STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Appeal No. 2014-AP-1758
Circuit Court Case No. 12-CF-254

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

WADE M. RICHEY,

Defendant-Appellant.

On Appeal from the Circuit Court of Barron County,
Hon. J. Michael Bitney, Circuit Judge, presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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I EXCLUSION OF MEDICAL RECORD ERRONEOUS AND PREJUDICIAL.

As opposed to interpreting Wis.Stats. §908.03(6m) as an independent hearsay exception, the State contends that it is but a subset of the previously existing hearsay exception in Wis.Stats. §908.03(6) for business records. If that were true, there would be no need for the additional exception. Instead, sub.(6m) has to have some significance in and of itself. Had the legislature wanted sub.(6m) to be merely a subset of sub.(6), then it would have included this language as part of sub.(6) and not created sub.(6m) as a separate independent hearsay exception for medical records.

Section 908.03(6m) is an exception from hearsay as independently valid and enforceable as any of the other exceptions listed in §908.03 (e.g., sub.(1) present sense impression; sub.(2) excited utterance; sub.(9) records of vital statistics, etc.) Just as these and a family record(sub.13), or a record of a religious organization (sub.11), etc. create an exception from hearsay in and of itself, so too does a medical record properly noticed under sub.(6m) qualify as an exception without more.

Because sub.(6m) is itself an exception from hearsay, why must Richey also establish "some other hearsay exception to gain admissibility" as the State maintains? (State p.6).

Such a rule would be contrary to the language of the statute, (i.e.,"[t]he following are not excluded by the hearsay rule…"). Notably, other than citing Blinka, the State provides no support for its proposition that even though medical records meet the sub.(6m) exception to hearsay they must also meet "some other exception." And Blinka as the source of the State's position that, regardless of the number of declarants all of them must have been part of the organization that prepared the record, is unpersuasive.(State p.6-8) As pointed out by Richey, and not specifically addressed by the State, the statements made by Richey which were taken down by the medical provider are the very type discussed in Wisconsin Practice Series, §805.1, Multiple hearsay, by the patient to the ambulance provider.(Richey, p.11-13). This very scenario also came from Blinka, thus calling into doubt the supposed rule that to be admissible all declarants must be part of the same organization.

Case law also disproves any requirement that for the sub.(6m) exception to apply all declarants must be from the organization. As discussed in ***State v. Rundle***, 166 Wis.2d 715, 728-29, 480 N.W.2d 518 (Ct.App.1992):

> We hold only that hospital records bear such an unusual indicia of reliability and trustworthiness that, in circumstances where the evidence is clinical and

> nondiagnostic and there is no articulated reason that there is any inaccuracy or irregularity in the entries in the record, such records satisfy the confrontation clause. Id.[***Hagenkord***] at 478…
> … "clinical and nondiagnostic" evidence can be defined as the objective findings of medical personnel, for example, temperature, x-ray results, and lab test results. Generally, "clinical and nondiagnostic" evidence is any information that would not be disputed by trained medical personnel. Also included would be statements of the patient/victim describing the source of the injury and giving an evaluation of the injury. ***State v. Olson***, 75 Wis.2d 575, 591-92, 250 N.W.2d 12, 20-21(1977). The patient/victim's statements can be classified as "clinical and nondiagnostic" for two reasons. First, the patient/victim's strong motivation for proper treatment will insure trustworthiness of the information provided to medical staff. See ***State v. Nelson***, 138 Wis.2d 418, 435, 406 N.W.2d 385, 392 (1987)….Second, any medical staff transcribing the statements would have been found qualified to do so and would have strong motivation to prepare them accurately because of professional dictates and the fact that others will rely upon the work. See ***Olson***, 75 Wis.2d at 592.

Granted, here, the statements by Richey and the lack of entry of meth indicators are not statements by a "victim" but they are statements by the patient and observations (or lack thereof) by medical staff. As a statement by a patient, victim or not, they share the same indicia of reliability and trustworthiness. At the time the medical records were prepared, Richey was not charged with a crime, and did not know that he would be. Thus, there is no reason to discount his statements. Moreover, his statements were given as part of the medical issue he was at the hospital for – what happened to him in the crash, so that they could treat him.

And the lack of observations as to any meth indicators at the time of the accident is directly relevant both to his evaluation/treatment that day, as well as what ultimately became a medical issue in the then unbeknownst criminal case – was there meth in his system, did he have signs of meth usage, was the accident/injuries the result of meth, or, would the accident have occurred regardless of meth?

Flores v. State, 69 S.W.3d 864 (Ark.2002) is distinguishable. There the statements provided were not relevant to defendant's care, and she knew she was potentially the subject of a criminal case. The court specifically found she was purposefully trying to shift blame to someone else by the statements she provided to medical personnel.

Medical records are "different" than regular business records, hence the existence of sub.(6m) as opposed to just sub.(6). There is a circumstantial guarantee of trustworthiness for the records are made and relied upon in affairs of life and death. ***Hagenkord v. State***, 100 Wis.2d 452,469-71, 302 N.W.2d 421 (1981). Presumably, the hospital that is creating the record and will be relying on the record is putting in information as accurately as it was relayed to them, and which they believe to be relevant or on which it may rely. That difference also explains why the

State's reliance on ***State v. Mitchell***, 84 Wis.2d 325, 267 N.W.2d 349 (1987) and ***Noland v. Mutual of Omaha Ins. Co.***, 57 Wis.2d 633, 205 N.W.2d 399 (1973) is misplaced. Neither of these cases involved medical records. Both cases discuss medical records under only the business records exception [i.e., sub.(6) and its predecessor] and not sub.(6m) which recognizes that medical records should be treated differently.

Hagenkord is applicable because it is the special trustworthiness of medical records, the information within them, and its intended use which calls for the special sub. (6m) hearsay exception. Thus, even though ***Hagenkord*** is a confrontation clause case, as opposed to a medical records hearsay case, the underlying rationale regarding medical records applies.

Nor did Richey waive his argument that sub.(4) provides an additional basis to admit the record. The court itself discussed both subsections but still refused to admit the record:

> It's my belief that 908.03(6m), if the documents are properly filed in advance, eliminates the need for a medical records custodian to come in and authenticate or verify the authenticity of the records. What I think we're addressing here is whether or not under (4), information about what happened to this young man and whether he was treated or not is admissible as an exception to the hearsay rule…

> I think you need something in the nature of either a physician or some kind of health care provider who actually provided the treatment to this young man to talk about what he gave in terms of a subjective narrative of what occurred or what his injuries were or how they were sustain to be allowed to testify about the actual content of the report.(R.112,p.192-3).

And it was prejudicial error to exclude the medical records as they were relevant to the reasonable doubt expressed by Juror Fisk in her letter to the judge (i.e., she believed there was a false positive for meth and that the accident/injuries would have occurred even in the absence of meth.) The medical records, which lacked any meth indicators, would have further bolstered that doubt and could have resulted in an acquittal.(Richey p.16-18). While the State did not have to prove that Richey was impaired, Richey maintained that even *if* methamphetamine was present in the trace amounts identified by the State, 1)it was a false positive, and 2)the accident would have happened anyway as a result of the unanticipated brake failure. The medical records were consistent with, and strong evidence of, both the lack of impairment at the time of the accident(i.e. accident the result of something else such as brakes going out) and Richey's testimony that he was not a meth user. These records went directly to the elements of Richey's affirmative defense.

II THE VERDICT CANNOT STAND GIVEN THE INFORMATION REVEALED IN RESPONSE TO THE JUDGE'S MEETING WITH JURORS.

That Wis.JI-Criminal 525A permits jurors to ask questions of the court, does not validate what occurred in this case. The JI does not contemplate that the judge meets with jurors outside of the presence of counsel. Instead, much like the same process that is used during jury deliberations, the JI contemplates that a juror with a question advises the bailiff. Presumably then the bailiff would inform the court and an informed decision could be made as to how to handle the question depending on what it was and all parties would be involved. Had that process been followed we would not have the serious doubt cast on the verdict itself as we now face. The "unusual" situation caused here was not in a judge thanking the jury for service, or even a juror submitting a question to the court through the bailiff process. The unusual situation here was the judge meeting face-to-face with the jury and inviting them or encouraging them, at least implicitly, to provide him with their thoughts or concerns pertaining to the case and sentencing. No one can dispute that this was not just thanks for your service good night. More occurred. Enough occurred that Juror Fisk interpreted it as "Thank you for offering us, the Jurors the opportunity to share our

thoughts and/or concerns with you prior to the sentencing date."(R.87).

Contrary to the State's assertions that Wis.Stats. §906.06 prohibits Richey from a new trial, Richey is not the one who sought to examine Juror Fisk or raise this issue. The issue was raised/invited by the judge and it started not two and a half months after the verdict, but it started at the very time that the judge met with the jury immediately after trial. The judge explained:

> They then asked -- or one of them asked, and I'm not sure if it was Ms. Fisk, I tend to believe it probably was but I don't recall these people by name, if they could submit something to the Court on behalf of the defendant at the time of sentencing or prior to sentencing. And I told them that the Court would receive information that would be relevant from any party with regards to sentencing and that I would certainly convey that to counsel and we would then have a discussion as to whether or not that would be an item that would be properly considerable by the Court at the time of sentencing. That has led to her letter in which she indicates at the very beginning of the letter which she filed or submitted two months after the verdict had been received thanking me for the opportunity to share their thoughts and concerns.(R.116,p.8-10).

The court, having prompted that communication and having, even if inadvertently, received information as to reasonable doubt and the jury's deliberations, cannot then ignore it. Despite the State's protestations to the contrary, this is entirely in line with ***Harris v. United States***, 738 A.2d 269, 278(D.C.Cir 1999) where the court

found error in the judge's post-verdict communication with the jury stating:

> Accordingly, while it is clear from the record that Judge Dixon did not intend to elicit substantive comments about the jury's deliberations and, indeed, cautioned the jury that it would be inappropriate for him to address some of their concerns, we are constrained to conclude that, despite his good intentions, the judge inadvertently initiated and subsequently engaged in prohibited ex parte communications about Harris' pending case during his post-verdict meeting with the jurors…

The State's position that no extraneous information was brought to the jury during deliberations misses the mark. No such claim has been made by Richey. The problem isn't that the court interfered with jury deliberations while they were occurring. The problem is that the court, perhaps inadvertently, inquired into the jury's deliberations by taking action or making statements which prompted Juror Fisk to reveal those deliberations. In this regard, this case is like ***State v. Cartegena***, 140 Wis.2d 59, 53, 409 N.W.2d 386 (1987) which the State does not discuss. When the court offered the additional dialogue it became bound by that dialogue. As in ***Harris,*** whether inadvertent or not, the judge discovered the jury's deliberations and discovered that there was reasonable doubt or dissention with regard to whether there was meth in Richey's system, as well as reasonable doubt as to whether the accident would have

occurred even without the meth. ***Dukes***, ***Austin***, and ***Rothbauer***, which addressed juror dissent during polling, are all applicable because in this case there was continued polling when the court indicated the jury could have continued input and when that input then showed reasonable doubt.

The inquiry into the deliberations resulted in communication bearing on the merits of the case as in ***Harris*** and ***People v. Nan Lu***, 300854, 2012 WL 385598 (Mich.Ct.App. Feb. 7, 2012). Juror Fisk's letter addresses the very elements of the crime and her doubt that they had been satisfied (i.e., she doubts meth in his system, and she believes accident/injuries would have occurred anyway as it was the lack of seatbelts).

Juror Fisk's letter does far more than express disagreement with the law and, instead, expresses reasonable doubt. When she states, "the trace amount of methamphetamine found in his system, could have quite possibly been a false-positive test result of some over the counter medication,"(R.87) she questions whether there was meth in his system -- the very element required for a conviction. If the jurors doubted there was meth in his system then the state failed to establish an essential element of the crime charged and there should be no conviction. So too, Juror

Fisk's revelation of the juror's deliberations exposes that the jurors accepted Richey's affirmative defense that the accident would have occurred in the absence of meth. She states, "…there was absolutely no impairment whatsoever." "…[T]he defendant [should be held] accountable for his criminal negligence in driving with the minors unbelted." She did not say he should be accountable for the condition of the vehicle, or the way he was driving, or because of meth in his system. Indeed, as set forth above, she doubted that there was meth in his system. With regard to the verdict and questions of reasonable doubt, unanimity and the affirmative defense, it was "[t]hese points are what the jurors solely deliberated on trying to find a way around the guilty verdict."(R.87).

The State's claims that Juror Fisk's letter was actually beneficial to Richey can be readily dispatched. Richey did not get any break at sentencing. But, more importantly, Juror Fisk's letter indicates that there should never have been a conviction in the first place. Therefore *any* sentencing was prejudicial to Richey. The letter exposes reasonable doubt as to essential elements of the crime and, thus, there should be no guilty verdict and no conviction. With no conviction, there should have been no sentencing. To suggest that an improper conviction should be upheld because

the defendant *may* have gotten some benefit of the doubt at sentencing is a type of logic that should be readily rejected by our criminal justice system. Based on Juror Fisk's letter, the State did not prove beyond a reasonable doubt that there was meth in Mr. Richey's system, and, likewise, based on the letter the jurors believed the affirmative defense that the accident/injuries would have occurred even if there had been meth in Mr. Richey's system. Mr. Richey should have been acquitted and that cannot simply be swept under the rug because it is inconvenient to the State and the court that it came to light based on the Judge's post-verdict communications with the jury.

While Richey did not object to that communication before it occurred, it does not matter given what transpired and what we now know. A combination of the invitation, whether implicit or explicit, to have the jury continue to provide input, the exposure of the jury deliberations, and the doubt cast upon the verdict are significant enough to constitute plain error.[1] Mr. Richey's actions did not invite this mess, nor did Richey sleep on his rights. Upon receipt of Juror Fisk's letter, and before sentencing, Richey's

[1] As pointed out by Richey in his primary brief citing to ***People v. Nan Lu***: "Preliminarily, we note that when the trial judge announced his intention to speak with the jurors, neither counsel offered any objection. Accordingly, we review this constitutional claim for plain error affecting defendant's substantial rights."

counsel promptly moved for relief in the form of a mistrial, additional polling of the jury, or recusal.(R.88).

Finally, the State does not address Richey's argument that in considering his motion for relief prior to sentencing, Judge Bitney misapplied the law in analyzing his contact with the jury and Juror Fisk's resultant letter.(Richey,p.35-38). The question wasn't whether it was error to meet with the jurors or not and to implicitly invite further communication, it was error. The court's analysis then, should have been whether the error was prejudicial or not. And while Judge Bitney may have implicitly found that it was not prejudicial that finding is questioned given that he did not understand there to be an error in the first place. The burden of proving no prejudice is on the beneficiary of the error, here the state. ***State v. Billings***, 110 Wis.2d 661, 667, 329 N.W.2d 192 (1983). They have not met that burden.

CONCLUSION

Mr. Richey respectfully requests reversal and/or a new trial.

Dated this 23rd day of January, 2015.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in §809.19(8)(b) and (c) for a reply brief produced with a monospaced font.

The length of this brief is 13 pages.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this reply brief, excluding the appendix, which complies with the requirements of §809.19(12).

I further certify that this electronic reply 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 reply brief filed with the court and served on all opposing parties.

Dated this 23rd day of January, 2015.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on January 23, 2015, pursuant to Wis. Stats. §809.80(3)(b), Defendant-Appellant's Reply Brief was delivered to FedEx, a third-party commercial carrier, for delivery to the Clerk of the Court of Appeals, Attorney Marguerite M. Moeller, Wisconsin Department of Justice, and Attorney Angela L. Beranek, Barron County District Attorneys Office, within three calendar days. I further certify that Defendant-Appellant's Reply Brief was correctly addressed.

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