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

REPLY BRIEF OF THE STATE OF WISCONSIN

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INTRODUCTION

While there are several independently sufficient bases on which this Court should reject Nieves' argument for a new trial, the simplest approach is holding—consistent with the overwhelming body of caselaw—that the rule from *Bruton v. United States*, 391 U.S. 123 (1968), has no application to a codefendant's confession to a jailhouse informant being admitted into evidence at a joint trial. Given that this case presents precisely that commonly recurring fact pattern, the court of appeals' decision should be reversed.

ARGUMENT

I. Nieves Has No Serious Response To The Overwhelming Body Of Caselaw Holding That The *Bruton* Rule Has No Application To Statements Made To Informants

In its opening brief, the State explained that Nieves' *Bruton* claim is meritless because it is based upon statements that are not "testimonial" and thus do not implicate the Sixth Amendment at all. Opening Br. 13–19. Overwhelming caselaw provides that the *Bruton* rule applies only to "testimonial" statements, Opening Br. 14–15 (collecting cases), and that statements made by codefendants to informants are not "testimonial" because they are not made with the primary purpose of creating an out-of-court substitute for trial testimony, Opening Br. 17–18 (collecting cases). Indeed, the Supreme Court in *Davis v. Washington*, 547 U.S. 813 (2006), cited with approval its prior holdings

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)).

Nieves asks this Court to ignore this threshold issue because the State did not promptly raise this point below. Resp. Br. 4–10. This Court has already considered and rejected this argument. The State presented the threshold "testimonial" question as its *first* issue in its Petition For Review and Nieves strenuously objected. *Compare* Petition for Review, *State v. Nieves*, No. 14AP1623-CR, 13–16 (Wis. July 5, 2016), *with* Response in Opposition to Petition for Review, *State v. Nieves*, No. 14AP1623-CR, 1–5 (Wis. July 19, 2016). After considering these arguments, this Court granted review on all of the State's issues presented. Order Granting Review, *State v. Nieves*, No. 14AP1623-CR (Wis. Sept. 13, 2016). And this Court was correct to grant review on this critical, threshold issue because "[w]aiver does not limit this court's authority to address unpreserved issues, particularly when doing so can clarify an issue of statewide importance." *State v. Long*, 2009 WI 36, ¶ 44, 317 Wis. 2d 92, 765 N.W.2d 557. Failing to address this threshold question would fail to provide guidance on an issue of statewide importance.

When Nieves turns to the merits of the State's argument, he makes three points, each of which is meritless.

First, he argues that Maldonado's statements to the informant were, in fact, "testimonial" under the Confrontation Clause caselaw. Nieves does not dispute the State's argument that *Maldonado's* "primary purpose" in making the incriminating statements to the informant was *not* "to create an out-of-court substitute for trial testimony." Opening Br. 18 (quoting *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (citation omitted)). Instead, he urges this Court to focus on the *informant's* purpose in taking part in the conversation. Resp. Br. 11–14. In *Davis*, the Supreme Court reaffirmed its pre–*Crawford v. Washington*, 541 U.S. 36 (2004), holding that "statements made unwittingly to a *Government informant*" are "clearly" outside the scope of the Confrontation Clause. *Davis*, 547 U.S. at 825 (emphasis added). And courts around the country are in accord, consistently holding that, where the codefendant confessed to an acquaintance who turned out to be a government informant, that confession is nontestimonial because the codefendant did not intend the confession to serve as a substitute for trial testimony (even where the government is recording that conversation with the informant's cooperation, and thus there can be no doubt about the informant's intent). *See* Opening Br. 17–18 (collecting cases).

The Supreme Court's recent decision in *Clark*, relied upon heavily by Nieves, Resp. Br. 11–12, is not to the contrary. *Clark* involved a conversation between a teacher and three-year-old child. 135 S. Ct. at 2177–78. The Court

held that this conversation was not "testimonial" because, *inter alia*, the three-year-old "never hinted that he intended his statements to be used by the police or prosecutors." *Clark*, 135 S. Ct. at 2180. While the Supreme Court in *Clark* did discuss the "'primary purpose' of the conversation" as a whole, *id.* at 2180–82, it did not call into doubt the Court's unequivocal conclusion that "statements made unwittingly to a *Government informant*" are "clearly non-testimonial." *Davis*, 547 U.S. at 825 (emphasis added).

Second, Nieves argues that this Court should reject the approach adopted by courts around the country that the *Bruton* rule does not apply to non-testimonial statements. *See* Opening Br. 14–15. Nieves bases this argument—supported by citations to one law review article and no directly applicable caselaw[1]—on the notion that the *Bruton* rule should be reinterpreted as a "due process" claim, measured based upon "hearsay rules." Resp. Br. 14–22. Nieves' approach would, in effect, readopt the *Ohio v. Roberts*, 448 U.S. 56 (1980), regime—under which courts measured compliance with the Confrontation Clause, including in *Bruton* cases, by looking to hearsay rules—but under the

[1] *Cruz v. New York*, 481 U.S. 186 (1987), cited by Nieves, Resp. Br. 16, does not support his position because that case dealt with confessions that all agreed implicated the Sixth Amendment. The dispute here is whether the Sixth Amendment applies at all.

guise of "due process."[2] Nieves' reimagining of *Bruton* fails. Both the Supreme Court, *Richardson v. Marsh*, 481 U.S. 200, 201–02 (1987), and this Court, *Renner v. State*, 39 Wis. 2d 631, 638 & n.2, 159 N.W.2d 618 (1968), have made clear that the *Bruton* rule is based entirely upon the Confrontation Clause, which is now understood through *Crawford*'s framework. *See United States v. Berrios*, 676 F.3d 118, 128 (3d Cir. 2012) ("*Bruton* is no more than a by-product of the Confrontation Clause."); Opening Br. 14–15 (collecting cases).

Third, Nieves argues that this Court should ignore any limitations on the *Bruton* rule because of Wis. Stat. § 971.12(3), which provides that a judge "shall grant a severance" where "the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged." *Id.* As the State explained in its opening brief, it has been the law in this State for more than 30 years that any changes to the *Bruton* rule apply to Wis. Stat. § 971.12(3) as well, by operation of law. Opening Br. 5 n.3 (citing *State v. Denny*, 120 Wis. 2d 614, 620, 357 N.W.2d 12 (Ct. App. 1984), and *State v. King*, 205 Wis. 2d 81, 97–98, 555 N.W.2d 189 (Ct. App. 1996)). Nieves does not even

[2] Contrary to Nieves' claim, Resp. Br. 25, this Court's application of *Roberts* to non-testimonial statements under the Confrontation Clause in *State v. Manuel*, 2005 WI 75, ¶ 3, 281 Wis. 2d 554, 697 N.W.2d 811, is no longer good law in light of *Giles v. California*, 554 U.S. 353, 376 (2008). *See State v. Jensen*, 2011 WI App 3, ¶ 26, 331 Wis. 2d 440, 794 N.W.2d 482. In any event, the statements here would not have implicated the Confrontation Clause even under *Roberts*. *See Bourjaily*, 483 U.S. at 181–84; *Dutton*, 400 U.S. at 87–89 (plurality opinion).

acknowledge this caselaw, let alone attempt to explain why it should be overruled. *State v. Douangmala*, 2002 WI 62, ¶ 42, 253 Wis. 2d 173, 646 N.W.2d 1 ("The principle of stare decisis is applicable to the decisions of the court of appeals.").

II. The Informant's Use Of The Term "They" In Recounting Maldonado's Confession Did Not "Expressly Implicat[e]" Nieves

The *Bruton* rule only applies when a codefendant's testimonial statement "expressly implicat[es]" the defendant. *Bruton*, 391 U.S. at 124 n.1; Opening Br. 20–23. Courts throughout the country have approved the use of neutral pronouns to omit the objecting defendant's name, so long as some reasonable degree of ambiguity remains. Opening Br. 21–22 (collecting cases). The informant's use of the term "they" did not "expressly implicate" Nieves because "they" could have referred to Maldonado and the victims, David and Buckle, or any of the other MLD gang members that the jury had already heard about (e.g., "Schotee," "Boogie Man," or "Fat Boy"), or someone else entirely. Opening Br. 23. Accordingly, even if the *Bruton* rule is held to have relevance here, the informant's recounting of Maldonado's statements was sufficiently ambiguous. Opening Br. 22–23.

In response, Nieves argues that Maldonado's statements "implicated Nieves" because of both the informant's and the prosecutor's use of the word "they" in discussing Maldonado's confession. Resp. Br. 26–30. But, as the State explained, the use of an ambiguous neutral pronoun

such as "they" is entirely acceptable where the *Bruton* rule applies. Opening Br. 21–22 (collecting cases). That is because the test is not whether a nontestifying codefendant's testimony could hypothetically "implicate" the defendant, but whether the statement "*expressly* implicat[es]" the defendant. *Bruton*, 391 U.S. 124 n.1 (emphasis added).

Nieves' reliance on *Richardson v. Marsh*, 481 U.S. 200 (1987), Resp. Br. 30–32, is unavailing. As explained in *Gray v. Maryland*, 523 U.S. 185 (1998), the Court in *Richardson* found no Sixth Amendment violation because any "linkage" to the defendant was made only via an "inference," the allegedly offending statements "did not refer *directly* to the defendant himself" and the inference could be made only with the use of "evidence introduced later at trial." *Id.* at 196 (emphasis added, citations omitted). In the present case, the allegedly offending statements similarly "did not refer directly to the defendant himself" and required other evidence to link the statements to Nieves.[3]

Nieves turns next to *Gray*, stating that this case supports his argument because it shows that "the deletion of a codefendant's name in a confession [does] not suffice." Resp.

[3] Nieves points out that *Richardson* involved a "limiting instruction." Resp. Br. 31–32. While *Richardson* did discuss the limiting instruction, the point is a red herring in this particular case because Nieves never requested that the trial court give such an instruction. *See* Response to Petition for Review, *State v. Nieves*, No. 2014AP1623-CR, 7 (Wis. July 18, 2016); *accord South Carolina v. Evans*, 450 S.E.2d 47, 50 n.1 (S.C. 1994) (distinguishing *Richardson* on similar grounds).

Br. 32. But the critical point in *Gray* was that this testimony was linked to the defendant "immediately." *Gray*, 523 U.S. at 188–89. The *Gray* Court emphasized that a *Bruton* problem arises when a statement's implication is "immediately" apparent to the jury. *Id*. at 196. Here, the informant's use of the term "they" did not make it "immediately" apparent to the jury who "they" referred to. *See supra* p. 6.

Finally, Nieves attempts to distinguish several of the State's cases from around the country that support the replacement of a name with a neutral pronoun. Resp. Br. 33–37. Notably, Nieves does not dispute that the Sixth Circuit approved of "substitut[ing] names in the deposition statements with the neutral noun 'person' or phrase 'another person,'" *United States v. Vasilakos*, 508 F.3d 401, 408 (6th Cir. 2007), and does not dispute that in *Thomas v. United States,* 978 A.2d 1211, 1237 (D.C. 2009), the court explained that "we" and "he" are "ordinarily acceptable under *Bruton*." And his attempts to distinguish the State's other cases fail. In *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), the Second Circuit did not deal with the *Bruton* issue "perfunctorily," as Nieves claims, Resp. Br. 33, but stated that changing a name to "my neighbor" did not expressly implicate the defendant *Id*. at 149–151. Nieves is also wrong that in *United States v. Lighty*, 616 F.3d 321 (4th Cir. 2010), the defendant *wanted* an explicit "referral to other participants." Resp. Br. 33–34. Defendant Flood objected to a statement referring to "three other people" because, "[a]ccording to

Flood, it is clear from CW's testimony that the 'three others' Lighty was referring to were Flood, Wilson and Mathis." *Id.* at 376 (citation omitted). The Fourth Circuit explicitly approved the use of "three other people" as a generic pronoun to replace Flood, Wilson, and Mathis' names. *Id.* at 377.

Nieves cites cases from the Eleventh Circuit in support of his position, Resp. Br. 36, but in those cases, the court found that the nontestifying codefendant's statements necessarily referred to the objecting defendant. *See, e.g.*, *United States v. Van Hemelryck*, 945 F.2d 1493, 1502 (11th Cir. 1991) ("[T]he record in this case presents no person other than Giraldo who could have been the man of Marina Bustamante's statement."). Here, "they" could have referred to any number of people, including other fellow gang members. *See supra* p. 6.

III. Any Alleged *Bruton* Error Was Harmless

Bruton violations do not "automatically require reversal of the ensuing criminal conviction." *Schneble v. Florida*, 405 U.S. 427, 430 (1972). If the evidence admitted in violation of *Bruton* is cumulative of other evidence, then the error is harmless. *Harrington v. California*, 395 U.S. 250, 253–54 (1969). In this case, the informant's testimony was cumulative of David's powerful eyewitness testimony, which described the entire episode, from the first shooting in Illinois to the shooting in Milwaukee. Opening Br. 6–7.

Nieves responds by questioning David's credibility based upon his prior criminal record and inconsistent statements in recounting the crime at issue. Resp. Br. 38–39. These past convictions and apparent contradictions were presented and explained to the jury for its own credibility assessment. *See Kohlhoff v. State,* 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978); *Nabbefeld v. State*, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978). With regard to the prior convictions, at the beginning of his testimony, David testified that he had "been adjudicated delinquent" five times, apparently referring to juvenile convictions. App. 16. As for the inconsistencies in David's story, it is true that in the moments following the shooting David misidentified the name of the driver ("Cookie" instead of "Schotee"), and refused to identify Nieves and Maldonado as the shooters. App. 73. When confronted with this inconsistent story on cross-examination, David explained that he did not identify Nieves and Maldonado at that time because he was "scared" of them. App. 73. This is understandable since Nieves and Maldonado had just tried to kill David (and did kill Buckle) and, as far as he knew, they were not yet in custody.

Nieves also seeks to call into question the informant's testimony about Nieves' own confession, arguing that the informant was not a credible witness because he was "a jail house informant who had been convicted of a crime on six occasions," "was sitting on sentences in excess of twenty years," "had cooperated with the police regarding a variety of

other inmates at the jail probably too many to count," and "who confirmed that there was a complaint against him alleging that he tried to bribe inmates." Resp. Br. 39–40. It is unclear why Nieves thinks these points would help his case, given that his entire argument is based upon the premise that the informant's recounting of *Maldonado's* confession was harmful to Nieves' defense. If the informant lacked all credibility, as Nieves now suggests, then his recounting of Maldonado's confession is similarly suspect.

IV. The "Boogie Man" Aside Was Harmless

David's passing statements about "Boogie Man" played no role in Nieves' conviction, as they merely provided color to David's emotional state. Opening Br. 25. Nieves claims that the circuit court essentially vouched for Boogie Man by telling the jury that he "existed, that the man was at the alleged hideout, and that the threat to kill was in fact made." Resp. Br. 42. This is not true. The circuit court simply stated that it was admitting the evidence "so you [the jury] understand how [David] felt," and "*not because what the person said is true*." App. 41 (emphasis added).

V. Nieves' Remaining Arguments Are Meritless

Nieves ends his brief by arguing that the admission of the informant's testimony about Maldonado's confession—when combined with the fact that the circuit court did not offer a limiting instruction—violated due process a matter of "fundamental fairness," involved plain error, and made it

such that the "real controversy" was never tried. Resp. Br. 43–47. But Nieves concedes that he did not ask the circuit court for any jury instruction regarding Trinidad's testimony, *see supra* p. 7 n.3, and "[t]his court will not find error in the failure of a trial court to give a particular instruction in the absence of a timely and specific request before the jury convenes." *See Bergeron v. State*, 85 Wis. 2d 595, 604, 271 N.W.2d 386 (1978). And while the parties disagree as to the level of ambiguity in the informant's use of the neutral pronoun "they" in recounting Maldonado's account, *see supra* pp. 6–9, there is nothing out of the ordinary about this banal factual disagreement or the progression of the trial, meaning that it would be inappropriate to apply extraordinary doctrines such as the plain-error exception or the "real controversy" rule.

CONCLUSION

The decision of the court of appeals should be reversed. The State agrees with Nieves' submission, Resp. Br. 47, that the court of appeals should be given an opportunity, in the first instance, to consider Nieves' ineffective assistance of counsel claim. *See, e.g.*, *State v. Rhodes*, 2011 WI 73, ¶ 4, 336 Wis. 2d 64, 799 N.W.2d 850.

Dated this 3rd day of January, 2017.

Respectfully submitted,

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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 2,933 words.

Dated this 3rd day of January, 2017.

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 3rd day of January, 2017.

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