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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
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CASE NO. 2017AP000850-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2013 CF 000196B**
(Wood County)

JOSEPH B. REINWAND,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN WOOD COUNTY CIRCUIT COURT, THE HONORABLE GREGORY J. POTTER PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

BY:

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CASES CITED

ARGUMENT

I. DEFENDANT REINWAND SHOULD BE GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED TESTIMONIAL HEARSAY STATEMENTS BY D.M. UNDER A FORFEITURE BY WRONGDOING ANALYSIS.

A. Analysis.

1. Testimonial v. nontestimonial hearsay.

The defense agrees with the State's assertion that victim D.M.'s statements to friends and others about the custody dispute involving his daughter were nontestimonial and therefore admissible (State's brief at 16-17).

The defense disagrees with the State's assertion that statements regarding D.M.'s statements to others about his fear of defendant Reinwand, as well as threats made by Reinwand, were not testimonial (State's brief at 17-18). The trial court was correct in concluding those statements were testimonial (313:5).

In support of its argument, the State points to cases further analyzing *Crawford* since the trial court made the relevant ruling in this case, two United States Supreme Court cases, *Ohio v. Clark,* 576 U.S. ___, 135 S.Ct. 2173 (2015) and *Michigan v. Bryant,* 562 U.S. 344 (2011), as well as a Wisconsin Supreme Court case, *State v. Mattox,* 2017 WI 9, 373 Wis.2d 122, 890 N.W.2d 256. Defendant Reinwand concedes these later cases appear to attempt to limit what evidence would be defined as testimonial. In *Clark,* the court addressed the admissibility of statements made by very young child to a guidance counselor at a school. The child reported having been the victim of physically assaultive behavior at the hands of Clark. The United States Supreme Court found these statements were nontestimonial because the primary purpose of the child's statements was not to create a record for trial. In so finding, the Court focused on several factors, codified in *Mattox:*

> (1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement

> individual; (3) the age of the declarant; and (4) the context in which the statement was given. *Mattox,* 373 Wis.2d 122, ¶32.

With limited argument, the State asserts D.M.'s statements made to other about threats by Reinwand, as well as his fear of Reinwand are nontestimonial statements (State's brief at 17-18). The State concedes the fact the statements were made to persons other than law enforcement is not dispositive of the issue. It writes, "In *Clark,* the Court recognized 'at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns'" (State's brief at 15). It avoids a close analysis because it recognizes this is the very type of exception that is reserved in *Clark.* Arguably, the four-part test is not very useful in determining whether the primary purpose of the statement by D.M. was to provide a substitute for trial testimony. It is obvious the primary purpose of D.M.'s statements was to provide a substitute for trial testimony. Why else would the statements be made by D.M.? Witness after witness provided testimony about D.M.'s fear of defendant Reinwand or threats he allegedly made toward D.M. The purpose of D.M.'s statements was to cast suspicion on defendant Reinwand in the event he died and to provide a vehicle for his statements to be used at a later trial if he became unavailable.

Even with new nuances in the law since the trial court ruled these statements by D.M. were testimonial, the trial correct was correct in concluding the statements were testimonial hearsay.

2. Forfeiture by wrongdoing analysis.

The court in *Giles v. Crawford,* 554 U.S. 36 (2008) unequivocally rejected the premise that all criminal defendants who intentionally kill their victim acted with at least a partial intent to prevent the victim from testifying at the defendant's murder trial for killing the victim, and therefore any testimonial hearsay statements made by victim would be admissible under a forfeiture by wrongdoing analysis. As previously argued, in order for testimonial statements to be admissible under the forfeiture by wrongdoing analysis, the defendant must act, not with a

possible intent, but with a specific intent to make the witness unavailable for another proceeding.

In its argument, the State cites several cases that suggest at least a partial motive to silence a witness is sufficient to trigger the forfeiture by wrongdoing doctrine, including *United States v. Houlihan,* 92 F.3d 1271, 1279 (1st Cir. 1996), *United States v. Dhinsa,* 243 F.3d 635, 654 (2d Cir. 2001), *United States v. Johnson,* 219 F.3d 349, 356 (4th Cir. 2000). Most of their cited cases by the State precede *Giles* and its unequivocal holding. The State asserts the Second Circuit, in *United States v. Vallee,* 304 F.App'x 916 (2d Cir. 2008), a post-*Giles* case, held that *any* intent, as a opposed to a *primary* intent to silence a witness is sufficient to trigger forfeiture by wrongdoing. While that may be the law in the Second Circuit, there is persuasive authority that holds to the contrary in a Wisconsin appellate case, previously cited by defendant. As it appears to definitely resolve the issue, it bears repeating. In *State v. Jensen (Jensen II),* 2011 WI App 3, 331 Wis.2d 440, 794 N.W.2d 482, the court said:

> First, *Giles.* In a much narrower interpretation of the forfeiture by wrongdoing exception to the Confrontation Clause than that espoused by our supreme court in *Jensen (Jensen II),* the United States Supreme Court, in *Giles,* held that a defendant forfeits his or her confrontation rights only when acting with intent to prevent the witness from testifying; the requirement of intent "means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable." *See Giles,* 128 S.Ct. at 2687 (citation omitted). … We adhere to the *Giles'* holding that because the Supremacy Clause to the United States Constitution compels adherence to United States Supreme Court precedent on all matters of federal law, although it means deviating form a conflicting decision of our supreme court. … The State claims that post-*Giles,* "logic" and case law "compel the conclusion that if [the State can prove] one reason Jensen killed his wife was to prevent her testimony in a family court action, then he forfeited the right to confront her at his murder trial." The State argues that if we reject its invitation to adopt a broad interpretation of the post-*Giles* forfeiture by wrongdoing exception, an error in admitting the challenged evidence was harmless beyond a reasonable doubt. We decline the State's invitation to adopt a broad interpretation of the post-*Giles* forfeiture by wrongdoing

> exception and leave for another day whether *Giles* should be read to permit testimonial evidence when the state can establish by a preponderance of the evidence that the defendant sought to prevent the victim from testifying in *any* court proceeding. *Id. at* ¶¶22, 26, 33-35.

The trial court never concluded defendant Reinwand acted with the primary purpose to make D.M. unavailable as a witness in his custody dispute. There simply were insufficient facts for the court to make such a finding. The trial court's finding was erroneous and must be reversed.

B. The error was not harmless.

The State makes no argument in opposition to defendant's assertion the erroneous admission of testimonial hearsay violated defendant's right to a fair trial because the error was not harmless. The State's concession is appropriate. The State's failure to respond to the argument is a concession that if error was committed on this point, it was not harmless.

II. DEFENDANT REINWAND SHOULD GET A NEW TRIAL BECAUSE THE TRIAL COURT ERRED IN ADMITTING OTHER ACTS EVIDENCE AGAINST HIM.

Defendant reasserts its argument from his brief-in-chief.

III. DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE TRIAL COUNSEL WAS INEFFECTIVE IN OPENING THE DOOR TO THE ADMISSION OF PREVIOUSLY EXCLUDED DNA EVIDENCE AT TRIAL.

Defendant concedes this error, in itself, is insufficient to warrant a new trial. As the State has not argued harmless error as it relates to the testimonial hearsay argument above, the defense does not cite this error as exacerbating that error; there is no reason to do so.

IV. DEFENDANT REINWAND SHOULD BE GRANTED A RESENTENCING BECAUSE TRIAL COUNSEL WAS INEFFECTIVE AT SENTENCING.

Defendant stands by his original argument on this issue. One cannot help but be troubled by trial counsel's decision related to sentencing. It is apparent defendant's trial attorneys did a good job throughout most of the trial. Trial counsels' decision to waive substantive argument on the issue of sentencing is indefensible. If trial counsel counseled defendant not to vigorously contest a life sentence without the possibility of parole, counsel was ineffective as a matter of law. Counsel had no right to quit at sentencing. That was not zealous representation. The State points out that one of his attorneys testified that defendant was told a presentence report would have been brutal (330:35). So what? Why was a concession for a life sentence a good idea under any circumstance? Why? Why? Why?

Defendant requests a resentencing.

CONCLUSION

For the reasons set forth above, defendant should be granted a new trial. In the alternative, defendant should be granted a resentencing.

Dated: 11/11/2017

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CERTIFICATION AS TO FORM AND 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 this brief is 2283 words.

Dated: 11/11/2017

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Philip J. Brehm

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 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 on or after this date and that 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: 11/11/2015

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Philip J. Brehm