No. 14AP1623-CR

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF–RESPONDENT–PETITIONER,

v.

RAYMOND L. NIEVES,
DEFENDANT–APPELLANT.

On Appeal from the Milwaukee County Circuit Court, the Honorable Judges Richard J. Sankovitz and Jeffrey A. Wagner, Presiding, Case No. 2010CF5111

OPENING BRIEF AND APPENDIX OF THE STATE OF WISCONSIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

ISSUES PRESENTED

1. Did the admission of the codefendant's non-testimonial statements to a jailhouse informant implicate Nieves' Confrontation Clause rights at all under *Bruton v. United States*, 391 U.S. 123 (1968)?

Neither the circuit court nor the court of appeals answered this question.[1]

2. Even if the *Bruton* rule is relevant here, did admission of the codefendant's statements violate Nieves' Confrontation Clause rights when those statements did not "expressly implicat[e]" Nieves? *See id.* at 124 n.1.

The circuit court allowed the codefendant's statements to be introduced, but the court of appeals found that their admission violated the Confrontation Clause.

3. Even if it was an error to allow the jailhouse informant to testify about the codefendant's statements, was the error harmless?

The circuit court did not answer this question, but the court of appeals held this alleged error was not harmless.

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[1] While the State did not make this argument until its motion for reconsideration before the court of appeals, the State sought review of this question in its Petition For Review before this Court, *see* State's Petition for Review, *State v. Nieves*, No. 14AP1623-CR, 13–16 (Wis. July 5, 2016), and this Court properly granted such review. Order Granting Petition for Review, *State v. Nieves*, No. 14AP1623-CR (Wis. Sept. 13, 2016); *accord State v. Long*, 2009 WI 36, ¶ 44, 317 Wis. 2d 92, 765 N.W.2d 557 ("Waiver does not limit this court's authority to address unpreserved issues, particularly when doing so can clarify an issue of statewide importance.").

4. Was it harmless error for the circuit court to allow the admission of a hearsay statement of someone identified as "Boogie Man"?

Neither the circuit court nor court of appeals answered this question.

INTRODUCTION

Raymond Nieves and his fellow gang member, Johnny Maldonado, shot two men in an alley, killing one. At the joint trial of Nieves and Maldonado, the State presented powerful testimony from the surviving victim of this shooting, who explained in detail for the jury how this crime occurred. Then the State presented the testimony of a jailhouse informant, who relayed that both Nieves and Maldonado had confessed their guilt to him.

The court of appeals held that Nieves is entitled to a new trial under the Confrontation Clause—pursuant to the doctrine the Supreme Court announced in *Bruton v. United States*, 391 U.S. 123 (1968)—because the circuit court permitted the jailhouse informant to describe his conversations with Maldonado at the joint trial. The court of appeals is wrong for at least three independently sufficient reasons. First, and most obviously, Maldonado's statements to the informant do not implicate the Confrontation Clause at all. As the Supreme Court made clear in *Davis v. Washington*, 547 U.S. 813 (2006), the Confrontation Clause simply has no application to "statements made unwittingly to a Government

informant" and "statements from one prisoner to another." *Id.* at 825. Caselaw from this Court and courts around the country is consistent with this instruction. Second, even if the Confrontation Clause applied, the *Bruton* rule requires that the statement must have "expressly implicat[ed]" the defendant, 391 U.S. at 124 n.1, which the informant's use of the pronoun "they" in recounting Maldonado's confession to his own crimes did not do. Finally, any *Bruton* error is harmless, as the critical evidence against Nieves was the surviving victim's detailed account, which was supported by Nieves' separate confession to the informant (which is not in dispute).

ORAL ARGUMENT AND PUBLICATION

By granting the petition for review, this Court has indicated that this case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. On April 11, 2009, Nieves and Maldonado killed Spencer Buckle and injured "David"[2] by shooting them in an alley in Milwaukee. App. 51–53. All four men were members of the Illinois-based Maniac Latin Disciples gang. App. 17, 31.

[2] Consistent with Wis. Stat. § 809.19(1)(g), a surviving victim is assigned a pseudonym.

The events leading to this shooting began on March 22, 2009, when some members of the Illinois-based Latin Kings gang shot at Buckle, David, and "Fat Boy," in Waukegan, Illinois. App. 25. Upon learning of this shooting, Nieves said that "we had to go do what we had to do to get revenge." App. 28. And so Nieves, Maldonado, Buckle, David, and "Fat Boy" found some Latin Kings playing basketball nearby, shot at them, and killed one member of the gang. App. 28–31, 38.

After this basketball court shooting, the group dropped off "Fat Boy," and then Nieves, Maldonado, Buckle, and David drove to Nieves' house in Kenosha, Wisconsin, in order to hide out. App. 31–33. During this time, Nieves did not permit David to go outside or use the phone, and then moved everyone to a second home. App. 34–35. Nieves and Maldonado then began talking just by themselves. App. 38.

Then, on April 10, 2009, Nieves and Maldonado suggested that the four men drive to Milwaukee to move to yet another hideaway. App. 42–43. A fifth man named "Schotee" was the driver. App. 42–43. Upon arriving in Milwaukee, Nieves and Maldonado led Buckle and David to an alley and shot them, shortly after midnight. Buckle died, David survived. App. 51–55; *see also infra* pp. 6–7.

Later, when both Nieves and Maldonado were in custody in the Milwaukee County Criminal Justice Facility, they each had separate conversations with another inmate, Ramon Trinidad, during which they confessed to shooting

Buckle and David. Trinidad then told law enforcement about these conversations. App. 132–42.

B. On October 8, 2010, the Milwaukee County District Attorney charged Nieves and Maldonado with first-degree intentional homicide and attempted first-degree intentional homicide. R.3. The State sought to try Nieves and Maldonado jointly, but Nieves moved to sever the trial under Wis. Stat. § 971.12(3),[3] based upon the fact that the State planned to call Trinidad, the jailhouse informant, to testify as to both confessions. R.17. Nieves argued that statements made by Maldonado, in particular, could not be introduced against Nieves, under the Confrontation Clause and *Bruton*. R.17. The State responded that the joint trial was proper because the informant "can be questioned relating to what Mr. Maldonado said to him that relates to Mr. Maldonado's defense." App. 3. The circuit court denied the motion to sever the trials, explaining: "[a]s long as [the State] asks Mr. Trinidad what Mr. Maldonado said about what Mr. Maldonado did, it's acceptable." App. 7. If the State asked the informant "about what Mr. Nieves did," then "I'm going to exclude it." App. 7.

C. During a four day jury trial in March 2012, the State presented powerful evidence of Nieves' guilt.

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[3] This statute "provides a mechanism for complying with the *Bruton* requirement in the Wisconsin Statutes." App. 184. Accordingly, any limitation on *Bruton* is also a limitation on the statute. *State v. Denny*, 120 Wis. 2d 614, 620, 357 N.W.2d 12 (Ct. App. 1984); *see also State v. King*, 205 Wis. 2d 81, 97–98, 555 N.W.2d 189 (Ct. App. 1996).

David—the surviving victim of the shooting—offered the most critical testimony. David provided the account summarized above, beginning with the fact that Nieves, Maldonado, Buckle, and David had shot at Latin Kings members at the basketball court, that the four men fled to Kenosha, and that Nieves and Maldonado then began talking to just one another. *See supra* p. 4. In discussing what occurred in Kenosha, David added an additional hearsay detail, which the circuit court improperly admitted. Another gang member named "Boogie Man" visited David in Kenosha. Over the objection of defense counsel, the circuit court allowed David to testify that "Boogie Man" told him "that [ ] [Nieves and Maldonado] were planning on killing [David]," and that this made David "nervous." App. 41.

Most importantly, David then provided a detailed account of what occurred after the four men arrived in Milwaukee. The four men left "Schotee," the driver, in the car. App. 47. After they all got out of the car, Nieves kept "telling us why we walking slow, and that's when I got a little bit more nervous and started [ ] thinking, like, something is not right." App. 48. The four men turned down an alley, with Nieves and Maldonado behind David and Buckle. App. 49. The car that had dropped the four off in the alley was "nowhere to be seen no more." App. 49. Then David testified: "I hear a gunshot, I see a flash, and I see Spencer Buckle fall to the ground." App. 51. "As I was turning to see, facing toward Nieves, I heard more shots and seen flashes coming

my way. So I threw myself on the ground as I was shot, like when I really was not shot, I threw myself on the ground and played dead. That's when I seen Johnny Maldonado's black tennis shoes come up." App. 51–52. Then more gun shots, and "I could feel the wind of the bullets passing through my head and I felt the burn where I got grazed at from my left hand." App. 53.

The State also presented testimony from Trinidad, who testified about inculpatory statements that both Maldonado and Nieves made to him in jail.

With regard to Maldonado's statements, as discussed at the motion hearing, the State framed its questions in terms of what Maldonado did: "And what did Mr. Maldonado say about why Mr. Maldonado was here in Wisconsin?" App. 132. Trinidad responded, "[b]ecause he had caught a murder case here in Milwaukee." App. 132. Maldonado explained that the targets of that murder were "[f]riends of his, shorties from his gang." App. 133.[4] As Trinidad put it, "He said shit went bad because of what they did in Illinois, so he had to do what he got to do." App. 134. Clarifying this remark, the State asked:

> Q. And did Mr. Maldonado elaborate on using the words you used, "shit went bad in Illinois," what Mr. Maldonado meant by that in terms of what he was involved in in Illinois. And by "he," I'm referring to what Mr. Maldonado was involved in?
>
> A. Another shooting.

[4] "Shorties" refers to junior members of the gang, such as David and Buckle. App. 188.

> Q. And did Mr. Maldonado indicate whether or not the targets of this plan to kill the two shorties, whether that was related to anything that happened in Illinois?
>
> A. Because he thought they were not going to hold any water.
>
> Q. What does that mean?
>
> A. Like they were not going to keep their mouths shut.

App. 134–35.

Maldonado further explained that the plan was to "[b]ring them to Wisconsin and kill them." App. 135. When the State inquired further about how the "two shorties" would come up from Illinois to Wisconsin, Trinidad remarked that "[t]hey told them to come party or celebrate to Wisconsin. And they came to Kenosha, and then from Kenosha they came to Milwaukee." App. 135. Again careful to clarify, the State asked:

> Q. By "they," you mean Mr. Maldonado and the shorties?
>
> A. Yes.

App. 135.

Regarding the details of the murder, Maldonado had explained to Trinidad that: "They brought them to a dark alley, if I'm not mistaken, and laid them on the ground. And then when he shot, he shot through the hoody. He thought he killed the victim, but it turned out to be that he played dead on him." App. 136. During his entire testimony about Maldonado's statements, Trinidad only mentioned Nieves once, explaining that Maldonado spent time with the "shorties

in Kenosha" at "Mr. Nieves's mom's house or his baby mama house." App. 139–40.

Trinidad added that Maldonado made these inculpatory statements in Spanish if other prisoners were around, so that no one would understand what he was saying. App. 134. Maldonado spoke in English when it was just the two of them. App. 134.

Separately, Trinidad testified about a conversation he had with Nieves: "We was walking around in the gym, I asked him how [ ] you do that and he get away like that, referring to the surviving victim, and he said that didn't spark. He got his guy." App. 141.

After these conversations occurred, Trinidad told his lawyer, and then brought these confessions to the police. Only then did Trinidad receive any leniency in his own separate case, in exchange for truthful testimony. App. 129, 148.

D. The jury convicted Nieves of first-degree intentional homicide with a dangerous weapon and attempted first-degree intentional homicide with a dangerous weapon. App. 172–74. Nieves was sentenced to life imprisonment on the first-degree intentional homicide count, with eligibility for extended supervision after 40 years, and to 30 years on the attempted first-degree intentional homicide count, with eligibility for extended supervision after 20 years, with the sentences running concurrently. R.93:48–49.

Nieves moved for post-conviction relief, claiming that the circuit court improperly tried the defendants together,

improperly allowed testimony about the statements by "Boogie Man," and that Nieves' trial counsel was ineffective. R.50. The circuit court denied the claims. App. 175–78.

E. On appeal, the court of appeals held that the circuit court erred in denying Nieves' motion to sever under *Bruton*. Acknowledging that the "decision to sever codefendants in a joint trial is normally within the trial court's discretion," the court found that Trinidad's use of the word "they" "while recounting his conversations with Maldonado" violated the Confrontation Clause. App. 183, 187, 190–93. Use of plural pronouns "implicate[d] a second unnamed shooter," and "the reasonable inference arising from Maldonado's apparent confession to Trinidad was that Nieves was the unnamed second shooter." App. 195–96. The court of appeals found that Nieves' confrontation rights were violated, and that the error was not harmless. App. 190, 197.

Next, the court of appeals found that it was an error to admit the testimony regarding "Boogie Man" because it was hearsay. App. 200. Nonetheless, because the court already ordered a new trial under *Bruton*, the court of appeals did not determine whether such an error was harmless. App. 201. The court also did not decide whether Nieves' counsel's performance was unconstitutionally ineffective. App. 201–02.

STANDARD OF REVIEW

A circuit court's decision on whether to try defendants in a joint trial is reviewed for abuse of discretion. *State v.*

Shears, 68 Wis. 2d 217, 237, 229 N.W.2d 103 (1975). "Although a [trial] court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." *State v. Jensen*, 2007 WI 26, ¶ 12, 299 Wis. 2d 267, 727 N.W.2d 518 (citation omitted).

SUMMARY OF ARGUMENT

A. Under *Bruton v. United States*, 391 U.S. 123 (1968), the State conducting a joint trial may not—consistent with the Confrontation Clause—present a nontestifying codefendant's testimonial statements that expressly implicate an objecting defendant. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause applies only to "testimonial" statements, which clarified the scope of the *Bruton* rule. As courts all over the country have held, the *Bruton* rule applies *only* when the codefendant's statements are, in fact, testimonial: that is, the codefendant's "primary purpose" in making the statements was "to create an out-of-court substitute for trial testimony." *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (citations omitted).

Applying these principles to the present case, it is clear that Maldonado's confession—which the jailhouse informant recounted for the jury—was not "testimonial." As the Supreme Court has made clear, "statements made

unwittingly to a Government informant" and "statements from one prisoner to another" are "clearly nontestimonial." *Davis v. Washington*, 547 U.S. 813, 825 (2006). Consistent with this controlling caselaw, it is indisputable that Maldonado made his confession not with the primary purpose of creating evidence against Nieves, but as a part of a confidential conversation with an acquaintance. Accordingly, the *Bruton* rule has no application in this case.

B. Even if the *Bruton* rule were relevant here, the jailhouse informant's testimony—recounting Maldonado's confession—complied with that rule. The *Bruton* rule requires that the nontestifying codefendant's statements must not "expressly implicat[e]" the defendant. *Bruton*, 391 U.S. at 124 n.1. In the present case, the informant's recounting of Maldonado's confession implicated only Maldonado, since this recounting only mentioned Nieves one time, and only with regard to the house where the gang members stayed.

The court of appeals reached a contrary conclusion by focusing on the fact that the informant repeatedly used the term "they" when describing what Maldonado had told him. But most of these uses of the term "they" clearly referred only to David and Buckle, not Nieves. And as to the few references that appeared to refer to Maldonado's partner in the crime, the informant properly used the pronoun "they" so as not to identify Nieves. This approach was consistent with the Supreme Court's instructions in *Richardson v. Marsh*, 481

U.S. 200 (1987), and *Gray v. Maryland*, 523 U.S. 185 (1998), as well as caselaw from across the country.

C. In any event, any *Bruton* error in this case would be harmless. The heart of the State's case against Nieves was the detailed testimony of David, who was one of the two victims of Nieves' crimes. That the jailhouse informant used the term "they" in recounting Maldonado's confession of his own actions was entirely harmless. Indeed, the informant *also* testified that Nieves had confessed to him as well, and that confession was unquestionably properly admitted.

D. The circuit court's decision to permit David to testify to a hearsay conversation he had with a fellow gang member, which made David feel scared of Maldonado and Nieves, is similarly harmless. While this hearsay conversation should not have been admitted, it was—essentially—an aside to David's story that he personally experienced these crimes.

ARGUMENT

I. The *Bruton* Rule Is Not Implicated At All Because The Codefendant's Statements To The Jailhouse Informant Were Not "Testimonial"

A. "The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront the witnesses against them." *State v. Manuel*, 2005 WI 75, ¶ 36, 281 Wis. 2d 554, 697 N.W.2d 811 (citation omitted); *see* U.S. Const. amend. VI; Wis. Const. art. I, § 7. Under the *Bruton* rule, the admission of a nontestifying codefendant's statements expressly implicating an objecting

defendant can—in some instances—violate the Confrontation Clause because the defendant has no opportunity to cross-examine his codefendant. 391 U.S. at 126; *see Wright v. State*, 46 Wis. 2d 75, 89–90, 175 N.W.2d 646 (1970).

Since *Bruton*, the Supreme Court has clarified the scope of the Confrontation Clause, thus narrowing the *Bruton* rule. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that an out-of-court statement does not implicate the Clause at all unless that statement is "testimonial." 541 U.S. at 53–54; *accord Whorton v. Bockting*, 549 U.S. 406, 413 (2007). The implications of *Crawford* for *Bruton* are straightforward: since the Confrontation Clause relates only to "testimonial" statements, and given that the *Bruton* rule relies upon that Clause, a nontestifying codefendant's statements only implicate that Clause if those statements are "testimonial." *See United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010) ("It is [ ] necessary to view *Bruton* through the lens of *Crawford* and *Davis*. The threshold question in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause has no application." (citation omitted)); *United States v. Berrios*, 676 F.3d 118, 128 (3d Cir. 2012) ("[B]ecause *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements."); *United States v. Dargan*, 738 F.3d 643, 651 (4th Cir. 2013) ("*Bruton* is simply irrelevant in the context of nontestimonial statements."); *United States v. Johnson*, 581 F.3d 320, 326

(6th Cir. 2009) ("Because it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to nontestimonial statements."); *United States v. Dale*, 614 F.3d 942, 955 (8th Cir. 2010); *United States v. Clark*, 717 F.3d 790, 816 (10th Cir. 2013); *Washington v. Wilcoxon*, 373 P.3d 224, 229 (Wash. 2016); *Burnside v. Nevada*, 352 P.3d 627, 643 (Nev. 2015); *New Mexico v. Gurule*, 303 P.3d 838, 848–49 (N.M. 2013); *Maryland v. Payne*, 104 A.3d 142, 164 (Md. 2014).

B. The *Bruton* rule thus applies only if the codefendant's statements are "testimonial": when the codefendant's "primary purpose" in making the statements was "to create an out-of-court substitute for trial testimony," such as giving a formal confession to police interrogators. *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (citation omitted). This focus on the "purpose" of the nontestifying codefendant is essential because it is the codefendant that is the absent declarant under the Confrontation Clause analysis. *See id.* at 2181 ("At no point did the teachers inform L.P. that his answers would be used to arrest or punish his abuser. L.P. never hinted that he intended his statements to be used by the police or prosecutors."); *Jensen*, 299 Wis. 2d 267, ¶ 24 ("The proper inquiry, then, is whether the declarant intends to bear testimony against the accused." (citation omitted)).

The present case involves one type of statement by a nontestifying codefendant: inculpatory, informal remarks to an acquaintance—a jailhouse informant. The United States

Supreme Court, this Court, and courts around the country have provided important guidance on this issue, making resolution of this question straightforward.

The Supreme Court has articulated that casual statements made to acquaintances are nontestimonial, including those made to jailhouse informants. *Crawford* explained: "'[t]estimony,' . . . is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. An 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.*" 541 U.S. at 51 (emphasis added) (citation omitted). Then, in *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court cited with approval its pre-*Crawford* caselaw holding that "statements made unwittingly to a Government informant" and "statements from one prisoner to another" are "clearly nontestimonial." *Id.* at 825 (citing *Bourjaily v. United States*, 483 U.S. 171, 181–84 (1987); *Dutton v. Evans*, 400 U.S. 74, 87–89 (1970) (plurality opinion)).

This Court has similarly held that conversations between an unavailable witness and an acquaintance are not "testimonial" under *Crawford*. In *Manuel*, this Court held that statements made during a "spontaneous, private conversation" between the unavailable witness and his girlfriend were not testimonial. 281 Wis. 2d 554, ¶ 53. This was supported by the fact that the girlfriend was "not a government agent, nor [was] there any contention that [the

witness] somehow expected [his girlfriend] to report to the police what he told her." *Id.* Similarly, in *Jensen*, this Court held that statements to a neighbor and a child's teacher, which were not intended by the speaker for police consumption, were not testimonial. 299 Wis. 2d 267, ¶¶ 31–33. The court of appeals has also held that an out-of-court statement made to a police informant is not testimonial. *See State v. Savanh*, 2005 WI App 245, ¶¶ 25, 28, 287 Wis. 2d 876, 707 N.W.2d 549.

Courts around the country have regularly concluded that statements made by codefendants to government informants are not testimonial. For example, the Seventh Circuit held that a codefendant's statement to an informant—recorded by the government without the codefendant's knowledge—was not testimonial because the codefendant could not have "reasonably believed that the statement would be preserved for later use at a trial." *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008). Similarly, the Tenth Circuit held that a codefendant's "boast[ing] of the details of a cold-blooded murder in response to casual questioning by a fellow inmate and apparent friend . . . is undoubtedly nontestimonial" because the codefendant "in no sense intended to bear testimony against Defendant." *United States v. Smalls*, 605 F.3d 765, 779–80 (10th Cir. 2010) (emphasis and internal quotations omitted). And the Eleventh Circuit held that a confession made by a co-conspirator to a covert government informant is not testimonial because, had the co-

conspirator "known that [his acquaintance] was a confidential informant, it is clear that he never would have spoken to her in the first place." *United States v. Underwood*, 446 F.3d 1340, 1347–48 (11th Cir. 2006); *accord United States v. Saget*, 377 F.3d 223, 229–30 (2d Cir. 2004); *United States v. Hendricks*, 395 F.3d 173, 182–84 (3d Cir. 2005); *United States v. Udeozor*, 515 F.3d 260, 269–70 (4th Cir. 2008); *Johnson*, 581 F.3d at 324–26; *Dale*, 614 F.3d at 956.

C. Maldonado's statements to Trinidad, the jailhouse informant, confessing to the crimes at issue were not "testimonial." The "primary purpose of" Maldonado's statements was to tell a fellow inmate what he had done in confidence, not "to create an out-of-court substitute for trial testimony." *Clark*, 135 S. Ct. at 2180. Indeed, Maldonado specifically spoke in Spanish when other inmates were around in order to keep the conversation confidential. App. 133–34. Maldonado was making "casual remark[s] to an acquaintance," *Crawford,* 541 U.S. at 51, as part of a "spontaneous, private conversation" that was "confidential and not made with an eye towards litigation." *Manuel,* 281 Wis. 2d 554, ¶ 53. Although the informant later reported the statements to police, App. 149–50, there is nothing in the record to suggest that the informant was "a government agent, nor is there any contention that [Maldonado] somehow expected [the informant] to report to the police what he told" him. *Manuel,* 281 Wis. 2d 554, ¶ 53; *accord Underwood*, 446 F.3d at 1347–48 (had the codefendant "known that [his

acquaintance] was a confidential informant, it is clear that he never would have spoken to her in the first place").

Notably, even if this Court were to assume—counterfactually—that Trinidad was acting as a government agent at the time of his conversations with Maldonado,[5] this would not change the conclusion that Maldonado's statements were not "testimonial." As the Supreme Court has explained, "statements made unwittingly to a Government informant" are "clearly nontestimonial." *Davis*, 547 U.S. at 825. Courts around the country are in accord, explaining that when the codefendant did not know that the person he was talking to was an informant, his statements are not "testimonial," including in cases where the government itself was already recording the conversation. *See Dale*, 614 F.3d at 956; *Watson*, 525 F.3d at 589; *Underwood*, 446 F.3d at 1347; *Hendricks*, 395 F.3d at 182; *Smalls*, 605 F.3d at 778–79.

II. Even If The *Bruton* Rule Applied Here, The State Did Not Violate Nieves' Confrontation Clause Rights Because The Disputed Testimony Did Not "Expressly Implicat[e]" Nieves

A. If this Court holds that Maldonado's statements to Trinidad were "testimonial," then it would need to decide whether introduction of those statements violated Nieves' Confrontation Clause rights under the *Bruton* rule.

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[5] Trinidad did not even communicate with the police about the jailhouse conversations until after they had taken place. App. 142, 147.

The *Bruton* rule applies when a codefendant's testimonial statement "expressly implicat[es]" the defendant. *Bruton*, 391 U.S. at 124 n.1. Two subsequent Supreme Court cases are particularly relevant.

First, in *Richardson v. Marsh*, 481 U.S. 200 (1987), the Court held that the State had not violated the *Bruton* rule when it introduced a statement by a nontestifying codefendant that removed all references to the objecting defendant. *Id.* at 211. The Court explained that such redaction was often a better approach than conducting separate trials, given that "[j]oint trials play a vital role in the criminal justice system." *Id.* at 209. "It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." *Id.* at 210.

Then, in *Gray v. Maryland*, 523 U.S. 185 (1998), the Court held that the State violated the Confrontation Clause when it introduced a nontestifying codefendant's confession with the objecting defendant's name replaced by an "obvious deletion," and then the police officer who read the confession into the record stated that he arrested the objecting defendant

right after obtaining this confession. *Id.* at 192–93. The critical difference from *Richardson*, the *Gray* Court emphasized, was that in *Richardson* the redaction became inferentially "incriminating 'only when linked with evidence introduced later at trial,'" whereas in *Gray*, the adverse inference could be made "immediately, even were the confession the very first item introduced at trial." *Gray*, 523 U.S. at 196 (quoting *Richardson*, 481 U.S. at 208).

Since *Gray*, courts around the country have approved the salutary practice of using neutral pronouns—instead of "obvious deletion[s]," *Gray*, 523 U.S. at 193—to omit the objecting defendant's name as consistent with *Bruton*, so long as some reasonable degree of ambiguity remained. As the Supreme Court of Pennsylvania aptly explained, "the *Gray* Court's reasoning, including its distinction of *Richardson*, leaves little question that" "a redaction that substitutes a neutral pronoun" is "appropriate under the Sixth Amendment." *Pennsylvania v. Travers*, 768 A.2d 845, 850–51 (Pa. 2001); *accord id.* ("other man"); *United States v. Yousef*, 327 F.3d 56, 149 (2d Cir. 2003) ("my neighbor"); *United States v. Lighty*, 616 F.3d 321, 376–77 (4th Cir. 2010) ("three other people"); *United States v. Vasilakos*, 508 F.3d 401, 407 (6th Cir. 2007) ("another person" or "another individual"); *United States v. Verduzco-Martinez*, 186 F.3d 1208, 1214 (10th Cir. 1999) ("another person"); *United States v. Taylor*, 186 F.3d 1332, 1335–36 (11th Cir. 1999) (per curiam) ("they"). Importantly for this case, "even where there was only one

accomplice and only one co-defendant is on trial with the declarant, the use of a non-specific pronoun like 'we' or 'he' is ordinarily acceptable under *Bruton*." *Thomas v. United States*, 978 A.2d 1211, 1237 (D.C. 2009).

B. In this case, Maldonado's statements—as relayed to the jury by Trinidad, App. 130–40—do not "expressly implicat[e]" Nieves. *Bruton*, 391 U.S. at 124 n.1. Nowhere in this testimony did Trinidad report that Maldonado said Nieves was involved in the shooting. In fact, Trinidad only "expressly" referred to Nieves once during his testimony when recounting Maldonado's confession: that before the shooting, Maldonado said that "they" spent time at "Mr. Nieves's mom's house or his baby mama house." App. 140.

The court of appeals reached a contrary conclusion by focusing on Trinidad's use of the pronoun "they" in relaying Maldonado's statements. App. 191–92. Although properly agreeing with the State that Maldonado's statements did not "implicate[ ] Nieves by name," App. 195, the court of appeals concluded that the combined use of the "they," along with the discussion of a home associated with Nieves' mother or girlfriend, led to "the reasonable inference arising from Maldonado's apparent confession to Trinidad [ ] that Nieves was the second shooter." App. 195–96.

Trinidad's use of "they" cannot bear the weight that the court of appeals placed upon it. Most of the times that Trinidad used "they," he was referring to Maldonado and the "shorties"—that is, David and Buckle. For example, when

Trinidad said that "they were not going to hold any water," he then clarified that this meant that the "two shorties" were "not going to keep their mouths shut." App. 135. And when Trinidad testified that "they" stayed at a house associated with Nieves' mother or girlfriend, he then again clarified that "they" referred to Maldonado and the two "shorties." App. 139–40. In these uses, Trinidad was clearly *not* referring to Nieves when he said "they" and thus cannot be said to have "expressly implicat[ed]" Nieves. *Bruton*, 391 U.S. at 124 n.1.

There were a couple of instances where Trinidad's use of the term "they" referred to someone other than Maldonado and the "shorties," but those usages of "they" were entirely appropriate. Trinidad testified that "[t]hey told them to come party or celebrate to Wisconsin," App. 135, and that "[t]hey brought them to a dark alley . . . and laid them on the ground," App. 136. The approach here was proper because Trinidad used the neutral pronoun "they," such that the jury would not know whether he was referring to Nieves or some other gang member (such as "Schotee," "Boogie Man," or "Fat Boy"). As noted above, since *Gray*, courts have consistently approved the use of vague pronouns in place of the objecting defendant's name. *See, e.g.*, *Travers*, 768 A.2d at 850–51; *Yousef*, 327 F.3d at 149; *Lighty*, 616 F.3d at 376–77; *Vasilakos*, 508 F.3d at 407; *Verduzco-Martinez*, 186 F.3d at 1214; *Taylor*, 186 F.3d at 1335–36.

III. Any Alleged *Bruton* Error Was Harmless

"The mere finding of a violation of the *Bruton* rule in the course of the trial . . . does not automatically require reversal of the ensuing criminal conviction." *Schneble v. Florida*, 405 U.S. 427, 430 (1972); *accord Cranmore v. State*, 85 Wis. 2d 722, 750–51, 271 N.W.2d 402 (Ct. App. 1978). Reversal is not required where "evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Schneble*, 405 U.S. at 430. In *Harrington v. California*, 395 U.S. 250 (1969), for example, the Supreme Court found that the confessions of codefendants introduced in violation of *Bruton*, which placed the defendant at the scene, were cumulative to other evidence, and the *Bruton* error was therefore harmless. *Id.* at 253–54.

Here, even if this Court concludes that the admission of some or all of Trinidad's "they" statements was problematic under *Bruton*, any such error was harmless. The State presented powerful evidence of Nieves' guilt. Specifically, David explained in detail how Nieves and Maldonado brought him and Buckle to an alley and then shot them. App. 48–53; *see supra* pp. 6–7. This testimony, standing alone, established Nieves' guilt on both of the counts that the jury convicted him of. In addition, Trinidad also offered testimony of Nieves' confession to him, which testimony is unquestionably admissible against Nieves. App. 140–41. The arguably

problematic portion of Trinidad's testimony—his oblique reference to "they" as he recounted the tale of Maldonado's confession—added little to the case against Nieves. At the very worst, it vaguely implied what Nieves himself confessed to Trinidad and what David told the jury actually happened.

IV. The Error In Admitting The "Boogie Man" Aside Was Harmless Beyond A Reasonable Doubt

At trial, David testified that "Boogie Man" came to him in Kenosha and told him that Nieves and Maldonado "were planning on killing me." App. 41. While the State agrees with the court of appeals that the statements of "Boogie Man" were improperly admitted, App. 200–01, this admission error was harmless beyond a reasonable doubt. *See Schneble*, 405 U.S. at 430. David's statements about "Boogie Man" played no role in Nieves' conviction. *See supra* p. 6. The critical aspect of David's testimony was his detailed account of how Nieves and Maldonado carried out their crime. App. 48–53. The "Boogie Man" comment provided only some additional color to the narrative, going to David's emotional state. David's important testimony—that he personally witnessed Nieves and Maldonado commit the crimes (and was, in fact, one of the victims)—would have remained just as credible and powerful without the "Boogie Man" aside.

CONCLUSION

The decision of the court of appeals should be reversed.

Dated this 14th day of November, 2016.

Respectfully submitted,

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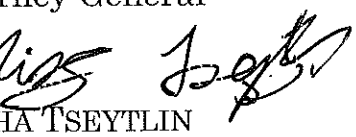

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5974 words.

Dated this 14th day of November, 2016.

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Dated this 14th day of November, 2016.

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