STATE OF WISCONSIN

SUPREME COURT

STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner,

v.

RAYMOND L. NIEVES
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

Case No. 2014AP1623-CR

Trial Case No. 2010CF5111 (Milwaukee Co.)

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JUDGES RICHARD J. SANKOVITZ AND JEFFREY A. WAGNER PRESIDING

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ISSUES PRESENTED FOR REVIEW

1. Did the court of appeals err when it determined that the trial court erroneously denied the defendant's pretrial motion to sever his case from that of his co-defendant?

Mr. Nieves' pretrial motion to sever his case from that of his codefendant was denied by the trial court. On appeal the court of appeals reversed, holding that severance was required.

2. Was it harmless error to admit hearsay that an individual identified as "Boogie Man" told an alleged victim that the codefendants planned to kill him?

Because the court of appeals overturned the conviction on the failure to sever issue, it did not address whether it was harmless error to admit the testimony.

POSITION ON ORAL ARGUMENT & PUBLICATION OF OPINION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE CASE & STATEMENT OF FACTS

This case is before the supreme court on a petition by the State seeking review of a decision of the court of appeals wherein the court of appeals reversed Mr. Nieves' judgment of conviction and remanded his case for a new trial.

The appellant, Raymond Nieves, and a codefendant, Johnny Maldonado, were charged with one count of First Degree Intentional Homicide, party to a crime, and one count of Attempted First Degree Intentional Homicide, party to a crime. Prior to trial Nieves' counsel filed a motion to sever the defendants' cases. The motion requested separate trials pursuant to the 5th, 6th, 8th, and 14th Amendments to the United States Constitution; Article I, sections 6, 7, and 8 of the Wisconsin constitution and sections 971.31(2) and (5) and section 971.12 of the Wisconsin Statutes. The motion alleged that Nieves would be prejudiced by a joint trial because a jail house snitch, Ramon Trinidad, was claiming that Maldonado confessed to him and implicated himself and Nieves. The motion alleged that the State had named Trinidad as a witness and that if Trinidad testified at a joint trial, and Maldonado chose not to testify, Nieves would not be able to impeach Trinidad's testimony, because Nieves could not compel Maldonado to testify. The motion alleged that because Nieves would then be deprived of a fair trial, the trials needed to be severed. (R.17)

A motion hearing was held on Feb. 20, 2012. At the motion hearing the State responded by saying that Trinidad was expected to testify to statements both Nieves and Maldonado made while in custody. The State's position was that the statements did not "necessarily" require that the matter be severed. The State

indicated that Trinidad could be questioned relating to what Maldonado said to him, and questions could be posed as to what statements Nieves made. At one point the court asked: "So you're not going to ask Mr. Trinidad what Mr. Maldonado told him about Mr. Nieves' involvement?" The State responded: "I believe I can couch the question in both in manners in which I'm always referring to what that individual said in terms of their involvement or planning or role and the statements that inculpated themselves as opposed to the codefendant." The court responded that it would be hearsay in any event, and the State agreed (R.82:3).

The court then inquired of the defense whether, if the State was "careful to toe that line", that would solve the joinder problem. Trial counsel then reviewed statements with the court that showed the repeated use of the word "they" by Maldonado. Counsel stated that the statements alleged that Maldonado's statements indicated that "they" were running from the police, that "they" had stopped in Kenosha prior to coming to Milwaukee, and that "they" were either at Nieves' mother's house or Nieves' baby mama's house in Kenosha. The trial court did not see a problem as long as Trinidad only testified to what Maldonado said he, i.e. Maldonado, did. The court stated: "All Maldonado is saying is where he was. That's not saying Nieves

was there. That's not saying Nieves was involved in the crime." (R.82:6,7).

When defense counsel attempted to explore additional problematic statements, the trial court indicated that it had to move on to another case. The court denied the motion. (R.82:8).

When the motion was again addressed on the first day of trial, it was again denied (R.85:77).

The court of appeals ruled that the trial court erred by denying the motion.

Additional material facts with corresponding cites to the record are presented in the relevant portions of this brief.

ARGUMENT

I. THE STATE HAS FORFEITED THE ARGUMENT THAT THE CODEFENDANT'S STATEMENTS DO NOT IMPLICATE BRUTON.

The State first argues that the **Bruton** rule is not implicated because Maldonado's statements were nontestimonial. Whether the statements made by Maldonado were testimonial was never raised in the course of this case until the State filed a motion for reconsideration in the court of appeals after the court of appeals issued its decision overturning the defendant's conviction. In its motion the State admitted that it had forfeited the argument.

It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are

not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. **State v. Caban**, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court. Id. at 604.

The above rule has been described as the "waiver rule," in the sense that issues that are not preserved are deemed waived. See **State v. Huebner**, 2000 WI 59, ¶11, 235 Wis. 2d 486, 492,611 N.W.2d 727 citing **State v. Erickson**, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). The waiver rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice. **Huebner** at ¶11. (citations omitted.) The rule promotes both efficiency and fairness, and "goes to the heart of the common law tradition and the adversary system." Id.

The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later

claiming that the error is grounds for reversal. For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice. **Huebner** at ¶12. (citations omitted.)

This court has recognized that labeling this rule the "waiver rule" is imprecise. It has been noted that it might be better to label the rule requiring issue preservation as the "forfeiture rule," because it refers to the forfeiture of a right by silence rather than the intentional relinquishment of a known right. **Huebner** at ¶11 n.2.

In **State v. Ndina**, 2009 WI 21, ¶¶30-31, 315 Wis. 2d 653, 761 N.W.2d 612, this court discussed forfeiture rights as follows:

> (S)ome rights are forfeited when they are not claimed at trial; a mere failure to object constitutes a forfeiture of the right on appellate review. The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming the error is grounds for reversal.

Furthermore, in **Cappon v. O'Day**, 165 Wis. 486, 490-491, the Court wrote:

> One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. The reason for the rule is plain. If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court..

As we stated, the State attempted to raise this issue in a motion for reconsideration in the court of appeals. In our response in the court of appeals we argued that the crux of the State's motion was that Maldonado's confession was clearly nontestimonial under **Crawford v. Washington**, 541 U.S. 36 (2004). We disagreed. The developing definition of "testimonial" was something the State did not address in its motion for reconsideration. The State only looked at the definition of testimonial statements as put forth in **Crawford**. The **Crawford** Court admitted that it was not stating a comprehensive definition of testimonial statements, but indicated that testimonial statements included at a minimum prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations. Id. At 68. There were a number of cases decided by the United States Supreme Court following **Crawford** that the State ignored in its reconsideration

motion, and again ignored in its petition for review. We argued that the definition of testimonial as it stands now would not mandate a finding that Maldonado's confession was not testimonial.

One of the Supreme Court cases following **Crawford** was **Davis v. Washington**, 547 U.S. 813 (2006). In **Davis**, when considering the nature of statements made to a 911 operator, the Court veered from the formulation for testimonial statements identified in **Crawford**, and instead focused on the primary purpose of questioning to determine whether a statement was testimonial. The court noted that it considered the 911 operator an agent of the police for purposes of its analysis.

In **Michigan v. Bryant** 562 U.S. 344 (2011), the Court again applied the primary purpose test, reiterating that when determining whether a statement is testimonial courts should evaluate "the primary purpose of the interrogation by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." **Bryant** at 370.

In **Ohio v. Clark**, 135 S. Ct. 2173 (2015), the Court addressed statements made by a three year old to a teacher. The Court indicated that **Crawford** did not offer an exhaustive definition of testimonial statements, and that the Court's more recent decisions fleshed out the definition. The Court stated it

had reserved the question of whether statements made to persons other than law enforcement officers are subject to the Confrontation Clause. Because some statements to persons other than law enforcement could raise confrontation concerns, the Court declined to adopt a categorical rule excluding such statements from the Sixth Amendment's reach. The Court stated that the question was whether, *in light of all the circumstances,* viewed objectively, the primary purpose of the conversation was to create an out of court substitute for trial testimony. The court determined that the teacher's questioning was out of concern for the child and there was no evidence that the primary purpose was to gather evidence. Therefore the statements were not testimonial.

As can be seen from the above, the determination of whether a statement is testimonial now hinges in part on whether the purpose of a conversation between parties is primarily to gather evidence. The evidence indicates that in this case the jailhouse informant, (perhaps as an agent of the police), conversed with Maldonado to obtain evidence. This would fit the present definition of testimonial statements. We argued to the court of appeals that such a determination would require further fact finding and could not be resolved in a motion for reconsideration. The court of appeals apparently agreed. It denied the State's reconsideration motion.

There was no argument by the State to the trial court that the statements were not testimonial. The State presents that position to this court as if such a finding had been made, but the State never made that argument below, and not only is it forfeited, it cannot be addressed. This is not a case where all the facts that would be necessary to resolve the issue are of record. This is not therefore a case where it would be appropriate to overlook the State's forfeiture of the issue.

Because the issue of whether the statements made to the jail house informant were testimonial was never raised nor litigated below, this court cannot consider all the circumstances surrounding the questioning of Maldonado by Trinidad. Therefore, this court cannot reliably address the question the State argues is presented, i.e. whether **Bruton** prohibits the admission of a nontestifying codefendant's statements when they are nontestimonial.

II. PURSUANT TO OHIO v. CLARK, MALDONADO'S STATEMENTS WERE TESTIMONIAL.

The State argues that the **Bruton** rule is not implicated at all because the codefendant's statements to the jailhouse informant were not testimonial. To that end the State argues that to be testimonial the *codefendant's* primary purpose in making the statements must have been to create an out-of-court

substitute for trial testimony. We do not believe that is a correct reading of **Clark**.

As we noted above, in **Ohio v. Clark**, 135 S. Ct. 2173 (2015), the Court addressed statements made by a three year old to a teacher. The Court indicated that **Crawford** did not offer an exhaustive definition of testimonial statements, and that its more recent decisions fleshed out the definition. The Court stated it had reserved the question of whether statements made to persons other than law enforcement officers are subject to the Confrontation Clause. Because some statements to persons other than law enforcement could raise confrontation concerns, the Court declined to adopt a categorical rule excluding such statements from the Sixth Amendment's reach. The Court stated that the question was whether, *in light of all the circumstances*, viewed objectively, the primary purpose of the conversation was to create an out of court substitute for trial testimony.

Regarding the circumstances surrounding the making of the statements, one consideration for the Court was the teacher's reason for questioning the child. The Court determined that the teacher's questioning was out of concern for the child and there was no evidence that the primary purpose was to gather evidence.

When the Court made the point that the primary purpose of the questioning by the teacher was not to gather evidence, the

Court was obviously giving consideration to the purpose of the questioner, not just the declarant. The reason for the questioning is therefore an important consideration.

Another consideration for the Court was whether there was an ongoing emergency involved or whether the questioning was after-the-fact. The court felt that the teacher's immediate concern was to protect a vulnerable child. In **Davis** statements to a 911 operator were held to be nontestimonial because the purpose of the questioning was to assist the police in meeting an ongoing emergency.

Also, the Court in **Clark** addressed the argument that the teacher, as a mandatory abuse reporter, could be considered an agent of the police. In **Davis** the Court determined that even if 911 operators were not themselves law enforcement officers, they could at least be agents of law enforcement when they question 911 callers. For purposes of that opinion the Court considered their acts to be acts of the police, making it unnecessary to determine whether and when statements to persons other than law enforcement personnel could be testimonial. **Davis** at n. 2. In **Clark** the Court determined that the fact that the teacher was a mandatory abuse reporter did not make her an agent of the police.

In this case the purpose of the questioning, the lack of an ongoing emergency, and the possibility that Trinidad was acting

as an agent for law enforcement, all weigh in favor of finding that Maldonado's statements were testimonial.

There is no doubt that the purpose of the questioning by Trinidad of Maldonado was to gather evidence. Trinidad testified that at the time of trial he was serving a number of sentences and had been convicted of a crime on six occasions (R.89:10,11). He indicated that he was sitting on sentences in excess of twenty years (R.89:28). He testified that he had cooperated with the police regarding a variety of other inmates at the jail (R.89:32). He indicated that it was probably too many to count (R.89:33). He testified that he was looking for people with major cases, like homicides, to inform on (R.89:33,34). He confirmed that there was a complaint against him alleging that he tried to bribe inmates at the jail by letting them know that if they gave him money he would not testify against them (R.89:39).

The purpose of the questioning of Maldonado by Trinidad was clearly to obtain incriminating information to give to law enforcement authorities. Trinidad's testimony also indicates that he was acting as an agent of the State. Furthermore, there was no ongoing emergency.

The State's blanket assertion that the statements were not testimonial because they were made to a jailhouse informant is not tenable. It is consistent with recent Supreme Court

decisions to hold that Trinidad was an agent for the police when he was questioning Maldonado, that the purpose of the questioning was to gather evidence for law enforcement, and that there was no ongoing emergency; therefore, statements to Trinidad by Maldonado were testimonial.

Under current Supreme Court decisions, Maldonado's statements certainly cannot be assumed to be nontestimonial without a fully developed record.

III. EVEN IF THE STATEMENTS ARE NOT TESTIMONIAL UNDER CRAWFORD, BRUTON SHOULD APPLY.

As we noted above, the United States Supreme Court observed in **Ohio v. Clark** that "because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach."

Consistent with the above sentiment of the Supreme Court, we believe confessions of a codefendant used at a joint trial are not excluded from the Sixth Amendment's reach. This is because of the special nature of these cases. We also believe the harm to defendant's of having a joint trial where a codefendant's confession is laid before the jury implicates a defendant's due process right to a fair trial. Therefore,

Crawford and its progeny should not be interpreted as limiting the reach of **Bruton**.

We believe it is important to remember that **Bruton** has not been overruled or expressly limited. **Bruton** and **Crawford** are distinguishable on their facts. **Bruton** involved the limited circumstance of the statements of a nontestifying codefendant being entered into evidence at a joint trial. **Crawford** on the other hand involved a situation where a wife, who did not testify against her husband at his trial because of spousal privilege, had given a statement to the police. Her statement was used against her husband at trial. She was not a codefendant.

In **Bruton** the Court began its opinion by stating: "This case presents the question ... whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence." **Bruton** 123, 124.

The primary concern in **Bruton** was that codefendant statements are harmful to a defendant, and no limiting instruction can mitigate the harm. Therefore, the Court in **Bruton** overturned the defendant's conviction because of the harm created when a codefendant's confession is placed before the

jury at a joint trial even though the jury was given a limiting instruction regarding its consideration of the confession.

The singularity of **Bruton** cases was stressed by the **Bruton** court itself when it stated:

> " ... there are some contexts in which the risk that the jury will not, cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before a jury at a joint trial. 135, 136.

The fact that **Bruton** cases are special cases has been recognized by the Supreme Court. In **Crawford** the court distinguished **Cruz v. New York**, 481 U.S. 186 (1987), a **Bruton** case that found interlocking confessions to be covered by **Bruton.** The **Crawford** court observed that **Cruz** did not address the question of whether testimonial hearsay by an unconfronted declarant violated the Confrontation Clause but instead "addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant's own confession against him at trial." **Crawford** at 59.

The concern that a jury will not be able to follow the requirements of a limiting instruction exists because of a key distinction between **Bruton** and **Crawford**. **Bruton** involved the

admission of testimony against one defendant that was inadmissible as to the other. That was not a concern in **Crawford**.

The problem in **Bruton** cases is that testimony that is not admissible against a defendant under the hearsay rules is heard by the jury. This is not an issue in cases not involving codefendants. In a "typical" confrontation analysis, there is first a determination whether the evidence is admissible under the hearsay rules. See **State v. Nelis** 2007 WI 58, ¶25. It is only after it has been determined to be admissible that the **Crawford** testimonial v. nontestimonial analysis is undertaken. If the evidence is not admissible, that ends the inquiry. The jury does not hear the testimony. **Bruton** cases are different. The distinguishing feature is that testimony admissible as to one defendant is heard by the jury even though that evidence is not admissible as to the codefendant. In this case Maldonado's statements were hearsay as to Nieves. Nevertheless, the jury heard that testimony.

In **Dutton v. Evans**, 400 U.S. 74 (1970), an opinion cited by the State for the proposition that statements from one prisoner to another are not testimonial, the court distinguished **Bruton** because **Bruton** was a joint trial. The court stated, "The primary focus of the Court's opinion in **Bruton** was upon the issue of whether the jury in the circumstances presented could reasonably

be expected to have followed the trial judge's instructions." **Dutton** at 86.

Because of the special circumstances present in **Bruton**, we do not believe it can be assumed that **Crawford's** testimonial/nontestimonial dichotomy sanctions the use of a codefendant's confession at a joint trial.

The argument that **Crawford** has in effect abrogated **Bruton** with respect to nontestimonial statements by codefendants has been met with criticism. It has been argued that **Crawford's** testimonial/nontestimonial dichotomy should have no effect on the **Bruton** doctrine. See Colin Miller, *Avoiding a Confrontation?. How Courts Have Erred in Finding That Nontestimonial Hearsay Is Beyond the Scope of the Bruton Doctrine,* 77 Brook L. Rev. (2012). Miller argues that whether evidence is testimonial or nontestimonial is irrelevant to the **Bruton** doctrine and that the vast majority of courts have erred in finding nontestimonial hearsay beyond **Bruton's** scope. Among other things the author argues that **Crawford's** testimonial/nontestimonial dichotomy applies only to Confrontation cases that hinge on the constitutional reliability of hearsay. It was the reliability analysis of **Ohio v. Roberts**, 448 U.S. 56 (1980), that was overruled by **Crawford. Bruton**, which predated **Roberts**, focused on the harm a codefendant's statement would cause, not whether the statement was reliable.

One of the cases cited by the State in support of its argument that the statements at issue herein are not testimonial and therefore not subject to the Confrontation Clause is **United States v. Dale,** 614 F.3d 942(8th Cir. 2010). In **Dale** one of two codefendants moved for severance on the basis that his codefendant had made statements to a fellow inmate who had been asked to wear a wire by law enforcement officials. The Eighth Circuit determined that because Dale did not believe his statements could be used against him at trial, they were nontestimonial and **Bruton** therefore did not apply.

Like many of the cases cited by the State, **Dale** predated **Ohio v. Clark**. As we have explained above, we believe solely focusing on the declarant's purpose rather than considering the purpose of the questioner is inconsistent with **Clark**, and such a narrow analysis should now be rejected. As to **Dale's** application of the **Crawford** testimonial/nontestimonial dichotomy to **Bruton** cases, **Dale** has been specifically criticized. See *Minimizing Confrontation: The Eighth Circuit Uses Crawford to Avoid Bruton for Non-Testimonial Statements.*

In the above referenced article the author points out that what the Supreme Court did in **Bruton** was to extend the scenarios in which juries could not be trusted to follow jury instructions. The author also notes that in **Bruton** the Supreme

Court indicated that the use of a codefendant's confession at a joint trial implicated due process concerns.

We agree that due process, not just Confrontation, was a real consideration for the Court in **Bruton**. The Court in **Bruton**, when comparing the situation in **Bruton** to the situation in **Jackson v. Denno**, 378 U.S. 368, where it was found to be a violation of due process for a jury to determine the voluntariness of a confession, stated:

> If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.
>
> Indeed, the latter task may be even more difficult for the jury to perform than the former. ... In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then ignoring it in determining the guilt or innocence of the codefendants of the declarant. A jury cannot "segregate evidence into separate individual boxes.' ... It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.

Bruton at 130, (citation omitted.)

Because of the due process concern that a defendant cannot get a fair trial if a jury hears a codefendant's confession,

Crawford's testimonial/nontestimonial dichotomy has less force in **Bruton** cases.

In Wisconsin, cross-examination is also a due process consideration. In **State v. Nerison**, 136 Wis. 2d 37, 401 N.W.2d 1 (1987), the issue was whether the defendant was denied his due process right to a fair trial by virtue of inducements given by the State to his accomplices in exchange for their testimony implicating him. In spite of the inducements given to the accomplices the court found no due process violation because the defendant's right to a fair trial was safeguarded by full disclosure of the agreement with the witnesses, the opportunity for full cross-examination, and the cautionary instructions given to the jury. Id. at 46. The opinion repeated the well known observation that "cross-examination is the greatest legal engine ever invented for discovering the truth." Id.

In **Bruton** cases the greatest legal engine invented for discovering the truth is unavailable to test the confession of a codefendant. This is in spite of the Supreme Court's observation in **Gray v. Maryland**, 523 U.S. 185, 194-195 (1998), that the use of an accomplice's confession "creates a special, and vital, need for cross-examination."

Because of the above we submit that the notion that the Confrontation Clause has no application to nontestimonial statements under **Crawford**, does not mean that **Bruton's** reach has

been limited to statements deemed testimonial under **Crawford** and its progeny. The concern that a jury will not be able to disregard a confession by a codefendant is still present whether or not the statement is found to be testimonial.

We respectfully assert that, consistent with **Bruton**, severance was required in this case.

IV. SEC. 971.12(3) STATS., AND WISCONSIN CASE LAW SUPPORT THE DECISION OF THE COURT OF APPEALS.

In the section of this brief following this section we argue that Maldonado's statements implicated Nieves. Under sec. 971.12(3) stats., the cases therefore should have been severed.

Sec. 971.12(3) provides:

> If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. *Thereupon, the judge shall grant a severance as to any such defendant.*

As can be seen from the above, in certain circumstances whether to grant severance under Wis. Stat. § 971.12(3) is committed to the circuit court's discretion. Namely, where joinder is challenged on the basis that it will cause prejudice to either the State or the defendant, "the court *may order*

separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." Id. (emphasis added).

On the other hand, the plain language of the statute requires severance when the court is "advise[d] prior to trial [that] the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged." Id. In that event, severance is mandatory: "the judge *shall grant severance* as to any such defendant" who will be implicated by the codefendant's statement. Id. (emphasis added).

The ultimate goal of statutory interpretation is to determine the statute's legislative intent. **In re Byers**, 2003 WI 86, 263 Wis. 2d 113, 665 N.W.2d 729. The first step towards discerning legislative intent is to consult the statute's plain language. **Reyes v. Greatway Ins. Co.**, 227 Wis. 2d 357, 364-65, 597 N.W.2d 687 (1999). If the statutory language is unambiguous and the statute's meaning thus clear on its face, then the inquiry proceeds no further. Id.

Given the plain language of Wis. Stat. § 971.12(3), severance should generally be required whenever the State intends to introduce a codefendant's statement implicating the defendant at their joint trial. Therefore Nieves' severance motion should have been granted. His severance motion specifically referenced Wis. Stat. § 971.12(3). (R.17).

Despite Wis. Stat. § 971.12(3)'s plain language, Wisconsin's courts have concluded that severance is not mandatory if the State can excise those portions of the codefendant's statement that implicate the defendant and a limiting instruction is given to the jury. See **Pohl v. State**, 96 Wis. 2d at 301, 291 N.W.2d at 559 and **Cranmore v. State**, 85 Wis. 2d 722,747-748, 371 N.W.2d 402 (Ct. App. 1978). (It should be noted that in **Cranmore** the statements at issue were after-the-fact statements to private citizens, not statements given to the police pursuant to police interrogation.) The court of appeals' decision herein is consistent with the case law. In this case the State was not able to excise all references to Nieves by Trinidad, and no limiting instruction was given.

The statutory requirement that a trial court excise and instruct in cases such as this remains regardless of developments regarding testimonial v. nontestimonial statements. That is because previous cases construing a statute become a part of the understanding of a statute's plain meaning. Once a construction has been given to a statute, the construction becomes part of the statute. **Meyers v. Bayer AG**, 2007 WI 99, ¶23, 303 Wis. 2d 295, 308, 735 N.W.2d 251.

Because cases construing a statute become part of a statute's plain meaning severance, or excision and instruction,

are still required even with the developments of testimonial v. nontestimonial statements under **Crawford.**

Furthermore, Wisconsin has indicated that it has retained the analysis of **Ohio v. Roberts**, 448 U.S. 56 (1980) for scrutinizing nontestimonial statements under the Confrontation Clause and Article I, Section 7 of the Wisconsin Constitution. See **State v. Manuel**, 2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811.

The **Roberts** test evaluates availability and reliability. There is no doubt in this case that Maldonado was unavailable, and confessions of codefendants have been found to be inherently unreliable. As the Supreme Court has stated: "... we have over the years spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." **Lilly v. Va.**, 527 U.S. 116, 131, 119 S.Ct. 1887, 144 L.Ed. 2d 117 (1999). Therefore, there is no reason to interpret the present statute as not requiring severance under these circumstances. If the statement of a codefendant is testimonial, severance should be granted under the statute consistent with **Bruton** and **Crawford**; if a statement of a codefendant is nontestimonial, severance should be granted under the statute consistent with **Bruton**, **Roberts** and **Manuel**. In any event, the plain wording of the statute along with the cases

interpreting the statute require, at a minimum, excision and instruction.

In this case the State did not successfully excise those portions of Trinidad's testimony that implicated Nieves, and no limiting instruction was given to the jury. The court of appeals' determination that severance was required was therefore correct under Wisconsin law.

V. THE COURT OF APPEALS CORRECTLY HELD THAT TRINIDAD'S TESTIMONY IMPERMISSIBLY IMPLICATED NIEVES.

The State argues that Trinidad's testimony did not implicate Nieves. We disagree. We believe the court of appeals correctly determined that Trinidad's testimony impermissibly implicated Nieves.

To properly analyze the impact of Trinidad's testimony, it must be considered in context.

In its opening statement the State laid out its theory of the case. The State explained to the jury how the defendants and the victims were members of a gang in Illinois. It explained that they were all involved in a retaliatory shooting, after which they fled to Kenosha, and later to Milwaukee, where the defendants planned to kill the victims (R.85:99-102). It was after this explanation that the State discussed with the jury Maldonado's discussions with Trinidad, (the jailhouse snitch). The prosecutor stated:

> Maldonado starts talking to Trinidad and tells him the story about how they had to leave Illinois, how they were hiding in Kenosha... .

(R. 85:107). At this point, the State did not limit its definition of "they" to Maldonado and the victims. Therefore, after having heard the State's theory of the case, the jury could only have understood "they" to include Mr. Nieves.

Later, during the trial when the State was questioning Mr. Trinidad, it asked him: "now at some point in time did you make law enforcement aware of the fact that both Mr. Nieves had made some statements to you, and Mr. Maldonado made multiple statements to you, about *their* involvement in this homicide" (R.89: 23).

The State's phrasing of the above question certainly indicated to the jury the State's view that Maldonado's statements implicated Mr. Nieves in the crime. There was no attempt to limit the statements of Maldonado to Maldonado, thereby protecting Nieves from any inference that Maldonado was implicating him.

The substantive questioning of Trinidad did not sufficiently limit Maldonado's statements either. During the questioning of Trinidad, the following exchange took place:

> Q. So what was the plan that Mr. Maldonado **was involved in** terms of these two shorties who he was afraid wouldn't hold water, wouldn't keep their mouth shut?

A. Bring them to Wisconsin and kill them.

Q. And did he, in fact talk about how that happened and what Mr. Maldonado's involvement was with either of these two shorties?

A. **They told them** to come party or celebrate to Wisconsin. And **they** came to Kenosha, and then from Kenosha **they** came to Milwaukee.

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

A. Yes.

Q. And after leaving Kenosha, **they** were going to go to Milwaukee, and what happened once **they** got to Milwaukee according to Mr. Maldonado?

A. **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.

(R.89:17-18)

The State then went on to question the informant regarding statements made by Maldonado about the time period that they were in Kenosha. The following exchange took place:

Q. Did he talk about, when he spoke of the period of time **they** were in Kenosha, where **they** were at where he was at with the shorties in Kenosha?

A. I believe **Mr. Nieves's mom's** house or his baby mama house.

Q. And did he talk about how long Mr. Maldonado was there with these shorties?

A. I believe for a day or two, a couple days. Not too long.

Q. And were **they** at that location before **they** came to Milwaukee according to Mr. Maldonado?

A. Yes.

Q. Now you also identified **Mr. Nieves** as one of the people you became acquainted with: is that correct?

A. Correct.

(R. 89:21-22).

Although the State at least once, after the fact, attempted to limit the informant's testimony to statements implicating Maldonado, it was unable to do so. Any fair reading of the above questioning leads to the conclusion that the State was unsuccessful in avoiding any "reference to the existence" of Mr. Nieves. The only reasonable conclusion a jury could make is that the "they" referred to in the questioning included Nieves. The testimony even mentioned his name, indicating that "they' went to his mother's or his baby mama's home. In that regard, there was no attempt to shield Nieves from any inference that Maldonado's statements included him. Indeed, there would be no other reason to ask whose house they went to if not to make a connection to Mr. Nieves. In fact, as the above excerpt shows, after questioning Trinidad about Maldonado's statements, ending with a reference to them going to Mr. Nieves' mother's house, the State immediately started questioning Trinidad about discussions he had with Nieves. This left no doubt that when Trinidad referred to the "they" who took the shorties to Kenosha

to celebrate, and the "they" who took the shorties to a dark alley in Milwaukee, he was referencing Maldonado and Nieves.

In its closing argument the State made no serious attempt to prevent the jury from using Maldonado's confession against Nieves. In fact, it did the opposite. The State in its closing melded the alleged confessions of the defendants. The State argued: "So how does Trinidad know all this in terms of where they went? There is only one answer and the answer is that he did gain the confidence of Maldonado, and he did gain the confidence of Raymond Nieves, and that when he spoke, that being when Trinidad spoke to them on those days, he was told they were going to talk to police. They had to get them up to Milwaukee. They took them down this alley." (R.91:40,41). Near the end of its argument, after reminding the jury how Trinidad said he struck up a relationship with Maldonado, the State argued "And from that, Maldonado begins explaining why **they** are in trouble." (R.91:83).

Given all of the above, the court of appeals was certainly correct when it determined that Trinidad's testimony improperly implicated Nieves.

The court of appeals' decision was consistent with applicable case law. Its decision was in keeping with the United States Supreme Court cases of **Richardson v. Marsh**, 481 U.S. 200 (1987) and **Gray v. Maryland**, 523 U.S. 185 (1998).

In **Richardson** the defendant Marsh was tried with a codefendant Williams for a home invasion with multiple homicides. A third alleged actor, Martin, was a fugitive at the time of trial. Williams' statement was admitted into evidence at trial. (The statement in its entirety was printed in the opinion.) There was no reference to Marsh in the statement. Part of the statement mentioned a discussion between Williams and Martin, as they drove to the scene, that they would have to kill the victims after the robbery. Marsh's defense was that she did not know that anyone was going to be hurt. She testified at trial that she was in the car when they drove to the scene, which would link her to the discussion of having to kill the victims after the robbery. The Court noted that the confession did not implicate Marsh at all; it was only her own testimony that provided the linkage that made the confession incriminating.

In this case Nieves did not testify. He did not provide the contextual evidence that made the confession incriminating; it was the confession itself that implicated Nieves.

Furthermore, in **Richardson**, the Supreme Court sanctioned the use of a statement when, not only the defendant's name, <u>but any reference to his existence</u>, was redacted, <u>and</u> a proper limiting instruction was given. In **Richardson** the statement was transcribed by police and redacted prior to trial. A limiting

instruction was also given. No such procedure was followed here. No limiting instruction was given. The fact that no limiting instruction was given was significant to the court of appeals.(Court of appeals' decision ¶33.)

The court of appeals' opinion also properly considered the decision of the United States Supreme Court in **Gray**. As pointed out by the court of appeals in its opinion, **Gray** illustrated the problem in this case. **Gray** held that the deletion of a codefendant's name in a confession did not suffice to remove any reference to the existence of the codefendant. The jury needed only to look up to see who was being referenced. The same applies here.

It must be remembered that the procedure followed by the State in this case was not redaction in the normal sense. Rather, the State attempted to limit the answers of a jailhouse informant through the wording of its questions. Attempting to excise the confession of a codefendant through the oral testimony of a jailhouse informant is a procedure fraught with peril. The problems with such a procedure are evident. As the **Bruton** Court observed at footnote 10 of its opinion:

> In this case Evans' confessions were offered in evidence through the oral testimony of the postal inspector. It has been said: "where the confession is offered in evidence by means of oral testimony, redaction is patently impractical. To expect a witness to relate X's confession without including any of its references to Y is to ignore human frailty. Again, it

> is unlikely that an intentional or accidental slip by the witness could be remedied by instructions to disregard.

Even if the State was inclined and able to ensure that Trinidad's testimony on direct did not implicate Nieves, without severance, it was not possible to prevent Maldonado's counsel from asking questions that implicated Nieves. As the court of appeals noted in its opinion:

> Additionally, when Maldonado's attorney cross-examined Trinidad, he asked Trinidad if Trinidad was "testifying ... that Mr. Maldonado told (him) that once they brought these other two guys from Waukegan, that they laid them on the ground in the alley and then shot them." Trinidad responded "Yes." While Trinidad himself did not use the words "they" in this exchange, he nevertheless confirmed that it was his testimony that Maldonado had told him that "they" brought "these other two guys" to an alley and "they laid them" on the ground and shot them. As used in this exchange, "these two other guys" and "them" unquestionably refer to the victims, and the word "they" can refer only to Maldonado and a second perpetrator. ¶27

The string of cases cited by the State at page 21 of its brief do not help the State.

In United **State v. Yousef** 327 F. 3d 56 (2d Cir. 2003), there was one reference which was changed to "my neighbor." All other references were eliminated. This issue was dealt with perfunctorily in a very lengthy opinion.

In **Lighty**, 616 F.3d 321 (4th Cir. 2010), the defendant was claiming prejudice because the court *prohibited* a referral to other persons as participants in a kidnapping. The defendant

wanted to use the testimony of a government witness to implicate others.

In **United States v. Vasilakos,** 508 F.3d. 401 (6th Cir. 2007), a more typical **Bruton** case, the court relied on the fact that a limiting instruction was given and the reference to another person did not infer the defendant's involvement. The court noted that the government alleged a multifaceted conspiracy in which several individuals were engaged.

In **United States v.Verduzco-Martinez,** 186 F.3d 1208 (10th Cir. 1999), the only statements in the record that were redacted to remove references to the defendant's alias were those by an officer who substituted the neutral pronoun "another person" where the codefendant referenced the defendant by the defendant's alias. At trial the officer testified that the codefendant had told the officer that "he was being paid by another person to drive the van to Casper, Wyoming," and that "another person had paid for the flight from Casper, Wyoming to LAX." The court held that where a defendant's name is replaced with a neutral pronoun or phrase there is no **Bruton** violation, providing that the incrimination of the defendant is only by reference to evidence other than the redacted statement **and** a limiting instruction is given to the jury. The court stated however that where it was obvious from consideration of the confession as a whole that the redacted term was a reference

to the defendant, then admission of the confession violates **Bruton**, regardless of whether the redaction was accompanied by use of a neutral pronoun or otherwise.

In **Unites States v. Taylor**, 186 F.3d 1332 (11thCir.1999), the court noted that although the Supreme Court did not express any opinion in **Richardson** about the admission of a statement that includes neutral pronouns, it noted that under Eleventh Circuit precedent the admission of a co-defendant's statement that contains neutral pronouns does not violate the Confrontation Clause so long as the statement does not compel a direct implication of the defendant's guilt. Regarding the facts of that case, the court determined that although the statement referenced other participants in the crime, it did not indicate their identity and did not directly incriminate the defendant. The court distinguished other cases, i.e. **United States v. Bennett**, 848 F.2d 1134, **United States v. Petit**, 841 F.2d 1546, 1556 (11th Cir. 1988), and **United States v. Hemelryck**, 945 F. 2d 1493 (11th Cir. 1991), because in those cases the neutral pronouns found to violate the Confrontation Clause could only be understood to apply to the defendants.

In **Bennett** three defendants were jointly tried in a drug conspiracy case involving a boat. One of the non-testifying defendants made a statement referring to "the vessel where they unloaded the cocaine from" and "the boat they were on." **Bennett**,

848 F. 2d at 1141-42. The Eleventh Circuit held that the admission of the statement was error because the references to "they" clearly referred to the other two defendants. Id at 1142. The court noted that the prosecutor had expressly made this connection in his opening statement and in his closing argument. Id. The court also noted that the trial court had failed to give a limiting instruction. Id. at 1142 n. 8.

In **Petit**, five defendants were jointly tried for conspiring to receive and possess stolen goods. **Petit**, 841 F.2d at 1549. One of the co-defendants made a statement that the unloaders (two of the defendants) did not know that the goods were stolen, and that he had called a "friend" to store the goods at the friend's warehouse. Id. at 1555. The jury convicted Petit, the "friend" who had supplied the warehouse. The Eleventh Circuit acknowledged the government's argument that the confession was not directly incriminating, but concluded that given the evidence in the record, the jury could only have understood Petit to be the "friend" identified in the statement. Id. In **Van Hemelryck**, 945 F.2d at 1502 a Confrontation Clause violation was found because the record presented no other possible person other than the defendant who could have been "the other person" and "the man" referred to in a co-defendant's statement.

The **Taylor** court distinguished **Taylor** from the **Bennett**, **Petit**, and **Van Hemelryck** cases because in **Taylor** the evidence

presented by the government consisted of a large conspiracy with many members, the neutral pronouns were not linked by the State to the defendant, the government actually attacked the statement as untrue in part, and because a limiting instruction was given.

The State also cited **Thomas v. United States**, 978 A.2d 1211, 1237 (D.C. 2009). The State cited **Thomas** for the proposition that the use of "we" or "he" is normally acceptable. The opinion made clear however that any conclusions are case specific, noting that the circumstances surrounding the making of the statement must be considered.

In this case there were only two defendants. The State argued in its opening that the four of them were in Milwaukee because two of them were on a mission and that "they" came to Milwaukee to kill two people (R.85:99). The informant indicated "they" laid them down in the alley and shot them. There is no doubt who "they" were. The court of appeals was correct when it determined that Maldonado's statements implicated Nieves.

VI. THE FAILURE TO SEVER WAS NOT HARMLESS.

The State argues that if there was a violation of **Bruton**, it was harmless error. We disagree.

The crux of the State's harmless error argument is that the State presented "powerful evidence of Nieves'" guilt through David's testimony. The court of appeals was correct in holding that David's testimony did not establish harmless error.

The testimony at trial indicated David had five prior convictions for purposes of evaluating his credibility (R.87:27). Regarding David's version of events, the testimony showed that when David first spoke to the police he lied about what happened. He did not identify Mr. Nieves. He didn't identify anyone who shot him. At trial, on direct examination, he indicated he told officers a girl had dropped them off in an alley and they were going to another girl's house. (R.87:72). On cross examination he testified that when he first had an opportunity to talk to an officer he merely indicated that "some guys" shot him and his friend. He testified that after being placed in a squad car he told a detective that a girl named "Cookie" had driven them to Milwaukee and that two subjects with masks had shot them. He was then taken to a hospital because of the wound to his hand. He was later taken to a police station where he repeated the same story about Cookie, and that there were two subjects with masks (R.87:85). He also added a detail that there were six subjects chasing him (R.87:85). He even identified one of the subjects chasing him as "Spooks", someone he said he knew from Waukegan who was a Latin King member (R.87:86).

After he got some rest, he was again interviewed. He then indicated that someone called Little K. drove to Milwaukee rather than Cookie (R.87:87). He admitted that he did not

identify anyone as "Woo", which is the nickname he knew Nieves by. He also indicated that he continued to claim there were six subjects and two others with masks (R.87:88,108).

The details given to the police initially were extensive. At one point in his interviews he indicated that they were taken to Milwaukee in an older black Honda Civic with tan seats (R.87: 121). In his trial testimony he claimed he was driven to Milwaukee in a silver SUV (R.87:121).

The above statements were made in Milwaukee. David indicated that he drove back to Waukegan with a detective and lied about being involved in the shooting in Waukegan. (R.87:81-86). It was only after being caught is a series of lies regarding the Waukegan shooting that he claimed Maldonado and Nieves were involved in that incident (R.87:92,93). It wasn't until he was back in Waukegan that he implicated Mr. Nieves (R.87:77-79).

In short, the State's case relied on the testimony of a victim who had told multiple versions of the shooting to the police, versions which did not implicate Mr. Nieves, (R.87:71-72), and the testimony of a jail house informant who had been convicted of a crime on six occasions ; who indicated that he was sitting on sentences in excess of twenty years; who testified that he had cooperated with the police regarding a variety of other inmates at the jail probably too many to count;

who testified that he was looking for people with major cases, like homicides, to inform on; and who confirmed that there was a complaint against him alleging that he tried to bribe inmates at the jail by letting them know that if they gave him money he would not testify against them.

The testimony of the State's key witnesses was not overwhelming.

Furthermore, as shown above and as found by the court of appeals, this was not a case where one minor improper reference was made, as the State had argued below. (Court of appeals' decision ¶31.)

Also, the State is incorrect when it implies that Nieves' alleged "confession" rendered harmless any improper reference to him by Trinidad. On the one hand the State minimizes testimony given by Trinidad, yet references an ambiguous statement allegedly made by Mr. Nieves, i.e. "He said that didn't spark. He got his guy" related by a jailhouse informant (R.89:23), as a full blown "confession" (State's brief at page 24.) Nieves "confession" was not as powerful as the State would make it, and does not render the admission of Maldonado's statements harmless. In fact, to the extent the State argues that the "confession" of Nieves is a legitimate consideration in its harmless error analysis, the State makes our case.

One reason the rule requiring severance is in place is because one confession bolsters the other. In ***Cruz v. New York*** 481, U.S. 186 (1987), the United States Supreme Court reaffirmed **Bruton** holding that "where a non-testifying codefendant's confession incriminating the defendant is not directly admissible against the defendant ... the confrontation clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, *and even if the defendant's own confession is admitted against him*." **Cruz** at 193-194. *This is because a codefendant's confession that corroborates a defendant's confession significantly harms the defendant's case*. **Cruz** at 192.

Rather than support a harmless error analysis then, the existence of the alleged confession of Nieves *increases* the harm to him of Maldonado's statements.

The court of appeals' determination that the State failed to prove harmless error was correct. The failure to sever was not harmless.

VII. THE BOOGIE MAN TESTIMONY WAS NOT HARMLESS

The State now agrees that statements allegedly made by "Boogie Man" were improperly admitted, but argues that the improper admission of the statements was harmless. We disagree.

During trial David was allowed to testify that "Boogie Man" had come to where they were allegedly hiding and told David that

Maldonado and Nieves were planning to kill him. (R.87:52) Defense counsel objected to the testimony but the court allowed it. The court, in front of the jury, stated:

> I'm going to allow the jury to hear what this person said to (David) not because what the person said is true, if we need to hear what the truth is, we can hear from that person, but (David) can tell you what he said so you understand how he felt. (R.87:52)

When the court said to the jury that it was going to "allow the jury to hear what this person said ... " , the court essentially told the jury that "Boogie Man" existed, that the man was at the alleged hideout, and that the threat to kill was in fact made. By telling the jury that "if we need to hear what the truth is, we can hear from that person ..." the court in essence told the jury that if Nieves and Maldonado wanted to show that the threat had not been made, they could bring "Boogie Man" to court to question him about the truth of the threat. This is damaging testimony and comment.

Even though the court of appeals did not undertake a harmless error analysis regarding the "Boogie Man" testimony, it did observe that allowing a jury to hear what an essentially unidentified third party who did not appear at trial allegedly told David was unfairly prejudicial. (¶42 of ct. of appeals opinion.)

The alleged statement of "Boogie Man" went to the heart of the case, i.e. an alleged plan to kill Buckle and David. As the court of appeals found, it was prejudicial testimony. The State has not proven harmless error.

VIII. THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE JURY HEARD TESTIMONY INADMISSIBLE AS TO HIM WITHOUT A CAUTIONARY INSTRUCTION.

A defendant has a due process right to a fair trial. See **Brown**, 114 Wis. 2d at 559, 338 N.W.2d at 860. "[D]ue process is an exact synonym for fundamental fairness. **In re D.M.D.**, 54 Wis. 2d 313, 318, 195 N.W.2d 594, 597 (1972). Fundamental fairness demands that a jury receive proper instructions which fully and fairly inform it of the law it is to apply. See **State v. Hurd,** 135 Wis. 2d 266, 275, 400 N.W. 2d, 46 (Ct. App. 1986). Jury instructions must assist the jury in analyzing the evidence. **State v. Waalen**, 125 Wis. 2d 272, 274, 371 N.W.2d 401, 402 (Ct. App. 1975). It is well established that an objection to jury instructions is not waived where the instructions misstate the law. **Hurd** at 275.

Regardless of the other issues in the case, it is plain that the jury heard testimony that implicated Mr. Nieves without being instructed that the evidence was not to be considered against him. This is a due process violation because the jury was not fully informed of the law. If the trial court was not required to sever the cases under any interpretation of the

applicable law, it nevertheless was required to give a limiting instruction to assist the jury in properly evaluating the evidence. As pointed out by the court of appeals at ¶33 of its opinion, "Without a limiting instruction, there is no way of knowing whether the jury was even aware that Trinidad's testimony concerning Maldonado's confession could only be used against Maldonado. This is particularly concerning given the at least implicit references to Nieves's involvement in Trinidad's recitation of Maldonado's confession."

The court of appeals also cited **Mayhall**, 195 Wis. 2d at 56 for the proposition that a trial court errs when it does not give a limiting instruction regarding a nontestifying codefendant's out-of-court statements.

For the reasons outlined earlier in this brief, we believe Trinidad's testimony implicated Nieves in the crime. If Mr. Nieves had been tried separately, the jury would not have heard that testimony. As the jury did hear the testimony, it was incumbent upon the court to give the jury a limiting instruction. For that reason, Mr. Nieves did not receive a fair trial.

Under the circumstances of this case, we do not believe the defendant should be held to have waived any objection he would have to the jury not being correctly instructed. As indicated in **Hurd**, a defendant does not waive a misstatement of the law. We

believe that concept should apply to a total failure to instruct on an important point of law as occurred here. It must be remembered that it was the State that requested the procedure that was followed, and it was the trial court that allowed it. It was the State's obligation to ensure that the procedure complied with due process, and that a proper limiting instruction was given to the jury.

IX. PLAIN ERROR.

Should this court determine that the defendant has waived his due process claim, he asserts that the entry into evidence of Trinidad's testimony, without a limiting instruction, constituted plain error.

Notwithstanding waiver, a reviewing court in its discretion may consider whether an error in instruction is so plain or fundamental that it affects a defendant's substantial rights. **Hurd** at 275.

If a party fails to object to an error that affects a party's substantial rights, then the error implicates the plain error doctrine. See Wis. Stat. §901.03(4), **State v. Jorgensen**, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. Plain error is "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." Id. (citations omitted). "The error, however, must be obvious and substantial.'" Id.

For the reasons stated previously herein, we believe the error herein was obvious and substantial.

X. THE REAL CONTROVERSY WAS NOT TRIED.

This court also has the discretionary power to reverse pursuant to Wis. Stat. 751.06. This broad authority allows the court to achieve justice in its discretion in the individual case when the basis for the reversal request is that the real controversy has not been tried. It is unnecessary in such a case for the court to conclude that the outcome would be different at trial. **Vollmer v. Luety**, 156 Wis. 2d 1, 19. Instead, reversal is sometimes required to maintain the integrity of our system of criminal justice. **State v. Jeffrey A.W.**, 2010 WI APP 29, ¶14, 323 Wis. 2d 541, 551,780 N.W.2d 231, citing **State v. Hicks**, 202 Wis. 2d 150, 171-172, 549 N.W.2d 435 (1996).

One situation in which the real controversy may not have been fully tried is where the jury has before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. **State v. Wyss**, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985).

As we have pointed out above, Trinidad was allowed to testify without the jury being given a limiting instruction. His testimony therefore was not properly admitted. For the reasons

stated throughout this brief, we therefore respectfully request that the decision of the court of appeals be affirmed

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL.

An ineffective assistance of counsel claim was also briefed in the court of appeals. The claim was based on an alleged failure of trial counsel to present an alibi defense. The issue was not addressed by the court of appeals due to its decision to overturn the conviction on other grounds. If this court overturns the court of appeals, that issue would need to be addressed.

CONCLUSION

For the reasons stated herein we respectfully request that this court affirm the court of appeals.

Dated: _____, 2016.

Respectfully submitted,

GRAU LAW OFFICE

_____
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Attorney for Defendant-Appellate

CERTIFICATION

I hereby certify that the foregoing brief conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief produced in non-proportional type with a courier font and is 47 pages long.

Dated: _____,2016

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. §809.19(12).

I further certify that the electronic brief is identical to the printed form of the brief filed with the court.

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

Dated:_____, 2016

GRAU LAW OFFICE

_____
John J. Grau