§947.01 and 939.62, Wis. Stats. (on or about January 13, 2006)

6. Misdemeanor Intimidation of a Witness as an Habitual Offender in violation of §§940.42, 940.46, and 939.62, Wis. Stats. (on or between January 30 2006 and May 14 2006 in case 05CM7326), and

7. Misdemeanor Intimidation of a Witness as an Habitual Offender in violation of §§940.42, 940.46, and 939.62, Wis. Stats. (on or between January 30 2006 and May 14 2006 in case 06CM299).

R4:24.

In addition to those charges, the trial would also deal with the battery and three bail jumping charges in case 07CF2984, the disorderly conduct charges in case 07CM1803, and the misdemeanor bail jumping charge in case 07CM2031. R4:48, pp. 13-18.

The State informed the trial court that it had again located D.Z., and again served her with a subpoena for the April 14, 2008 trial. R4:48, pp. 19-22.

On April 14, 2008, the date set for trial, the matter was called, D.Z. did not appear, and a body attachment warrant was issued to secure her appearance. R4:49, pp. 5-16. The Defendant/Appellant objected that the transcripts prepared by the State identified the speakers as being the Defendant/Appellant and DZ, even though neither was identified as such in the content of the transcripts (except that on a transcript of a voice mail left for defense counsel, the speaker identifies himself as the Defendant/Appellant), and that the identity of the speakers is exactly what the jury was going to have to determine. R4:49, pp. 24-26.

The State argued, and the court agreed, that the transcripts identifying the speakers as the Defendant/Appellant and D. Z. would only be presented and published to the jury for their use due to the difficulty of understanding the actual recordings 'because the tapes are hard to hear." R4:49, pp. 26-33.

Shortly after 12:00 noon, the court, noting that it had issued the body attachment less than three hours earlier, declared D.Z. unavailable for trial without any inquiry as to what steps were taken to execute the body attachment, and ruled that the Defendant/Appellant had thus forfeited his right to confrontation under *Jensen*, and that hearsay testimony would be admitted in lieu of DZ.'s actual testimony. R4:49, pp. 36-44.

A jury was selected during the afternoon of April 14, 2008. R4:50, pp. 1-114.

On April 15, 2008, it was established that telephone number 414 588-4372, according to U.S. Cellular billing records is

issued to a C A. R4:51, pp. 36-37. Testimony from the officer who recovered the bill verified that there was no proof that C.A. was an alias for D.Z. R4:51, pp.46-47.

Evidence established that telephone calls were made from the Milwaukee County House of Correction to 414 588-4372, but, other than the one call containing the voice mail, noted above, neither caller is ever identified in the body of the call as being either the Defendant/Appellant or D.Z.; nonetheless, the recordings were all admitted into evidence over defense objections, and the jury was presented with the objected-to transcripts identifying the callers as Defendant/Appellant and D.Z. See R4:51-56. Massive hearsay evidence, consistent with the court's order based on *Jensen*, was also admitted. *Id.*

The defendant was found guilty on all of the charges, except count three of case 07CF3514, the criminal damage to property charge. R4:27.

On June 19, 2008, the Defendant/Appellant was sentenced on all of the counts in the consolidated cases.

Case 07CF3514:

1. Felony Intimidation of a Witness as an Habitual Offender, 12 years WSP, 7 years initial incarceration, 5 years extended supervision, consecutive to any other sentence;

2. Disorderly Conduct as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months extended supervision, consecutive to any other sentence

3. No sentence for Criminal Damage to Property as an Habitual Offender due to Not Guilty Verdict

4. Battery as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months extended supervision, consecutive to any other sentence

5. Disorderly Conduct as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months

extended supervision, consecutive to any other sentence,

6. Misdemeanor Intimidation of a Witness as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months extended supervision, consecutive to any other sentence

7. Misdemeanor Intimidation of a Witness as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months extended supervision, consecutive to any other sentence.

R4:31.

07CF2984:

1. Misdemeanor Battery as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months extended supervision, consecutive to any other sentence

2. No sentence on the charge of False Imprisonment as an Habitual Offender, dismissed at the preliminary hearing,

3. Misdemeanor Bail Jumping as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months extended supervision, concurrent to count 4 and consecutive to any other sentence

4. Misdemeanor Bail Jumping as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months extended supervision, concurrent to count 3 and consecutive to any other sentence

5. Misdemeanor Bail Jumping as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months extended supervision, consecutive to any other sentence.

6. No sentence on the charge of Misdemeanor Bail Jumping as an Habitual Offender , dismissed at the preliminary hearing.

R3: 8.

07CM2031:

1. Misdemeanor Bail Jumping as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months extended supervision, consecutive to any other sentence.

R2: 8.

07CM1803:

1. Disorderly Conduct as an Habitual Offender, 2 years WSP, 1 year 6 months initial incarceration, 6 months extended supervision, consecutive to any other sentence

R1: 12.

As the court began pronouncing the various sentences to be imposed, it addressed the conditions of extended supervision that would be in place on all of the counts, and stated, "On the one felony matter, I'm requiring that he pay the DNA surcharge, and I'll get to that in a moment, with – that he submit a DNA sample – submit a DNA sample as a condition of extended supervision if not taken in prison. R4:58, p. 81.

Later, in sentencing the Defendant/Appellant on the felony count, the court further addressed the issue of the DNA surcharge.

> The Court: This is the felony case. I am requiring that the defendant submit a DNA sample while in prison. If not, it is a condition of extended supervision, and he shall pay for the surcharge for that. On each of the cases, the defendant is required to pay the costs, fees, and assessments, as I said, twenty –five percent

> from prisoner's wages and as a condition of extended supervision.
>
> Attorney Shikora: Judge, I believe that the defendant has already given a DNA sample in the past.
>
> The Court: Sir, I'm not aware of –that he has provided a DNA sample. If he has, he does not have to provide another sample. The DNA surcharge, he would be responsible for that. That is a surcharge that is assessed and – and funds, actually, the DNA testing in part, and I think it's appropriate that he pay the surcharge for that . If he's been tested already, I will not require a second actual testing of him. I do not have that in –
>
> The Defendant: 202. It's 202, Your Honor.
>
> The Court: I do not have that in front of me, that information, so I am ordering it. If, in fact, as I have said, he has been tested, I will not order a second testing, but he shall pay the surcharge for that.

R4:58, pp. 84-85.

Following his conviction, the Defendant/Appellant filed his Notice of Appeal to appeal of the judgments of conviction. Specifically, exception is taken to the circuit court's granting of the State's Motion for Forfeiture by Wrongdoing Hearsay and Confrontation Clause Petition and Legal Analysis filed on August 8, 2007, requesting that the Court allow hearsay statements of D.Z. be admitted at the trial held on April 14, 2008 due to the Defendant/Appellant's actions in causing D.Z. to not appear (even though the actual trial date had not been set at the time the motion was filed), the admission of the recorded telephone conversations without proper authentication, and the court's order at sentencing that the Defendant/Appellant pay the DNA surcharge even if he did not submit a DNA sample due to having previously submitted a sample.

ARGUMENT

A. As A Matter Of Law, The Court Erred In Ordering That The Defendant/Appellant Pay The DNA Surcharge, Even If He Does Not Submit A DNA Sample, Based On The Fact That The DNA Testing Program Is Funded By Payment Of The Surcharge.

Given that the issue of the DNA surcharge is the "cleanest" issue for purposes of this appeal, it will be dealt with first in this brief.

The Defendant/Appellant believes that the imposition of the DNA surcharge, especially in light of the fact that the court ordered that the defendant would not be required to submit a DNA sample if he had already done so, violates this court's holding in *State v. Cherry*, 312 Wis.2d 203, 752 N.W.2d 393 (Ct. App. 2008), because the court offered no reasoning to support its exercise of discretion in ordering the payment of the DNA surcharge, other than to say that the surcharge funds the DNA testing.

> We hold that in assessing whether to impose the DNA surcharge, the trial court should consider any and all factors pertinent to the case before it, and that it should set forth in the record the factors it considered and the rationale underlying its decision for imposing the DNA surcharge in that case. Such is the exercise of discretion contemplated both by the statute and our supreme court's pronouncement in *State v. Gallion*, 2004 WI 42, ¶ 19, 270 Wis.2d 535, 678 N.W.2d 197 (The exercise of discretion contemplates a process of reasoning: " 'This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standard.'") (*citation omitted*).

> Thus, in exercising discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can. We also do not find the trial court's explanation that the surcharge was imposed to support the DNA database costs sufficient to conclude that the trial court properly exercised its discretion. To reach such a conclusion would eliminate the discretionary function of the statute as a DNA surcharge could be imposed in every single felony case using such reasoning. We are not going to attempt to provide a definite list of factors for the trial courts to consider in assessing whether to impose the DNA surcharge. We do not want to limit the factors to be considered, nor could we possibly contemplate all the relevant factors for every possible case. In an effort to provide some guidance to the trial courts, however, we conclude that some factors to be considered could include: (1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the trial court finds pertinent.

312 Wis.2d at 207-09, 752 N.W.2d at 395-96.

Concluding that "the record does not reflect a process of reasoning before the trial court imposed the $250 DNA surcharge", this court then reversed that portion of the judgment and order, and remanded the matter back to the circuit court with directions to the court to determine if, using the criteria set forth above, the imposition of the DNA surcharge was appropriate. 312 Wis.2d at 209, 752 N.W.2d at 396. Given that this situation is identical to *Cherry*, the Defendant/Appellant respectfully requests that the same relief be afforded to him in the instant case, praying for partial reversal of the judgment, and remand with directions for a

similar determination, regardless of this court's decision on any other issue.

B. The Trial Court Improperly Invoked The Doctrine Of Forfeiture By Wrongdoing And Admitted The Hearsay Statements Of D.Z. Based On "Bad" Law And Insufficient Fact-Finding

The issue is whether the court properly allowed the admission of the hearsay statements of D.Z. by properly finding D.Z. to be unavailable and then using the proper legal framework for finding a forfeiture of confrontation based on wrong-doing.

The Defendant/Appellant contends the actions of the court violates the Confrontation Clause, which was found to apply in all criminal trials in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). While the scope of the Confrontation Clause has not changed, its governing rules have undergone recent modification. Pre- *Crawford*, the general rule had been that hearsay rules and the Confrontation Clause protected similar values and hearsay did not violate the confrontation clause when it fell within a "firmly rooted" hearsay exception or was supported by "particular guarantees of trustworthiness." *See White v. Illinois*, 502 U.S. 346, 352, 112 S.Ct. 736, 741, 116 L.Ed.2d 848 (1992); *Idaho v. Wright*, 497 U.S. 805, 816-17, 110 S.Ct. 3139, 3147, 111 L.Ed.2d 638 (1990); *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Under this rule, "firmly rooted" hearsay exceptions "carr[ied] sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause." *White*, 502 U.S. at 355 n. 8. This rule was re-examined in *Crawford*, and the "firmly rooted" hearsay exceptions became severely restricted to "those exceptions established at the time of the founding [of this nation]." *Crawford*, 541 U.S. at 36; *and see Giles v. California*, --- U.S. ----, 128 S.Ct. 2678, 2682, 171 L.Ed.2d 488 (2008).

In *Crawford*, "[t]he Court declined to 'spell out a comprehensive definition of 'testimonial," but stated that the term 'applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.' " *United States v. Powers*, 500

F.3d 500, 506-507 (6th Cir.2007) *(quoting Crawford v. Washington*, 541 U.S. at 68, 124 S.Ct. at 1374). The Supreme Court elaborated that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Ibid*.) and further that the term "interrogation" is used in its "colloquial" sense and is applicable to any recorded statement given in response to "structured police questioning." *Crawford*, 541 U.S. at 53 n. 4, 124 S.Ct. at 1365 n. 4. This means that "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are "testimonial." *Davis v. Washington*, 547 U.S. at 826, 126 S.Ct. at 2276.

D.Z.'s statements to police officers about what happened to her and who committed criminal acts are "precisely what a witness does on direct examination," since they were the type of statement that a reasonable person would anticipate being used "against the accused in investigating and prosecuting the crime." *See Davis v. Washington*, 547 U.S. at 830-31; *and see United States v. Gibbs*, 506 F.3d 479, 486 (6th Cir.2007); *United States v. Powers*, 500 F.3d 500, 508 (6th Cir.2007).

The Wisconsin Supreme Court acknowledged that one exception to the Confrontation Clause exists when a defendant causes a witness to not appear at a trial in *State v. Jensen*, 299 Wis.2d 267, 727 N.W.2d 518 (2007).

In *Jensen* the Wisconsin Supreme Court declared it "explicitly adopt[ed the] doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused." 299 Wis.2d at 303, 727 N.W.2d at 536. Known as the forfeiture by wrong-doing doctrine, the Wisconsin Supreme Court held that the doctrine applies whenever the State proves by a preponderance of the evidence that the accused caused the absence of the witness, expressly rejecting a narrower forfeiture by wrongdoing doctrine, so that the State need not show that the defendant caused the witness's unavailability with intent to prevent the witness from testifying. 299 Wis.2d 299-303, 727 N.W.2d at 534-36.

It was on the *Jensen* doctrine that the State reasoned it could admit D.Z.'s statements; in fact, the State referred to its motion as a "*Jensen* Motion".

The problem, of course, is that after *Jensen* was decided, the "*Jensen* doctrine" was explicitly rejected as unconstitutional by the United States Supreme Court.

In *Giles v. California*, 128 S.Ct. 2678 (2008), decided after the trial court's decision in this case, the United States Supreme Court clarified that the forfeiture-by wrongdoing exception applies *only* when a defendant engages in wrongdoing *intended* to make a potential declarant unavailable as a witness. *Id.* at 2685. In other words, it is not enough, for example, that a defendant murdered a victim with the *effect* of preventing her testimony; rather, the defendant must have murdered the victim with the *intent* of preventing her testimony. *Id.* This is an absolute rejection of the Wisconsin Supreme Court's holding in *Jensen*.

Moreover, after repeatedly stating that D.Z. would be declared "unavailable" after a showing of the State's efforts to secure her presence, the court, *less than three hours* after issuing the body attachment, made its finding without ever inquiring what steps were taken to locate and produce D.Z.

This is especially important because the State's position, previously articulated to the court, that D.Z. was unavailable regardless of whether she was physically present in court, is not consistent with believing that it had to make any significant effort to secure her presence. This belief by the State is also reflected in its failure to ever request a body attachment on, or following, the non-appearance of D.Z. on January 7, 2008. Given that the State did nothing to enforce that subpoena, there is no reason to believe it made any diligent effort in executing the body attachment within the three hours it had available on April 14, 2008.

A circuit court erroneously exercises its discretion when it fails to consider and make a record of the factors relevant to its decision, considers clearly irrelevant or improper factors, or clearly gives too much weight to one factor. *Sunnyside*

Feed Co. v.. City of Portage, 222 Wis.2d 461, 471, 588 N.W.2d 278 (Ct.App.1998). A reviewing court independently decide questions of law imbedded in the circuit court's exercise of discretion, but benefits from the circuit court's analysis. *Kocken v. Wisconsin Council 40,* 301 Wis.2d 266, 732 N.W.2d 828 (2007).

Because the circuit court's analysis of this issue was premised on a legal principle that was later declared unconstitutional, and because the court, contradicting its own prior statements, made no fact-finding regarding the efforts of the State to secure the missing witness before declaring her unavailable, the judgments of conviction should be vacated, and the matter remanded for a new trial consistent with the proper legal principles.

C. The Telephone Recordings Were Not Properly Authenticated, And Therefore Should Not Have Been Admitted Into Evidence.

Proper authentication of recorded telephone calls is governed by §909.015, Wis. Stats., which indicates that there should be "by evidence that a call was made *to the number assigned at the time by the telecommunications company to a particular person* or business, if: (a) In the case of a person, *circumstances, including self-identification*, show the person answering to be the one called." §909.015(6)(a), Wis. Stats. (*emphasis added*).

Meeting these three requirements, proper number assigned to the person in question, self-identification, and circumstances of message content, has long been the process required by courts in Wisconsin.

> Telephone conversations may be authenticated by circumstantial evidence. Where the message itself reveals that the speaker has knowledge of facts which only the person *whose name he has used* would be likely to know, this is sufficient authentication. McCormick, Evidence (1954), p. 405, sec. 193; *Merchants' Nat. Bank of St. Paul v. State Bank* (1927), 172 Minn. 24, 214

> N.W. 750; *Morriss v. Finkelstein* (Mo.App.1940), 145 S.W.2d 439. *See also* 26 Washington University Law Quarterly (1941).

Campbell v. Wilson, 18 Wis.2d 22, 30, 117 N.W.2d 620, 625 (1963)(*emphasis added*).

This is authentication process is consistent with perhaps the earliest statement regarding telephone call authentication articulated by Judge Learned Hand:

> If, for example, a man were to write a letter, *properly addressed to another*, and here to receive a telephone call in answer, *professing to come from the addressee*, and *showing acquaintance with the contents of the letter*, it would in our judgment be a good enough identification of the speaker to allow in the proof, though in the end, of course, the issue of identity would be for the jury.

Van Riper v. U.S., 13 F.2d 961, 968, (2nd Cir., 1926.)(*emphasis added*).

As noted above, the telecommunications company in question, U.S. Celluar, assigned 414 588-4372 to C.A., not D.Z. Thus the first requirement of authentication is not met. Secondly, while the State indicates *ad infinitem* that there were "circumstances", it never passes the "self-identification" hurdle, which is the next requirement.

Again the circuit court did not consider the proper factors, or the proper legal standard in admitting the recordings into evidence over the objection of counsel, thus it erroneously exercised its discretion regarding this evidence as well. It's error was exacerbated to an unknown degree by allowing the State to provide the jury with the transcripts with the identities of the parties, D.Z. and the Defendant/Appellant written on them.

Again, the judgment of conviction should be vacated, and the matter remanded for a new trial consistent with the proper legal principles.

CONCLUSION

The judgments of conviction should be vacated, and the matter remanded for a new trial consistent with the proper legal principles regarding the question of forfeiture by wrong-doing and admission of the recorded telephone calls into evidence.

Independent and regardless of those issues, however, the Defendant/Appellant is entitled to have the matter remanded for a proper determination of whether it is appropriate for the court to impose the payment of the DNA surcharge as a condition of the judgment of conviction in case 07CF3514.

Dated this ____ day of _____, 20 .

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CERTIFICATION OF COMPLIANCE
WITH REGARD TO THE APPENDIX

Robert E. Haney, counsel for the defendant/appellant, certifies to the Court as follows:

1. I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

2. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of _____, 2009.

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FORM AND LENGTH CERTIFICATION

Robert E. Haney, counsel for the defendant/appellant, certifies to the Court as follows:

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7146 words.

Dated this _____ day of _____, 2009.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.62(4)(b).

I further certify that: This electronic petition is identical in content and format to the printed form of the petition filed as of this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this _____ day of _____, 2009.

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APPENDIX

Table Of Contents