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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP2058-CR

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

On Appeal to Review Judgment of Conviction and Order Denying Postconviction Relief, Entered in the Circuit Court for Oconto County, the Honorable Michael T. Judge Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. THE ADMISSION OF HEARSAY STATEMENTS OF HANSON'S DECEASED WIFE INCULPATING HIM IN MURDER VIOLATED HANSON'S RIGHT TO CONFRONTATION

A. Hanson's Right to Confrontation was Violated

In *Crawford*, the Court returned to the roots of the Sixth Amendment and what the Framers intended when they drafted the clause. *See Crawford v. Washington*, 541 U.S. 36, 50-61 (2004). In doing so, the Court repeatedly dispelled the notion that the Framers intended that the panoply of modern-day evidentiary rules could circumvent the protections they established. *Id.* at 42, 54-55, 61.

Hanson can locate no support that the Framers intended that the more modern-day "consciousness of guilt" evidence could be used to circumvent one's right to confront his accuser. Indeed, the cases cited by the State, for the proposition that consciousness of guilt evidence or evidence of one's subsequent belief can be offered for nonhearsay purposes, do not implicate one's weighty right to confrontation. *United States v. Shorter*, 54 F.3d 1248 (7th Cir. 1995); *State v. Giacomantonio*, 2016 WI App 62, 371 Wis. 2d 452, 885 N.W.2d 394; *State v. Britt*, 203 Wis. 2d 25, 553 N.W.2d 528 (Ct. App. 1996).

In any event, the "nonhearsay" excuse offered by the State is a trojan horse used to parade Kathy's statements before the jury. Hanson's *feelings* toward the passing of his

estranged wife do not even qualify as consciousness of guilt evidence, as such evidence is limited to *acts* evidencing such consciousness. "It is generally acknowledged that evidence of criminal *acts* of an accused which are *intended to obstruct justice or avoid punishment* are admissible to prove a consciousness of guilt of the principal charge." *State v. Bauer*, 2000 WI App 206, ¶ 6, 238 Wis. 2d 687, 617 N.W.2d 902 (emphasis added).

There was no evidence that Hanson *acted* in a way to silence Kathy, to prevent Kathy's testimony, or to otherwise obstruct justice. In addition, Hanson's *feelings* toward the death of his estranged wife, in which he had no involvement, were not tied to Kathy testifying[1] or not, and Hanson had a number of reasons to feel scorned by Kathy. *See* Hanson's Opening Brief at 15-16. Any *suggestion* that Hanson's feelings over the death of his estranged were tied to her inability to testify (even if considered to be evidence that he acted to obstruct justice or avoid punishment) was too far attenuated, particularly when weighed against the violation of Hanson's confrontation rights by admitting Kathy's statements.

The State argues that Kathy's accusations against Hanson were critical to show the context of Hanson's feelings about her passing. State's Brief at 11. However, the State did not need to prove Hanson's feelings over the passing of his estranged wife to establish that he committed murder over ten years earlier; these were two unrelated incidents

[1] Kathy testifying against Hanson was not a foregone conclusion, given their marital status and spousal privilege. *See* Wis. Stat. § 905.05 (2011-12).

that occurred several years apart. The State *did* need Kathy's testimony, given the weak evidence it had connecting Hanson to the murder. Indeed, it was Kathy's statements to police that resurrected the investigation that had gone cold for so many years. *See* (R. 1:14). Without the ability to call Kathy as a witness, the State devised a scheme to get her accusation before the jury.

The State does not dispute the brunt of Hanson's confrontation claim, that the jury heard unconfronted *testimonial* statements implicating him in murder. *See* State's Brief at 10-16. Instead, the State shifts the focus from this plain confrontation violation to a fleeting reference in *Crawford*, that "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 10 (quoting *Crawford*, 541 U.S. at 59, n. 9). *Crawford* relied on *Street's* holding that the *legitimate* nonhearsay use of evidence (for rebuttal purposes) does not violate the Confrontation Clause. *Crawford*, 541 U.S. at 59, n. 9; *Tennessee v. Street*, 471 U.S. 409, 417 (1985). *Street* is thus critical to the State's argument that there was no confrontation violation. Yet, the State curiously argues that *Street* does not apply. State's Brief at 14. Contrary to the State's argument, *Street* was not concerned with the fact that the evidence in that case involved an "accomplice confession"; instead, it focused on how the jury was repeatedly and pointedly instructed to limit its use of the evidence, thereby alleviating any confrontation issues. *Street*, 471 U.S. at 412, 414.

The State acknowledges that the jury "might" have improperly used Kathy's statements for their truth but

faults Hanson for not requesting a limiting instruction. State's Brief at 14-15. Detrimental to the State's argument, however, is that Hanson had no basis to request a limiting instruction because the court did not admit this evidence for the limited reasons offered here. (R. 44:81). Instead, the court admitted the statements as an admission by a party opponent, under Wis. Stat. § 908.01(4)(b)(1), thereby permitting the State to use them for their truth. *Id.* Thus, Hanson had no basis to request that the court instruct the jury that it was not consider Kathy's statements for their truth. The State does not dispute that the circuit court erred in admitting these statements as an admission by a party opponent; instead, the State argues that other grounds, that these statements were not used for their truth, supported the admissibility of this evidence. Hanson's Opening Brief at 12; *see* State's Brief at 11. However, these grounds cannot be relied upon in affirming the admissibility of this evidence due to the lack of a limiting instruction. *See State v. Payano*, 2009 WI 86, ¶ 104, 320 Wis. 2d 348, 768 N.W.2d 832 (lack of a limiting instruction is relevant in determining whether the evidence was admissible at all). Where the evidence was admitted for its truth, and where the jury was not instructed to limit its use of this evidence, the State's reliance on this alternative basis is infirm.

Kathy's statement to police directly inculpating Hanson in the murder is "the principal evil at which the Confrontation Clause was directed" at its founding, and the Framers would not have intended for the State's feigned and infirm reliance on non-constitutional evidence law to eradicate Hanson's right to confront Kathy. *See Crawford*, 541 U.S. at 50-51, 55.

B. The State has not Established Harmless Error

The State points to the testimony of the two jailhouse informants to argue that Kathy's statements duplicated other unchallenged evidence. State's Brief at 17-18. Dey's testimony, that Hanson told him "Just that him and his wife were going through a squabble and she made a statement to the cops against him about it[,]" was innocuous and lacked any detail as to what Kathy told police or even that her statement was related to the murder. *See* (R. 44:117). It is impossible to forecast how the jury would have interpreted this evidence had it not heard that Kathy told police Hanson was responsible for killing McLean. (R. 44:83-84). O'Connor's testimony, that Hanson said his wife was freaking out because he had blood all over his hands and that Hanson told him he told his wife he killed somebody, was different than what the jury heard from Kathy through Hanson's John Doe testimony. (R. 40:28-29). Kathy's statements in the John Doe testimony did not reference a confession but rather appeared as though she was a direct witness to the killing. *See* (R. 44:83-84). In addition, O'Connor's testimony did not implicate Kathy's direct accusation against Hanson or testimony from Hanson himself; instead, O'Connor's statements involved several layers of hearsay and thus did not have the impact of the John Doe testimony.

Given that these individuals where jailhouse informants, their questionable credibility and incentive to lie must be considered by this Court. While appellate courts typically do not determine credibility, the State is asking this Court to rely on the supposed strength of their

testimony to conclude that the error is harmless. In evaluating harmless error, the Court must "*weigh* the effect of the trial court's error against the totality of *credible* evidence supporting the verdict." *State v. Ziebart*, 2003 WI App 258, ¶ 26, 268 Wis. 2d 468, 673 N.W.2d 369 (emphasis added).

The State cannot establish *beyond a reasonable doubt* that the erroneous admission of Kathy's hearsay statements *did not contribute* to the guilty verdict where the jury made a specific request for additional details about Kathy's statements to police. (R. 36); *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434. The jury did not request more information about what Dey, Hudson, or O'Connor had to say about Kathy; the jury asked about Kathy's statements to *police*, which came in only through Hanson's John Doe testimony.[2] (R. 36; R. 44:83-84). The State even acknowledges that the jury "might" have used Kathy's statements as substantive evidence of guilt, but faults Hanson for not requesting a limiting instruction. State's Brief at 15. As discussed above, Hanson had no basis to request a limiting instruction. *Supra* at 4. In addition, the lack of a limiting instruction is relevant in determining whether there was a definite risk that the jury misused the evidence. *State v. Spraggin*, 77 Wis. 2d 89, 100-02, 252 N.W.2d 94 (1977).

[2] The State notes that the court denied the request because "no such police report existed." State's Brief at 15. That is incorrect. Instead, there were no exhibits entered into the record of Kathy's statements to police. (R. 41:99).

II. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE ADMISSIBILITY OF INCULPATORY STATEMENTS MADE BY HANSON AT A JOHN DOE HEARING WHERE HE WAS IN CUSTODY AND NOT PROPERLY MIRANDIZED

A. *Miranda* was Violated

Miranda is clear that warnings are required when the defendant is 1) in custody and 2) subject to questioning. *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). The State argues that a *Miranda* challenge was without merit because Hanson was not in custody for *Miranda* purposes and because he was not questioned by *police.* State's Brief at 30-38. As an initial matter, before the circuit court, the State conceded custody and implicitly conceded questioning; its only argument was that *Miranda* had been complied with. (R. 55:4). Similarly, before the court of appeals, the State focused its arguments on the nature of the hearing at which Hanson was questioned, without developing the issue of custodial questioning. State's Court of Appeals Brief at 37-38.

As the circuit court found, Hanson was in custody at the Oconto County jail on an unrelated matter at the time he was questioned at the John Doe hearing. (R. 55:4; R. 106:4). The fact that Hanson was in custody for purposes unrelated to the questioning does not change his custodial status. *Mathis v. United States*, 391 U.S. 1, 4-5 (1968). The State draws the distinction that Hanson must be in *police* custody to satisfy *Miranda*, citing to *J.D.B.* State's Brief at 31 (citing *J.D.B v. North Carolina*, 564 U.S. 261, 268 (2011)).

But the issue in *J.D.B.* was whether the defendant was in *constructive* custody when he was questioned at school, not in *actual* custody as is the case here. *J.D.B*, 564 U.S. at 265-66, 281; (R. 55:4; R. 106:4). Hanson's custodial status as an inmate, under the sheriff's dominion, did not change when he entered the courtroom. There can be no argument that Hanson's liberty was somehow restored, and that he was free to walk out of the courtroom.

A suspect is in custody for *Miranda* purposes if he is "deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. There is no doubt that Hanson as a jail inmate was deprived of his freedom in a significant way. *Id.*; (R. 55:4; R. 106:4). The State points to *Fields* for the proposition that imprisonment alone is insufficient to constitute custody for *Miranda* purposes. State's Brief at 37. But *Fields* was much different. In *Fields*, the defendant, who was questioned in jail, was directly and repeatedly told that he was free to leave and return to his cell whenever he wanted. *Howes v. Fields*, 565 U.S. 499, 502-03 (2012). Here, Hanson was not permitted to end questioning and return to his cell when he desired; just the opposite: he was ordered to answer the questions asked of him. (R. 32, Exh. 54 at 49). Hanson was significantly deprived of his freedom by being held in custody *and* was compelled to answer questions while in custody, thus, he was in custody for *Miranda* purposes. *Miranda*, 384 U.S. at 444; *Fields*, 565 U.S. at 517.[3]

[3] The Court held, "Taking into account all of the circumstances of the questioning–including *especially the undisputed fact that respondent was told that he was free to end the questioning and to return to his* cell–we hold that respondent was not in custody within the meaning of *Miranda*." *Fields*, 565 U.S. at 517 (emphasis added).

The Court should not adopt the reasoning in the cases cited by the State that an individual is not in custody for *Miranda* purposes if he appears at a judicial proceeding in unrelated custody. State's Brief at 38 (citing to *United States v. Williston*, 862 F.3d 1023 (10th Cir. 2017) and *United States v. Byram*, 145 F.3d 405 (1st Cir. 1998)). In addition to these cases not being binding, these courts relied on a fundamental misunderstanding of the *Mandujano* holding. Both courts incorrectly interpreted *Mandujano* as "holding" that grand jury witnesses are not entitled to *Miranda* warnings before testifying. *Williston*, 862 F.3d at 1030-32; *Byram*, 145 F.3d at 409.

The *Mandujano* decision fractured the Court and resulted in no majority opinion. *United States v. Mandujano*, 425 U.S. 564 (1976). "'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *State v. Deadwiler*, 2013 WI 75, ¶ 30, 350 Wis. 2d 138, 834 N.W.2d 362 (quoting *Marks v. United States*, 403 U.S. 188, 193 (1977)). The eight justices participating in the *Mandujano* decision all agreed only that in a perjury prosecution, the Fifth Amendment does not require suppression of testimony that serves as the basis for the perjury charge. *Mandujano*, 425 U.S. at 570, 582-85, 609. The four justices concurring in the plurality opinion *suggested* that *Miranda* warnings are not required, but explicitly stated that they were not determining whether warnings are required because warnings were given. *Id.* at 579-580, 582, n. 7.

As to the questioning component of *Miranda*, the State argues that warnings were not required because Hanson was not subject to questioning by *police.* State's Brief at 31-32. The Supreme Court, however, has dispelled the notion that *Miranda* is limited to only those who wear a badge and carry a gun. *Mathis*, 391 U.S. at 2-4 (warnings required where defendant questioned by an internal revenue agent, a "government agent"); *Estelle v. Smith*, 451 U.S. 454, 456-57, 467 (1981)(warnings required where defendant questioned by court-ordered psychiatrist).[4] If an internal revenue agent and a psychiatrist qualify as government agents for purposes of *Miranda*, then a skilled prosecutor, seeking to establish that a crime has been committed, certainly does as well.

The State faults Hanson for not "developing" the issue as to whether the prosecutor's questioning of Hanson constitutes questioning for *Miranda* purposes. State's Brief at 38. But this issue does not require the thorough analysis the State suggests. As the *Innis* Court stated, warnings are required "whenever a person in custody is subjected to either *express questioning* or its functional equivalent." *Rhode Island v. Innis,* 446 U.S. 291, 300-01 (1980)(emphasis added). Here, the prosecutor's direct questioning of Hanson at the John Doe hearing as to his involvement in the murder is–by definition–"express questioning." (R. 32, Exh. 54 at 53-233).

[4] The Court stated, "That respondent was questioned by a psychiatrist . . . rather than by a police officer, government informant or *prosecuting attorney*, is immaterial." *Id.* at 467 (emphasis added).

B. Attorney Jazgar was Deficient

The State continues to shift the focus on this issue to the nature of the hearing in asserting that the law is unsettled as to whether warnings were required. State's Brief at 27-29. The nature of the hearing did not mandate the warnings; the nature of Hanson's status being in custody and subject to questioning mandated the warnings. *Miranda*, 384 U.S. at 478. The dictates of *Miranda* are well-settled, and reasonably prudent defense counsel should be aware of *Miranda's* holding.

The unique facts of this case make counsel's deficiency even more pronounced. A *Miranda* challenge was not some novel claim that counsel had to identify; the State paved the way for Attorney Jazgar to challenge this evidence by raising the *Miranda* concern, conceding that Hanson was in custody, and asserting that proper *Miranda* warnings were given. (R. 55:4). All Attorney Jazgar had to do was not concede the point. Under these circumstances and the clear dictates of *Miranda*, Attorney Jazgar was deficient.

C. Hanson was Prejudiced by Counsel's Deficiency

As previously developed, the State's emphasis on Hanson's John Doe testimony, the jury's pointed attention to Kathy's statements admitted through that testimony, and the lack of other *credible* evidence supporting guilt undermines confidence in the outcome of the proceedings. *Supra* at 5-6; Hanson's Opening Brief at 18-21, 29-30.

CONCLUSION

Accordingly, this Court should reverse the court of appeals' decision and remand for a new trial.

Dated this 25th day of March, 2019

Respectfully submitted,

_____

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Dated this 25th day of March, 2019

Signed:

_____

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Dated this 25th day of March, 2019

Signed:

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