STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2016AP002058 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
PETER J. HANSON,
Defendant-Appellant.

On Notice of Appeal to Review Judgment of Conviction Entered in the Circuit Court for Oconto County, the Honorable Michael T. Judge presiding, and the order denying motion for postconviction relief in the Circuit Court for Oconto County, the Honorable Michael T. Judge presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY ARGUMENT

I. CONFRONTATION CLAUSE

A. Statutory evidence provisions cannot serve to eradicate one's weighty constitutional right to confrontation

The State asks this Court to dispose of this issue, relying on a mere footnote in *Crawford*. State's Brief at 16. Specifically, the State relies on *Crawford's* fleeting reference to *Street* stating, "The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59, n. 9 (2004)(citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)); State's Brief at 16. The *Crawford* Court did not conduct any analysis or legal reasoning on this issue, and this Court should thus not rely on this dicta to dispose of Hanson's important constitutional claim. *See generally Crawford*, 541 U.S. 36. Indeed, *Crawford* cautioned that, "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . ." *Id.* at 61. As Professor Blinka warns, hearsay exemptions "should not license wholesale evasion by the expedient of offering the statement not for its truth." Daniel. D. Blinka, Wisconsin Practice Series: Wisconsin Evidence § 802.302, 715 (3d ed. 2008). Thus, this Court should not conclude

that a statutory evidence provision overrides one's Constitutional right to confrontation.

B. These statements did not show a consciousness of guilt

Even if this Court concludes that using these statements to establish "consciousness of guilt" trumps Hanson's right to confront witnesses against him, these statements do not show consciousness of guilt. The State theorizes that Hanson's comment that his wife's death was the best thing that ever happened to him showed a consciousness of guilt because it rendered her unable to testify. State's Brief at 17. However, the spousal privilege — first and foremost — would have rendered Kathy Hanson unable to testify against her husband, Peter Hanson. Wis. Stat. § 905.05. Because Hanson could have invoked the spousal privilege to prevent Kathy Hanson's testimony, his comments regarding her death did not show a consciousness of guilt. Rather, his comments related to "how the last four years was with her," given that they were separating/divorcing. R 44 at 84; R 123 at 3-4.

C. The State has not established that the error was harmless

The State has failed to show *beyond a reasonable doubt* that the error *did not contribute* to the verdict. *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434. Regardless of whether the court provided Kathy's police statements to the jurors, their

inquiry into such shows that the jury took particular note of Kathy's statements in finding Hanson guilty. R 36. This was the only question asked by the jury. Hanson will address the State's argument as to the other "strong evidence" against him under the prejudice prong of his ineffective assistance of counsel claim. *Infra* at 11-13.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. There is no basis for this Court to uphold the circuit court's ruling that Attorney Jazgar employed a reasonable trial strategy

At the postconviction motion hearing, Jazgar could not identify any strategic reason for failing to call the witnesses at issue. R 102 at 10, 11, 13, 14, 16. Despite this testimony, the circuit court curiously concluded that Attorney Jazgar made a reasonable strategic decision not to call these witnesses. R 106 at 4. The State suggests that when counsel is unable to offer any strategic basis for his decision, courts can invent their own strategic basis. State's Brief at 28. Such a proposition, however, conflicts with the directive that, "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defense which counsel does not offer." *State v. Jenkins*, 2014 WI 59, ¶ 36, 355 Wis. 2d 180, 848 N.W.2d 786 (citing *Harris v. Reed,* 894 F.2d 871, 878 (7th Cir. 1990)). Indeed, in

Honig, the case on which the State relies, this Court overruled the circuit court's finding that trial counsel made a reasonable strategic decision to not call witnesses. *State v. Honig*, 2016 WI App 10, ¶ 30, 366 Wis. 2d 681, 874 N.W.2d 589. In *Honig*, defense counsel could not recall specifically why he did not present certain witnesses but offered reasons as to why he *possibly* might not have presented the witness. *Id.*, ¶ 28. The postconviction court, like the circuit court in this case, found that counsel made a strategic decision in failing to call the witness, despite counsel being unable to articulate such a reason. *Id.*, ¶¶ 20, 28. This Court overruled the circuit court's decision, explaining that "[c]ounsel articulated no tactical reason" for failing to call the witnesses and the "postconviction court's finding that counsel's decision was strategic is not supported by counsel's *Machner* testimony." *Id.*, ¶ 30.

Similarly, in this case, counsel was unable to offer any strategic reasons for failing to call the witness. R 102 at 10, 11, 13, 14, 16. Indeed, counsel admitted that he did not even *interview* any witnesses. *Id.* at 5, 9-10. Thus, it is impossible that Jazgar exercised the requisite "deliberateness, caution, and circumspection" in deciding not to call any or all of these witnesses. *See Honig*, 366 Wis. 2d 681, ¶ 30.

More importantly, any such "strategic" decision was unreasonable. The State argues that it was objectively reasonable for Jazgar to

not call any witnesses because doing so undermines a defense theory that the State has not met its burden of proof. State's Brief at 29. Notably, the State has cited no authority for such a proposition, as courts have repeatedly rejected this "strategy", particularly when there is additional evidence to support the defense theory. *United States ex rel. Cosey v. Wolff,* 727 F.2d 656, 658 (7th Cir. 1984)(defense counsel's decision not to call witness because prosecution's case was so weak falls below the minimum standards of professional competence), *overruled on other grounds by United States v. Payne,* 741 F.2d 887, 891 n. 4 (7th Cir. 1984); *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1989). For example, in H*arris*, the court concluded that it was unreasonable when defense counsel "tempted the fates when he decided to rest on the perceived weaknesses of the prosecution's case[,]" particularly because he made such a decision without even interviewing witnesses. *Harris*, 894 F.2d at 878-79. Similarly, in this case, relying on only the theory that "the state has not met its burden of proof" was unreasonable in light of the compelling evidence to support doubt that Jazgar neglected to present, as discussed in Hanson's opening brief. Hanson's Brief at 14-23.

Presenting doubt is compatible with a defense theory the State has not proved its case beyond a reasonable doubt, and *Hubanks* provides no guidance; indeed, *Hubanks* is inapposite. State's Brief at 29-30. In *Hubanks*, the defendant challenged counsel's decision to

argue only that the State failed to prove identity and counsel's failure to also argue that the State had not proved the dangerous weapon element. *State v. Hubanks,* 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992). These were not compatible theories, as the State asserts. State's Brief at 30. Specifically, arguing both theories is essentially saying, "my client didn't do it, but if he did, he didn't do it with a dangerous weapon." Under these circumstances, it is certainly reasonable to forgo an inconsistent defense theory, as such theory would suggest the defendant conceded that he was the perpetrator.

Unlike in *Hubanks*, presenting these witnesses – or at least some of them – would have been consistent with Jazgar's defense theory. Specifically, Jazgar testified that part of his defense theory was the premise that Hanson dropped McLean off at the Truck Stop and never saw him again, and that McLean could have had contact with multiple different people prior to his death. R 102 at 7-8, 18. The witnesses Jazgar failed to call would not have diverted the jury's attention from the general theories of defense; rather, these witnesses would have bolstered Jazgar's theories, as discussed. Hanson's Brief at 22-23. Hanson agrees that Hetrick's[1] and Snow's testimony would conflict with the evidence none of the Truck Stop employees saw McLean that night.

[1] There was no evidence to support the State's proffered theory that Hanson and Mlados were the frightening people waiting for McLean at the truck stop and that McLean retuned to Hanson's vehicle. Certainly, it is nonsensical that McLean would get back into the vehicle with the people of whom he was fearful.

However, this is the precise reason Jazgar should have presented it: it undermined the State's theory that McLean was never at the Truck Stop and that he was last seen alive with Hanson. Indeed, Snow would have testified that she saw a man that might have been McLean around midnight, which would have been after all of the employees' shifts ended. R 98, Exh. F; R 39 at 134-39, 144-49, 152-55, 158-60, 162-65, 174-79.

With regard to Snow and Patton, they – understandably– could not say "for sure" that the man they saw was Mclean; however, the brunt of the State's case was based on conjecture, and presenting evidence that Patton saw a man *matching McLean's description* walking along a rural highway in the middle of February, presents strong support that Hanson dropped McLean off at the Truck stop and never saw him again. R 98, Exh. H; R 43 at 217.

The State attacks the several witnesses who saw McLean, or a man matching his description, six days after Hanson purportedly killed him, arguing that it would not make sense for McLean to have been wandering around given his contacts in the area and his employment status. State's Brief at 34-35. Hanson agrees that we do not know why McLean would have acted in this matter, however, we also do not know why Hanson would have killed McLean. In any event, these witnesses would have cast considerable doubt on the State's theory that McLean was never

seen alive after he left the Byng residence with Hanson. R 41 at 60.

With regard to Cory Byng's confession, the State argues it was irrelevant, as Byng did not say he killed McLean specifically. State's Brief at 35-36. This evidence, however, is the same as the testimony of Barry O'Connor that Hanson claimed to shoot "somebody." R 40 at 25. In addition, it is more than coincidental that Byng admitted to killing "someone" in the woods, and that McLean – with whom Byng had fought the night McLean disappeared– was found murdered in a rural northern town. R 43 at 221-22.

Hanson agrees with the State that presenting the Cory Byng confession theory would have been somewhat inconsistent with the witnesses who would have testified to seeing McLean six days later; however, Jazgar did not need to present all of these witnesses. Rather, this evidence shows that Jazgar had multiple defense theories to choose from, each of them stronger than the weak "burden of proof" defense.

B. *Miranda* issue

The State's reliance on *Maloney* is misplaced, as the issue in this case does not involve a split of authorities, as in *Maloney.* State's Brief at 36; *State v. Maloney*, 2005 WI App 74, ¶ 24, 281 Wis. 2d 595, 698 N.W.2d 583. In addition, even if an attorney cannot be ineffective in failing to raise an issue of first

impression – a proposition for which Hanson cannot locate any legal support – this was not an issue of first impression. *See* State's Brief at 37. Rather, the dictates of *Miranda* are clear, and trial counsel should have recognized that Hanson's John Doe testimony should be suppressed. Hanson's Brief at 26-31. The State does not refute Hanson's argument that the warnings provided do not comport with *Miranda*. Hanson's Brief at 28-31. Perhaps more importantly, *the State set this issue up*, as the prosecutor, seeing that Jazgar neglected to raise this issue, did so *sua sponte* prior to trial. R 55 at 4. The State implicitly acknowledged that *Miranda* applied to this custodial situation, paving a clear path for Jazgar to raise a challenge. *Id.*

Finally, the cases cited by the State, in which courts have declined to mandate *Miranda* warnings at judicial and quasi-judicial proceedings, are inapplicable. State's Brief at 38. For example, in *Gillespie*, the court concluded that the warnings provided to the defendant were sufficient to satisfy his constitutional right against self-incrimination. *United States v. Gillespie*, 974 F.2d 796, 803 (7th Cit. 1992). The *Gillespie* court, however, did not address the issue of whether *Miranda* applied to the situation, indeed the defendant conceded that *Miranda* warnings are not per se required at such a hearing; rather, the court addressed whether the defendant was properly advised of his Fifth Amendment right against self-incrimination. *Id.* at 802-03. In referencing *Miranda*, *Gillespie* noted its

reluctance to extend *Miranda* warnings beyond the custodial context. *Id.* at 804. As Hanson has repeatedly stressed, it is not the nature of the hearing that afforded him *Miranda* protections, it is the circumstances surrounding the interrogation: that Hanson was in custody. R 55 at 4; *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).

The other cases cited by the State addressed the type of hearing *at which the statements were sought to be introduced*, not the circumstances under which the statements were given. *See e.g. State v. Thomas J.W.*, 213 Wis. 2d 264, 266, 276, 570 N.W.2d 586 (Ct. App. 1997)(non-Mirandized custodial statements made to police officer were admissible in CHIPS proceedings); *State ex rel. Struzik v. DHSS,* 77 Wis. 2d 216, 221, 252 N.W.2d 660, 662 (1977)(non-Mirandized custodial statements made to probation agent admissible at revocation hearing). These cases hold that because the hearings *at which the statements were sought to be introduced* were not the type of adversarial criminal proceedings contemplated by the constitution, the exclusionary rule did not apply. *Id.* In this case, there can be no dispute that the proceeding at which Hanson's statements were admitted, a criminal trial for first-degree intentional homicide, is the type of adversarial criminal proceeding contemplated by the Fifth Amendment.

In any event, the State is judicially estopped from now arguing that *Miranda* warnings were not required when Hanson was subject to custodial interrogation, as the State effectively conceded the warnings were required. *See* R 55 at 4; *State v. English-Lancaster,* 2002 WI App 74, ¶ 22, 252 Wis. 2d 388, 642 N.W.2d 627 (doctrine of judicial estoppel bars court from considering party's argument where party advocated a certain position in the trial court and a contrary position on appeal).

Because Hanson was in custody and subject to interrogation, because he did not receive proper *Miranda* warnings, and because his statements were admitted at an adversarial criminal proceeding, these statements should have been suppressed.

C. The above errors prejudiced Hanson

The State argues that the errors discussed were harmless, asserting that there was "strong evidence" supporting Hanson's guilt. State's Brief at 18. Despite this assertion, the State appears to also concede that the State's case was weak, when it argued that selecting a simple "burden of proof defense" was reasonable, explaining that the State had no motive and no physical evidence connecting Hanson to the murder. *See* State's Brief at 27. In support of its "strong evidence" argument, the State first points to the "fact" that McLean was last seen alive with Hanson. *Id.* at 19. In addition, the State relies on the

testimony of the Truck Stop employees who all testified that they did not see McLean at the Truck Stop that night. *Id.* However, as discussed in Hanson's opening brief, there was ample evidence that McLean *was* seen alive after Hanson dropped him off at the Truck Stop, and trial counsel failed to present this evidence. Hanson's Brief at 14-21. The State cannot argue that evidence contradicting this "fact" would have been irrelevant while simultaneously citing this "fact" as the prime support of Hanson's guilt.

In addition, the testimony of Billy Byng, that he did not see Hanson drive toward the Truck Stop, would have been undermined had trial counsel presented the evidence that Byng's nephew, Cory, confessed to the murder, thereby establishing Billy Byng's bias. *See* State's Brief at 19; Hanson's Brief at 21.

The brunt of the State's case, the jailhouse snitch testimony of O'Connor and Dey, should not be relied upon as "strong" evidence of Hanson's guilt. Notably, while the Supreme Court refused to impose a bright line rule that jailhouse informant testimony be automatically excluded, the Court nonetheless cautioned that, "[t]he likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored." *Kansas v. Ventris*, 556 U.S. 586, 594, n. *, 597 n. 2 (2009).

The State's other arguments of "strong" evidence of guilt are unavailing. First, neighbors testified that there was *always* gunshot activity off and on from Hanson's property. State's Brief at 19; R 39 at 211. Second, the fact that Hanson stopped shooting guns and having parties is not atypical behavior of someone being investigated for a homicide. State's Brief at 21; R 43 at 55-62. Third, the testimony showed that a .22 caliber is the most common caliber in the U.S., thereby minimizing the relevance that Hanson owned a .22 caliber gun. State's Brief at 20; R 40 at 85. Fourth, the fact that McLean's body was found in a river – a moving body of water – a mile from Hanson's property would make anyone living along that river a suspect in the murder. State's Brief at 19.

Accordingly, trial counsel's deficient performance in failing to present compelling defense witnesses and in failing to object to the admission of Hanson's John Doe testimony prejudiced him, and Hanson is therefore entitled to a new trial.

CONCLUSION

Based on the errors discussed above and in Hanson's opening brief, Hanson requests that this Court vacate the judgment of conviction and remand for a new trial.

Dated this 3rd day of July, 2017

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,989 words.

Dated this 3rd day of July, 2017

Signed:

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I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 July, 2017

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