STATE OF WISCONSIN
SUPREME COURT
****
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 BRIEF AND APPENDIX

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITY

ISSUES PRESENTED

I. WHETHER THE TRIAL COURT ERRONEOUSLY ADMITTED TESTIMONIAL HEARSAY STATEMENTS BY D.M. UNDER A FORFEITURE BY WRONGDOING ANALYSIS, THEREBY DENYING DEFENDANT HIS RIGHT TO A FAIR TRIAL.

On 6/26/14, the trial court ruled the State could call numerous witnesses to testify about testimonial hearsay statements the alleged victim, D.M., made to others (6/26/14 tr. at 3-10, App. at 115-22). On 4/5/17, the trial court orally denied defendant's motion for a new trial on this basis (333:3, App. at 102). On 4/24/17, an order denying a new trial on this basis was entered (299).

II. WHETHER THE TRIAL COURT ERRED IN ADMITTING OTHER ACTS EVIDENCE AGAINST DEFENDANT REINWAND THEREBY DENYING DEFENDANT HIS RIGHT TO A FAIR TRIAL.

On 10/6/14, the trial court ruled the State could present other acts evidence against defendant Reinwand (10/6/14 transcript. at 3-5, App. at 127-29). On 4/5/17, the trial court orally denied defendant's motion for a new trial on this basis (333:3, App. at 102). On 4/24/17, an order denying a new trial on this basis was entered (299).

III. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN OPENING THE DOOR TO THE ADMISSION OF PREVIOUSLY EXCLUDED DNA EVIDENCE AT TRIAL.

On 4/5/17, the trial court orally denied defendant's motion for a new trial on this basis (333:3-10, App. at 102-109). On 4/24/17, an order denying a new trial on this basis was entered (299).

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

On 4/5/17, the trial court orally denied defendant's motion for a new trial on this basis (333:10-15, App. at 109-114). On 4/24/17, an order denying a new trial on this basis was entered (299).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Any issue addressed by the Wisconsin Supreme Court warrants oral argument and publication.

STATEMENT OF THE CASE

On 5/24/13, a criminal complaint was filed Wood County Circuit Court against defendant Joseph B. Reinwand alleging the commission of the offenses of (1) first-degree intentional homicide; (2) arson with intent to defraud as a Class C felony; (3) felony bail jumping; and (4) felony bail jumping (24). On 8/17/13, a preliminary hearing was held (304). At the conclusion of the hearing, defendant was bound over for trial (304:75). On 9/3/13, an information was filed which alleged the same counts as the criminal complaint (32). On 9/12/13, defendant was arraigned (305). Defendant entered not guilty pleas to the charges (305:3).

On 1/14/14, the State filed a motion to admit other acts of defendant including burglary, theft and misappropriation of identity (58). On 10/6/14, the court granted the State's motion to authorize the admission of the evidence (10/6/14 tr. at 3-5, App. at 127-29).

On 1/6/14, the defense moved to sever the first-degree intentional homicide charge from the other three counts in the information (52). On 5/8/14, the court entered an order severing the first-degree homicide charge from the other counts (89).[1]

[1] The first-degree homicide file was renumber to 2013CF 196B. The remaining charges were disposed of separately under 2013 CF 196. Those charges will not be discussed further in this brief.

On 1/14/14, the State filed a motion requesting the admission of prior statements of the alleged victim, D.M. (58). On 5/7/14 and 5/8/14, as an offer of proof, witnesses testified as to relevant statements made to them by the alleged victim, D.M. (312, 313). On 6/26/14, the court ruled most of the statements made by D.M. to others would be admissible under forfeiture by wrongdoing analysis (314:3-10, App. at 115-122).

On 4/15/14, the defense moved to exclude DNA testing results prior to November of 2009 (79). On 9/14/14 and 9/15/14, the court took relevant evidence and argument related to the issue (316, 317). On 9/29/14, the court granted the defense motion related to DNA evidence (9:29/14 tr. at 6-9, App. at 123-26).

On 8/19/14, the State filed a motion challenging the defense's intended use of an expert on defendant interrogations, Dr. Gregory DeClue (120). On 8/29/14, a hearing was held on the issue (315). On 9/29/14, the court held the expert's testimony was inadmissible (9/29/14 tr. at 3-6, App. at 120-23).

A jury trial was held over several days, 10/20/14, 10/21/14, 10/22/14, 10/23/14, 10/24/14, 10/27/14, 10/28/14, 10/29/14 and 10/30/14 (320-330). At the conclusion of the jury trial, defendant was convicted of first-degree intentional homicide, as alleged (329:188-91). The parties proceeded directly to sentencing (329:191:94). After a brief presentation by the parties, the court imposed life in prison without the possibility of parole (329:204).

Defendant filed a timely notice of intent to seek postconviction relief (285). On 1/25/16, defendant filed a motion for a new trial and in the alternative a resentencing (286). On 10/19/16, a postconviction motion hearing was held (331). On 4/5/17, the court orally denied defendant's postconviction motions (333:2-15, App. at 101-114). On 4/24/17, an order denying postconviction relief was entered (299). On 5/3/17, a notice of appeal was filed (301). The matter was briefed. On 7/26/18, the court of appeals sought certification of forfeiture-by-wrongdoing issue to the Wisconsin Supreme Court. On 9/4/18, the Wisconsin Supreme Court accepted certification.

STATEMENT OF FACTS

Defendant Joseph Reinwand was accused of murdering D.M. between February 28, 2008 and March 4, 2008. D.M. was the father of defendant Reinwand's grandchild, E.M., then two years old (24). Defendant's daughter, JoLynn Reinwand, is the mother of E.M. (24). There were no eyewitnesses to the murder (24). The case against defendant Reinwand was circumstantial. A lengthy jury trial took place between October 20 and 30, 2014 (320-330). Many witnesses were called during trial. A substantial portion of the State's case against defendant Reinwand, including over 10 witnesses, testified about statements D.M. made to them about defendant Reinwand. At trial, witness after witness was allowed to testify that D.M. told them he was fearful of defendant Reinwand and that if anything happened to him that defendant Reinwand would be responsible for his death.

Prior to trial, a lengthy hearing was held over two days on the admissibility of these statements, May 7 and 8, 2014 (312, 313). During this hearing, 15 witnesses testified regarding these statements: (1) Alice Conwell, the former mother-in-law of defendant Reinwand; (2) Michael Steger, the son-in-law of Alice Conwell; (3) Renee Steger, the daughter of Alice Conwell; (4) Jodi Biadacz, a close friend of D.M.; (5) Todd Biadasz, a close friend of D.M.; (6) Brian Molepske, a friend of D.M. since high school; (7) Carrie Garrow, a person who knew defendant Reinwand since high school; (8) Randy Winkels, a long-time friend of D.M.; (9) Cynthia Fellowes, a long-time friend of D.M.; (10) Raymond Meister, the brother of D.M.; (11) Monica Cline, a long-time friend of D.M.; (12) Clinton Gyrion, a friend of D.M. and Randy Winkels; (13) Michelle Meister, the sister-in-law of D.M.; (14) Martin Baur, the pastor at D.M.'s parish church; and (14) Ethan Bauer, the son of defendant Reinwand (312, 313).

A summary of the relevant evidence each witness testified about during the motion hearing is set forth in the State's "Supplemental Legal Brief on Use of Statements of Victim [D.M.] at Jury Trial Based on 'Forfeiture by Wrongdoing' and 'Adoptive Admissions' by the Defendant Under §908.01(4)(B)2" (94). The relevant content of testimony from each witness as summarized by the State is as follows:

> (1) Alice Conwell: "D.M. provided Ms. Conwell with information on his relationships, his concerns about a contentious child custody/visitation matter regarding his daughter, [E.M.], and his concerns about the Joseph Reinwand. Also, [D.M.] told her to look at Joseph Reinwand if something happens to him."
>
> (2) Michael Steger: "In the weeks prior to his death, [D.M.] provided Mr. Steger with information on his relationships, his concerns about a contentious child custody/visitation matter regarding his daughter, and his fears about Joseph Reinwand possibly hurting [D.M.] physically or killing [D.M.]."
>
> (3) Renee Steger: "D.M. provided Ms. Steger with information on his relationships, his concerns about a contentious child custody/visitation matter regarding his daughter, and his fears about Joseph Reinwand, the controlling behaviors of Joseph Reinwand, and Joseph Reinwand possibly going to hurt him."
>
> (4) Jodi Biadacz: "[D.M.] told her that he was threatened by Joseph Reinwand. Often [D.M.] would talk about his tumultuous relationship with JoLynn Reinwand and the custody/visitation dispute. … Jodi also reported about overhearing a telephone call between [D.M.] and his brother Ray on the night of Monday, February 25, 2008. In the conversation Dale told his brother on the phone, 'if anything happens to me, its JoLynn's dad.'"
>
> (5) Todd Biadasz: "[H]e described several times when [D.M.] told him he was very concerned about Joseph Reinwand, he was threatened by Joseph Reinwand, and he was uncomfortable staying at his own trailer home as of February of 2008."
>
> (6) Brian Molepske: "[D.M.] told him about child placement disputes, not trusting Joseph Reinwand, and that Joseph Reinwand was interfering with the custody

matter. [D.M.] also told Brian that he was afraid of Joseph Reinwand."

(7) Carrie Garrow: "Carrie reported the last time she talked to [D.M.], he had just filed for visitation rights with his daughter. [D.M.] told Carrie that JoLynn was really mad. [D.M.] commented to her about feeling threatened from JoLynn's dad. [D.M.] said he felt like someone was driving past his trailer watching him. [D.M.] said Joe Reinwand was asking him personal questions that he felt were inappropriate."

(8) Randy Winkels: "[D.M.] was excited about increased visitation with his daughter, but also scared during the week before he was found dead. Winkels also overheard [D.M.] on the telephone arguing with JoLynn Reinwand. In February of 2008, [D.M.] provided Winkels with information that Joseph Reinwand got into a heated conversation with [D.M.] at [D.M.'s] trailer. He also told Winkels that Reinwand choked him up against the trailer during the heated conversation."

(9) Cynthia Fellowes: "[D.M.] told Cynthia that Joe Reinwand (Jolynn's father) was constantly meddling in their relationship. [D.M.] wanted Joe to leave them alone. Around Halloween of 2007 when she had coffe with [D.M.] at her house, [D.M.] told Cynthia about being threatened by Joe Reinwand. During the coffee meeting, [D.M.] expressed concern for his safety. Joe had been making comments to [D.M.] about kicking his ass. Joe told [D.M.] that he had guns and he if he wanted to, he could kill him with his feet. Joe also told [D.M.] that he had done it before and that no one would ever find his body. Cynthia remembered [D.M.] telling her that if Joe thinks [D.M.] is going to stay out of his baby's life, he has another thing coming. Cynthia also heard from [D.M.] that Joe made the comment to him 'I've killed once, I'm not afraid to do it again.'"

(10) Raymond Meister: "[D.M.] was nervous and told Ray that he had been threatened by JoLynn's father (Joe Reinwand).

(11) Monica Cline: "She described having emotional conversations with [D.M.] in February of 2008 regarding child custody issues and [D.M.'s] concerns about his life being in danger because of comments made to [D.M.] by Joseph Reinwand. During these conversations [D.M.] never told Monica to provide this information to the police or any other authority. In one part of the conversation with Monica, he told her that if anything

happened to him, she should tell the authorities to look at JoLynn's father, her aunt, and possibly another Reinwand family member."

(12) Clinton Gyrion: "[D.M.] talked to Clinton about being excited about more child visits with [D.M.'s] daughter. [D.M.] also expressed concerns about his well-being due to JoLynn Reinwand's father."

(13) Michelle Meister: "[D.M.] called Michelle on the evening of Wednesday, February 27, 2008 just before 7 p.m. [D.M.] talked to her about his visitation schedule to start the next day with his daughter E.M. [D.M.] told Michelle that JoLynn was resisting the start date for the visitation. According to Michelle from the phone call, [D.M.] had told JoLynn that she would get in trouble with the Court Commissioner if she did not allow him visituation on Thursday, February 28th. In conversations prior to the February 27th call, [D.M.] had told Michelle that if [D.M.] would up dead, look at Joe Reinwand because Joe had been threatening [D.M.]. During the February 27, 2008 phone conversation, Michelle reported that [D.M.] again mentioned Joe Reinwand threatening him. [D.M.] told Michelle that he was supposed to meet up with Joe 'in a little while here.' Michelle asked [D.M.] if he really thought Joe would kill him. [D.M.] said 'yes' he was capable of killing him and stated, 'he's really out there.' Michelle confronted [D.M.] in the call and said 'Why are you going to meet him?' At that point, [D.M.] said something about a gun and then switched the topic to JoLynn being really mad at him. During the February 27, 2008 call, Michelle could hear in [D.M.'s] voice that [D.M.] was scared. Michelle reported about another phone call about a week earlier. In that call [D.M.] told Michelle that Joe Reinwand had made the statement to [D.M.] 'if you press your visitation rights, you will never see E.M. again.' [D.M.] told Michelle that Joe had made other threats against [D.M.] and told her that if he turned up dead or missing, she should look at Joe Reinwand."

(14) Pastor Martin Baur: "[D.M.] told his pastor that he was afraid of Joseph Reinwand. [D.M.] was concerned for his own life. [D.M.] told the pastor that he expected to be dead and the person who did it would stage it to look like a suicide. [D.M.] met with the pastor on the afternoon of Monday, February 25, 2008 and they talked about [D.M.] getting visitation rights with his daughter E.M. [D.M.] told the pastor 'I should feel great, but I don't.' He was glad to get more visitation but did not want to see his former girlfriend JoLynn upset. He was

> also scared that his mediation efforts would make JoLynn, her father and her Aunt more upset. [D.M.] told the pastor that if he died, the pastor should look at Joe Reinwand and dig deeper into it. During his testimony at the motion hearing, Baur stated that there were at least five times that [D.M.] spoke of these topics."
>
> (15) Ethan Bauer: "[D.M.] told Ethan that he was afraid of Ethan's dad (Joe Reinwand). He was afraid that Joe Reinwand would kill him. [D.M.] was staring at Ethan when he told him that information. Ethan was 100% certain that [D.M.'s] statements were genuine. [D.M.] pressed Ethan and asked him if he thought his dad would kill him. [D.M.] also told Ethan that JoLynn was resistive of any type of agreed custody. " (94, 312, 313).

On 6/26/14, the trial court ruled on the admissibility of the relevant statements of the 15 witnesses (314:3-10, App. at 115-122). The court found what D.M. had told the witnesses about the child custody/placement issues was nontestimonial hearsay and was admissible (314:5, App. at 117).

As to other statements by D.M. about his fear of defendant Reinwand, the trial court ruled the statements were testimonial:

> The testimonial statements come into play when the various witnesses have stated if something happens to [D.M.], they were supposed to look to Mr. Reinwand. In making those statements, it's obvious that [D.M.] indicated if something happened to him, they should go to the police, they should look toward Mr. Reinwand. Those statements could be interpreted that the declarant is objectively foreseeing that his statement might be used in the investigation or prosecution of a crime. He was fearing for his safety and his well-being and he stated numerous times to numerous people that if something happens to him, that's what should take place. And therefore, those are testimonial, the confrontation clause applies (314:6, App. at 118).

However, the court authorized the admission of the testimonial statements on based on forfeiture by wrongdoing:

> In this case, the exception comes into play because there was litigation that was commenced. … In this case, numerous witnesses have indicated that the parties, that being [D.M.] and Mr. Reinwand's daughter, had a daughter together; that [D.M.] was seeking additional

> visitation and placement; that they had gone through mediation; that mediation resulted in an order being rendered; that Ms. Reinwand indicated that she was not going to comply with the mediation order, and Mr. Schmidt, who was representing one of the parties, indicated that the next step in that process if mediation was not successful or if it was not being complied with meant that it would have to be heard by one of the—by the trial court and that would result in litigation. The litigation obviously would require the testimony of each of the parties and therefore by having the homicide take place, Mr. Reinwand was ensuring that [D.M.] would not be available to testify at that type of hearing. I should also note that the *Giles*[2] at 554 U.S. 359 somewhat indicated that there isn't really a distinction when you have a person that hasn't commenced a lawsuit yet but is going to and is then made unavailable versus having a lawsuit and then simply making the person unavailable. Basically, you're accomplishing the same thing. In either respect, you're making sure that the person is unavailable and unable to testify at the hearing. Based upon that, again, I find and grant the State's motions to allow the forfeiture of wrongdoing and adopt the forfeiture by wrongdoing (314:7-8, App. at 119-120).

The court went on to hold certain statements made by D.M. to Randy Winkels, Cynthia Fellowes, Pastor Baur and Ethan Bauer would not be admissible at trial without a further offer of proof by the State (314:8-10, App. at 120-21).

At defendant's jury trial, 12 of the witnesses were called by the State and testified consistent with the trial court's pretrial ruling.

On 10/20/14, Randy Winkels testified D.M. expressed concerns about defendant Reinwand and that "he seemed a little scared" of him (320:157-58). On 10/27/14, he was recalled as a witness (326:152). During his second appearance, he testified he met with D.M. on 2/27/08 (326:153). During that meeting, D.M. told him he had a physical altercation with defendant Reinwand (326:154). D.M. told him at some unspecified time, defendant Reinwand threw him against his trailer and choked him (326:154).

[2] *Giles v. California,* 554 U.S. 353 (2008).

On 10/21/14, Jodi Biadacz testified she spoke with [D.M.] shortly before his death (321:22). D.M. told her he was scared of defendant Reinwand and that if anything happened to him, that defendant Reinwand would be the person responsible for it (321:23-25). She testified D.M. appeared frightened of defendant (321:24).

On 10/21/14, Michelle Meister testified D.M. told her defendant Reinwand threatened him and that D.M. would get visits with his daughter over defendant's dead body (321:65). She testified D.M. appeared worried (321:66). She testified D.M. told her that if he pressed for visits with his daughter, defendant Reinwand told him he would never see her again (321:69). She testified that D.M. believed that defendant was "out there" and that he would really kill him (321:71). She reiterated D.M. was frightened of defendant Reinwand (321:72).

On 10/21/14, Walter Sosin, D.M.'s cousin testified (321:119). Although he was not part of the State's earlier offer of proof in May of 2014, he testified that D.M. told him he had concerns about defendant Reinwand, that he was afraid defendant Reinwand was going to "kick his ass" (321:126-27).

On 10/21/14, Renee Steger testified that D.M. "feels like he may be threatened. He feels like [defendant] was going to come after him if he continued to pursue visitation. He felt threatened" (321:167). She testified D.M. expressed concerns about defendant Reinwand on multiple occasions and that he appeared agitated about the situation (321:168-69).

On 10/21/14, Monica Cline testified D.M. told her "he felt threatened, that if he was to pursue his visitation with [his daughter], that his life would be on the line and he took that very serious" (321:186). She testified she spoke with D.M. on February 26th or 27th, 2008, immediately before his death (321:195). She testified D.M. told her that two days prior to her last discussion with D.M., D.M. said he had a heated argument with defendant Reinwand (321:196). D.M. told her defendant Reinwand showed up at his residence, argued with him and while he left, he told D.M. that if he pursued any kind of visitation, that D.M.'s life was on the line (321:196).

On 10/21/14, Alice Conwell testified D.M. visited him shortly before his death (321:214-16). D.M. told her that if anything happened to him that she and others should look to defendant Reinwand (321:217). D.M. said that more than once

(321:218). D.M. expressed some fear of defendant Reinwand (321:218-19).

On 10/21/14, Ethan Bauer testified that D.M. talked to him the evening of 2/25/08, immediately before his death (321:240). D.M. told Ethan he was worried about his father, defendant Reinwand (321:242). D.M. told him he was worried that defendant Reinwand would harm him in some form or fashion (321:243). D.M. said defendant Reinwand had threatened him (321:243). D.M. mentioned to him that defendant Reinwand had threatened his life (321:244). D.M. asked him whether he believed defendant Reinwand would kill him (321:246).

On 10/21/14, Todd Biadasz testified he spoke with D.M. on 2/24/08 (321:305). He spoke about his visitation and mediation issues (321:305). D.M. told him that defendant Reinwand was going to harm him in some way (321:308). D.M. told him that defendant "said he was going to shoot him in the temple and he could get away with it" (321:308). D.M. repeated this "a couple of times" (321:308). D.M. told him that if anything happened to him that it was defendant Reinwand (321:308). He testified D.M. was nervous and concerned about the threats (321:309).

On 10/23/14, Michael Steger testified D.M. told him about his visitation issue in late February of 2008 (324:190). D.M. told him that he was afraid defendant Reinwand was going to hurt him and one day D.M. told him that he believed defendant Reinwand would hurt or kill him (324:191). D.M. told him that he had an argument with defendant Reinwand on 2/27/08 (324:197). D.M. told him that defendant Reinwand tried to make him angry (324:197).

On 10/24/14, Pastor Martin Baur testified about his conversations with D.M. shortly before his death (325:147-161). D.M. told him "that if he came up dead, the police should dig deeper because it would look staged" (325:158). D.M. told him defendant Reinwand would be responsible for his death (325: 159). He reiterated D.M. expressed a concern for his life (325: 160).

On 10/27/14, Cynthia Fellowes testified (326:167). She testified in the fall of 2007, D.M. told her defendant Reinwand had told him that he could kill him if he wanted to (326:178). D.M. was agitated when discussing this conversation (326:179).

Other facts will be presented as necessary in the following argument.

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. Relevant law.

The Confrontation Clause of the Sixth Amendment bars the use of testimonial hearsay statements unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington,* 541 U.S. 36, 54 (2004). The *Crawford* court noted that the Confrontation Clause "most naturally read[s] as a reference to the right of common law, admitting only those exceptions established at the time of the founding." *Id.* at 54.

In *Giles v. California,* (2008), the United States Supreme Court discussed exceptions to *Crawford* in the context of a murder case. In *Giles*, defendant Giles was accused of killing his ex-girlfriend, Brenda A. There were no other eyewitnesses to the shooting and killing of Brenda A. At trial, defendant Giles raised self-defense. Prosecutors sought to introduce statements that the victim had made to a police officer responding to her domestic abuse report. She had told the officer that defendant Giles had physically assaulted her, held a knife toward her in a menacing fashion and threatened to kill her if he found her cheating on him. The California Court of Appeal held that the admission of the victim's unconfronted statements at defendant Giles' trial did not violate the Confrontation Clause, as construed by *Crawford* because *Crawford* recognized a doctrine of forfeiture by wrongdoing. 19 Cal. Rptr.3d 843, 847 (2004). It concluded that Giles had forfeited his right to confront the victim because he had committed the murder for which was on trial, and because his intentional criminal act made the victim unavailable. The California Supreme Court affirmed. 40 Cal. 4th 833, 837, 152 P.3d 433, 435 (2007).

The United Stated State Supreme Court reversed. In the majority opinion, Justice Scalia wrote:

> The manner in which the rule was applied makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant **intended to prevent a witness from testifying**. (emphasis added). In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying declaration exception.

The court also wrote:

> The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to "dispensing with jury trial because a defendant is obviously guilty" *Crawford*, 541 U.S., at 62.

A Wisconsin case addressed forfeiture by wrongdoing before and after *Giles.* In *State v. Jensen (Jensen I)*, 2007 WI 26, 299 Wis.2d 267, 727 N.W.2d 518, the defendant was accused of killing his wife. Within the three weeks prior to her death, she told a neighbor, Wogt, that she believed defendant was trying to kill her. *Id.* at ¶5. Within two weeks prior to her death, she left a voice mail with Officer Kosman indicating that she thought defendant was trying to kill her. *Id.* at ¶6. She told him that if she was found dead, she did not commit suicide. *Id.* Finally, prior to her death, she gave a lengthy letter to Wogt that included an analysis as to why she believed her husband was trying to kill her. *Id.* at ¶7.

Defendant challenged the admissibility of these statements. The trial court admitted some of the statements. The case went to the Wisconsin Supreme Court. On appeal, the Court found the much of the content of the proffered evidence was testimonial. *Id.* at ¶34. The court remanded with instructions:

> If the circuit court determines in a pre-trial decision by the court, that Jensen caused his wife's unavailability, then the forfeiture by wrongdoing doctrine applies to

> Jensen's confrontation rights, an otherwise testimonial evidence may be admitted. *Id.* at ¶51.

The trial court authorized the admission of testimonial hearsay evidence under a forfeiture by wrongdoing analysis. Defendant Jensen was convicted of first-degree intentional homicide and appealed. While his case was on appeal, the United State Supreme Court decided *Giles.*

On appeal, in *State v. Jensen (Jensen II),* 2011 WI App 3, 331 Wis.2d 440, 794 N.W.2d 482, defendant Jensen argued the victim's letter and statements to police were erroneously admitted. While the court of appeals, agreed, citing *Giles,* it affirmed defendant conviction:

> 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. Instead, we assume the disputed testimonial evidence was erroneously admitted; however, we deem its admission harmless beyond a reasonable doubt given the voluminous corroborating evidence, the duplicative untainted

> evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case. *Id. at* ¶¶22, 26, 33-35.

In *Jensen v. Clements (Jensen III)*, 800 F.3d at 894 (7th Cir. 2015), the United State Supreme Court granted defendant Jensen a new trial, finding the testimonial hearsay statements admitted at his trial deprived him of his right to a fair trial.

B. Analysis.

The *Giles* court 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. 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 ruling the relevant statements were admissible in this case, the trial court held that because victim D.M. was **likely** to be a witness in a custody dispute between him and the mother of his daughter, that defendant Reinwand's killing of him made him unavailable as a witness in the custody dispute, triggering a waiver of his right to confront his witnesses. In finding the exception applied, the trial court did not make a finding defendant Reinwand acted with the specific intent to make D.M. unavailable as a witness in a later custody hearing. Nor could it have done so. There simply were not sufficient facts to support such a conclusion.

This was argued by the defense in its filing in opposition to the admission of testimonial hearsay statements:

> The more interesting question is whether or not Mr. Reinwand acted with intent to keep [D.M.] from testifying at a custody hearing in Wood county 06PA12. The mediation meeting, which was not a court hearing, occurred without incident. It appears some uncertainty developed after-the-fact and may have required a hearing to solve, but the most important fact is that no motion was filed by [D.M.] seeking a hearing in court on the

> issue of custody and placement. With the facts that we have in this case it is too hard to predict whether a hearing would have occurred. Did [D.M.] pay Attorney Schmidt enough of a retainer to cover the filing of a motion? How about enough money to actually go through a hearing? Could the parties ([D.M.] and Jolynn) work out their differences on their own? Could they maybe return to the mediator to try and resolve any issues? In theory, paternity cases are open forever for the purposes of filing a motion and requesting a hearing. There is no evidence to support the idea that [D.M.] threatened to take Jolynn to court for more time with E.M. At the end of the day it is just too much uncertainty on whether or not a hearing was every going to be scheduled let along be held on this issue. For that reason, the Court should deem all testimonial statements inadmissible because the State cannot prove Mr. Reinwand acted with the intent to keep [D.M.] from testifying at a hearing (95:10-11).

In ruling the statements were admissible, the trial court found the possibility D.M. would be a witness in a proceeding between Jolynn Reinwand and D.M. was sufficient to meet the admission standard of *Giles, ie.* that defendant acted with the intent to silence witness D.M. In so ruling, the trial court erred.

C. Further law on forfeiture by wrongdoing.

1. There are two legal reasons why the doctrine does not apply.

As the Court has accepted certification based in part on an analysis by the court of appeals, defendant presents additional argument that was not included in his original submissions to the court of appeals. Reinwand asserts there are two reasons why the forfeiture-by-wrongdoing doctrine does not apply to the facts of this case. First, as referenced above, defendant asserts the record does not support the conclusion defendant engaged in specific conduct "designed to prevent the witness from testifying," the applicable standard from *Giles,* 554 U.S. 359. Second, the defense is unaware of any post-*Giles* case that has held that testimonial hearsay statements by a deceased declarant are admissible against a defendant under the doctrine where the defendant did not seek, alone or with others, to prevent the decedent

from testifying against defendant in some other legal matter. In other words, in this case, the only relevant proceeding the trial court found the decedent may have testified in was a civil proceeding between Jolynn Reinwand and decedent D.M. Defendant Reinwand was not a party to that proceeding. For both reason, this Court should find the forfeiture-by-wrongdoing doctrine was erroneously applied by the trial court.

2. That defendant Reinwand may have killed D.M. is not a basis to admit the decedent's statements in these proceedings.

Giles stands for the proposition that a defendant's act in killing of a person cannot in itself form the basis for a court to conclude the defendant has forfeited his or her right to confront the witness. As noted in *Giles:*

> In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying declaration exception. 541 U.S., at 62.

This concept is amplified in Justice Johnson's concurring opinion in *Hunt v. State,* 218 P.3d 516, 520, fn. 1, 2009 OK Cr. 21 (Okla. Crim. App., 2009):

> The State's argument in favor admissibility goes thus: "If Defendant wanted to confront [the declarant] as a witness in a court of law regarding her statements of December 18, 2003, to the 911 operator and police, he should not have murdered her." (Appellee's Brief at 20) Obviously, whether the defendant murdered the declarant is the whole point of the trial. The circularity of such reasoning was noted by Justice Souter's separate opinion in *Giles. See Giles,* ___ U.S. at ___, 128 S.Ct. at 2649 (Souter, J., concurring in part) ("Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying").

3. State v. Baldwin.

Currently, in Wisconsin, the forfeiture by wrongdoing doctrine applies where: (1) a witness is unavailable to testify; (2) the State made a good faith effort to produce the witness to testify; (3) the defendant prevented the witness from testifying; and (4) the defendant intended to prevent the witness from testifying. *See State v. Baldwin,* 2010 WI App 162, ¶¶37-39, 48, 330 Wis.2d 500, 794 N.W.2d 769. In *Baldwin,* the defendant was found by the court to have engaged in acts designed to control and intimidate the alleged victim of domestic abuse, R.Z., not to come to defendant's trial. *Id.* at ¶¶22-23, 41. In support of the application of the doctrine, the State was able to present evidence that defendant, in a three-way call from the jail to the victim, was heard telling his podmate to tell the victim of the offense to draw up a notarized statement so she would not have to appear at trial. *Id.* at ¶22. There was ample evidence in the case that defendant Baldwin had successfully engaged in conduct designed that prevent R.Z. from testifying against him in a criminal proceeding about prior domestic abuse.

4. Conduct designed to prevent the witness from testifying.

In *Giles,* the court held a defendant only forfeits his or her confrontation rights only when he or she engages in conduct designed to prevent the witness from testifying. *Id.* 554 U.S. at 359. This means the defendant must act with the particular purpose of making the witness unavailable. *See Jensen II* at ¶22.

This standard has been discussed in cases in other jurisdictions. For example, in *United States v. Jackson,* 706 F.3d 264 (4th Cir. 2013), the defendant argued that unless the State could prove the defendant's sole motivation in making the witness unavailable was to prevent the witness's testimony, the forfeiture by wrongdoing doctrine was inapplicable. *Id.* at 267. In *Jackson,* the defendant argued that although the deceased witness was a witness against him regarding then-pending drug charges, he had two other motivations why he had killed the witness, because the witness's actions had harmed his drug enterprise and because the witness had stolen drugs from an associate. *Id.*

The court tersely rejected defendant's argument:

> We find no support in controlling precedent for Jackson's restrictive view of the forfeiture-by-wrongdoing exception, and in accord with several other courts that have addressed the issue, we decline to provide criminal defendants with an opportunity to avoid the exception by adducing some additional motive for their misconduct. *Id.*

Instead, the court adopted the lower court's finding on the matter:

> The district court in this case made an explicit finding that preventing Greene from testifying was a "precipitating" and "substantial" reason why Jackson murdered him. J.A. 845. There is ample support in the record for this finding, as Jackson told others that Greene "was an informant trying to bring down [Jackson] and his brothers" and that Greene "deserved" to be killed. J.A. 816. While it may be true that Greene was in some general sense bad for business or the target of retribution for robbing Garian "Boo" Washington, Greene's murder was set up within a very short time after Jackson learned that he was out of jail as an apparent reward for his cooperation with law enforcement. We conclude, under *Giles,* the district court's finding was sufficient to permit the admission of Greene's statement pursuant to the forfeiture-by-wrongdoing exception to the Confrontation Clause. *Id.* at 269-70.

In *Bibbs v. State,* 371 S.W.3d 564 (Tex.App. 2012), the court discussed the intent component of the forfeiture by wrongdoing analysis. In *Bibbs,* the defendant was accused of killing C.D., a person with whom he had had a relationship. During the process of breaking off her relationship with Bibbs, C.D. reported to police that Bibbs had broken into her residence on several occasions between 3/28/09 and 5/5/09. On 5/4/09, C.D. sought a protective order and was granted a temporary order of protection. The final hearing was set for 5/20/09. On 5/15/09, Bibbs killed C.D. He was charged with murder. At trial, the State introduced statements C.D. had given to a probation officer during the investigation of the earlier incidents.

While affirming on other grounds, the court found that the forfeiture-by-wrong doing doctrine did not apply:

> Next, the State contends that appellant waived his rights under the confrontation clause argument by engaging in conduct that is designed to prevent the witness, [C.D.], from testifying. *See Giles v. California,* 554 U.S. 353 (2008). However, a closer reading of *Giles* leads to the conclusion that the U.S. Supreme Court does not see the forfeiture by wrongdoing theory as waiving a criminal defendant's right under the confrontation clause unless the defendant engaged in this wrongful conduct specifically for the purpose of preventing the witness from testifying. *See Id.* at 367-68. This was also the holding of our sister court, the Forth Worth Court of Appeals, in *Davis v. State. See* 268 S.W.3d 683, 706 (Tex. App.-Fort Worth 2008, pet. ref'd). The evidence regarding appellant's motives for shooting [C.D.] include a theory that he did so to keep her from testifying before an administrative panel convened to possibly remove appellant's parole. However, the evidene was also presented that the trouble between appellant and [C.D.] was just as likely tied to appellant's obsession with [C.R.] after she decided to terminate their relationship. Accordingly, we do not find the application of the forfeiture of appellant's rights to confrontation because of his conduct to be applicable to this case. *Id.* at 569-70.

In the *Davis* case, cited in *Bibbs,* the court found the victim's statements to police about domestic abuse at the hands of the defendant prior to her murder were inadmissible hearsay because no evidence was presented the defendant had murdered the victim with an intent to prevent her from testifying. *Id.* at 703, 06.

In *People v. Burns,* 494 Mich. 104, 832 N.W.2d 738 (Mich. 2013), the court addressed a forfeiture-by-wrongdoing issue. In the case, the defendant was accused of sexually assaulting CB, a 4 year-old child victim. During the assault, the defendant was alleged to have told the victim that she should not tell anyone about the assault or she would get in trouble. During trial, the victim shut down and refused to testify. Her pretrial statements to a social worker were then admitted over the objection of the defense. The issue in the case revolved around whether defendant's actions were

sufficient to prove he intended to procure the victim's unavailability at trial. In finding they were insufficient the court wrote:

> Without the guidance of an explicit trial court finding to shed light on the record, defendant's contemporaneous statements to CB are consistent with the inference that defendant's intention was that the alleged abuse go undiscovered as they are with an inference that defendant specifically intended to prevent CB from testifying. Further, assuming defendant knew that CB would not disclose the abuse because of his directive, that knowledge is not necessarily the equivalent of the specific intent to cause CB's unavailability to testify as required by MRE 804(b)(6). Attempting to equate the two in every circumstance improperly assumes that a defendant's knowledge is always the same as defendant's purpose. In other words, whether a person in defendant's position would reasonable foresee that the wrongdoing might cause CB's unavailability is separate and distinct from whether defendant intended to procure the declarant's unavailability to testify at trial. We interpret the specific intent requirement of MRE 804(b)(6)—to procure the unavailability of the declarant as a witness—as requiring the prosecutor to show that defendant acted, with at least in part, the particular purpose to cause CB's unavailability, rather than mere knowledge that the wrongdoing may cause the witness's unavailability. *Id.* at 117.

Defendant concedes that admissibility should not turn on whether defendant's **sole** purpose in killing D.M. was to prevent him from testifying at a possible custody hearing between defendant's daughter Jolynn and D.M. That position, as advocated for by the defense in *United States v. Jackson* to that effect is implausible and unsupportable. However, whether the trial court had to find defendant was **primarily** motivated to make D.M. unavailable in the custody proceeding, as required in *Bibbs v. State,* or the slightly lesser burden from *United States v. Jackson,* that preventing D.M. from testifying in the custody proceeding was a **"precipitating" and "substantial" reason** why defendant murdered D.M., the trial court failed to make a finding supporting either standard. The trial court did not make the requisite finding from *Giles,* that the defendant in fact engaged in conduct designed to prevent the witness, D.M., from testifying. The court did not find the defendant acted

with that specific intent. Instead, like the approach rejected in *Burns*, the trial court equated the forseeability of defendant's actions in making D.M. unavailable in the later custody proceedings with his actual intended purpose. That is not the standard. The trial court's conclusion essentially was that because D.M. **could** have been a witness in a later custody proceeding, the standard was met. That is not the law.

5. As D.M. was not a witness against defendant in another proceeding, the forfeiture-by wrongdoing doctrine does not apply.

In its brief-in chief to the court of appeals, the State cited *U.S. v. Stewart,* 485 F.3d 501 (4th Cir. 2008) and *U.S. v. Gray,* 405 F.3d 227 (4th Cir. 2005) for the proposition that as long as a defendant acts with an intent to prevent a witness from testifying in *any* proceeding other than the homicide case, criminal or otherwise, the "conduct designed to present the witness from testifying" proof from *Giles* is met. Both of these cases were decided prior to *Giles.*

While *Gray* seems to broaden the definition of the term "witness" for purposes of a forfeiture-by-wrongdoing analysis, there are important limits to the definition, as is pointed out in the *Gray* opinion:

> The text of Rule 804(b)(6) requires only that the defendant intend to render the declarant unavailable "as a witness." The text does not require that the declarant would otherwise be a witness at any particular trial, nor does it limit the subject matter of admissible statements to events distinct from the events at issue in the trial in which the statements are offered. Thus, we conclude that Rule 804(b)(6) applies *whenever* the defendant's wrongdoing was intended to, and did, render the declarant unavailable as a witness **against the defendant**, without regard to the nature of the charges at the trial in which the declarant's statements are admitted. (emphasis added) *Id.* at 241.

This quote from *Gray* is consistent with law coming before and after *Gray.* In *State v. Thompson,* 286 F.3d 950, 961-62 (7th Cir. 2002), the court recognized:

> A defendant may waive his right to object on hearsay grounds to the admission of out-of-court statements made by a declarant whose unavailability he intentionally procured. *United States v. Dhinsa,* 243 F.3d 635, 653 (2nd Cir. 2001); *Ochoa,* 229 F.3d 639; Fed.R.Evid. 804(b)(6) (exempting from the prohibition against hearsay "statements offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness"). The primary reasoning behind this rule is obvious—to deter criminals from intimidating or "taking care of" potential witnesses **against them**. (emphasis added).

Giles recognized the rule applies "when a witness has been kept out of the way by the prisoner, or by someone on the prisoner's behalf, in order to prevent him from giving evidence against him." 554 U.S. at 361. Counsel is unaware of any post-*Giles* case that has authorized the admission of statements of an unavailable declarant under a forfeiture-by-wrongdoing analysis where the declarant was not a witness against defendant in either a criminal or civil trial.[3]

Limiting the application of the rule to situation where the witness is in fact a witness **against** defendant is a commonsense cut-off point. Trial courts should not endeavor to speculate about or create scenarios where the murder victim could have been a witness against defendant or defendant's interests in another proceeding. The more attenuated the subject of the witness's alleged knowledge is to defendant and his or her interests, the less likely it is truly "conduct designed to prevent the witness from testifying." At some point, it becomes a mere vehicle utilized by a trial court to defeat the pronouncement of *Giles.*

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[3] Counsel's research is consistent with that reached in the conclusion of the court in the slip opinion, *Commonwealth v. Joshua Rosado,* SJC-12467, Supreme Judicial Court of Massachusetts, September 14, 2008, were the court wrote, "We are aware of no case in which the doctrine of forfeiture by wrongdoing has been applied where a defendant did not seek, alone or with others, to prevent a witness from testifying against him, and the Commonwealth has cited no such case."

D. The error was not harmless.

1. Standard of review

In *State v. Hale,* 2005 WI 7, ¶¶60-61, 277 Wis.2d 593, 691 N.W.2d 637, the court said:

> The test for this harmless error was set forth by the Supreme Court in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), reh'g denied, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967). There, the Court explained that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24, 87 S.Ct. 824. An error is harmless if the beneficiary of the error proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 9. Although the Chapman standard is easy to state, it has not always been easy to apply. As a result, this court has articulated several factors to aid in the analysis, including the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case. *State v. Norman*, 2003 WI 72, ¶ 48, 262 Wis.2d 506, 664 N.W.2d 97; *State v. Billings*, 110 Wis.2d 661, 668-70, 329 N.W.2d 192 (1983).

2. Analysis.

Like in the *Jensen* case, the erroneous admission of D.M.'s testimonial hearsay statements was not insignificant. As to its impact on trial, there were at least 12 witnesses who testified about what D.M. had told them about his fear of defendant Reinwand. Each of these witnesses testified that D.M. was either afraid of defendant Reinwand and/or that if was found dead defendant Reinwand would be responsible. The presentation of these witnesses was a substantial portion of the State's case.

The evidence was obviously important to the State. At trial, it called most of the witnesses who testified at the offer of proof hearing. The evidence was of a quality likely to have had an impact on the jury. It suggested defendant Reinwand might have had a motive to harm D.M. While D.M.'s statements suggested defendant Reinwand might have had a motive to harm him, the basis for his beliefs were not well defined for the jury. This lack of definition would have allowed the jury to speculate that D.M. had good or compelling reasons for believing defendant Reinwand wanted to harm him. However, without an opportunity to cross-examine D.M. in the presence of the jury, the right *Giles* deems of critical importance, the defense had no way of testing the accuracy of D.M.'s beliefs.

The testimonial hearsay statements of D.M. were not admissible in any other form. The State did not present this evidence through other witnesses because there was no other way for it to do so. The evidence was not duplicative of other evidence presented at trial.

As to the strength of the State's overall case, this was a circumstantial case. There obviously was evidence tending to show defendant may have killed D.M. The defense had the inability to point to other possible suspects. While there were some incriminating statements made by defendant to law enforcement, they are fairly characterized as equivocal. There was no compelling evidence tying defendant to scene of the murder.

Ultimately, given the sheer volume and quality of the erroneously admitted evidence, the State is unable to demonstrate beyond a reasonable doubt that the erroneous admission of the evidence did not contribute to defendant's conviction. Defendant must be granted a new trial based on the erroneous admission of this evidence.

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

A. Relevant facts.

In January of 2014, the State filed a motion to introduce other acts evidence against defendant, including that he had burglarized his neighbor's (Terry Pelot's) house, that he had stolen items from the residence and from Varga and that he had obtained a driver's license in Pelot's name in January of 2007 (59). The defense filed a brief objected to the admission of this evidence (68). On 10/6/14, the trial court found the evidence was admissible (10/6/14 tr. at 3-4, App. at 127-29):

> Then, with respect to the other acts evidence, I had the opportunity to review the transcripts of the taped statement that was taken from Mr. Reinwand and after doing so I find that during that interview Mr. Reinwand was not asked or questioned directly about the other acts, that he is the one that initiated the conversation with respect to that, and again I'm making a reference to his loss or lack of memory concerning doing certain acts and the issue is whether that should be admitted or not and I am going to allow the testimony about loss of memory and then his ability to recollect certain other bad acts. Again, I believe that goes to showing the overall panorama of the interview, number one. Number two, I think it also goes to inconsistent statements that were made by Mr. Reinwand. In other words, in one incident he's saying that he doesn't recall and in the next he indicates that he does have memory of those and I understand that it goes to other bad acts evidence and you can look and do a *Sullivan* analysis and look that it does go for another purpose, more specifically intent or motive. So there is a basis and I find that it is highly relevant; and lastly, that I don't find the prejudicial value is outweighed by the prejudicial fact in this case. So those statements will be admissible.

The other acts evidence was introduced during trial. Officer Tad Wetterau testified defendant could not remember having stolen items from Terry Pelot or Marty Varga even though they were found in his house (323:171). Officer Wetterau confirmed items stolen from Pelot were found

during a search of defendant Reinwand's residence in April of 2010 (324:110). Officer Wetterau confirmed items of property stolen from Varga were found in defendant Reinwand's residence (324:113). Defendant's daughter, Jolynn Reinwand testified defendant Reinwand had admitted to her he burglarized Pelot's residence (324:298). Terry Pelot testified he became aware his house was burglarized on 1/3/07 (326:102). Defendant Reinwand denied committing the burglary to him (326:111). He testified he was out of the country when a driver's license was issued in his name (326:129). Jeffrey Mace, a former employee of the Wisconsin Department of Motor Vehicles provided testimony tending to show defendant Reinwand had obtained a drivers license using Terry Pelot's name in January of 2007 (326:47-65).

B. Relevant law.

As stated in *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983):

> Upon review of evidentiary issues, "[t]he question on appeal is not whether [the reviewing] court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts in the record." (citation omitted). Thus, the test is not whether this court agrees with the ruling of the trial court, but whether appropriate discretion was exercised. (citation omitted). This court will not find an abuse of discretion if there is a reasonable basis for the trial court's determination. (citation omitted). For a discretionary decision of this nature to be upheld, however, "there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth." (citation omitted.)

In *State v. Sullivan*, 217 Wis.2d 768, 576 N.W.2d 30 (1998), the court addressed the admissibility of other acts evidence. Per *Sullivan*, the following analysis must be performed by the trial court in determining whether to admit other acts evidence pursuant to Wis. Stat. §904.04(2):

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2) such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident? (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? Id. at ¶¶5-9.

C. The other acts evidence was erroneously admitted.

The evidence was erroneously admitted for the reasons argued in defendant's pretrial filing on the issue (68). The defense noted the State was attempting to introduce the evidence to show a "consciousness of guilt" and to attack the credibility of defendant (68:4). It correctly argued:

> "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 criminal charge." *State v. Bettinger,* 100 Wis.2d 691, 698, 303 N.W.2d 585, 589 *and modified* 100 Wis.2d 691, 699a, 305 N.W.2d 57 (1981). The Pelot burglary and subsequent letter to T.R., do not fit this exception and thus are not relevant. The Pelot Burglary occurred prior to [D.M.]'s death. The incidents are completed unrelated. In the "consciousness of guilt" situation the "other act" must be an act done to somehow advance the principal crime or assist in covering it up. Mr. Reinwand telling the officers he cannot recall committing the Pelot burglary does nothing to advance the principal crime charged—[D.M.]'s murder (68:5-6).

As to the State's admissibility theory related to credibility, asserted to be supported by the law from *State v. Johnson,* 184 Wis.2d 324, 516 N.W.2d 463 (Ct.App. 1994), the defense correctly asserted mere relevance to credibility is insufficient to trigger admission. In *Johnson,* the court held:

> We conclude that the evidence was relevant to a proposition of consequence other than Peterson's character and any inference that she acted in conformity therewith. Unlike the other category of other acts evidence involving Peterson's ex-husband, this evidence, viewed from the theory of defense, is directly linked to the criminal events charged against Johnson. The probative value of other acts evidence is partially dependent on its nearness in time, place and circumstances to the alleged act sought to be proved. *Id.* at 467.

While the trial court ruled the evidence was relevant to "motive or intent," the record does not support that conclusion. Events occurring prior to the alleged murder in this case, including the burglary of Pelot's residence, the theft of items from him and others and defendant's act of identity theft against Pelot were completely divorced from the facts of the murder of D.M. and were not indicative of defendant Reinwand's motive or to kill D.M. Nor were these offenses directly relevant to defendant's credibility as it related to the homicide offense. They were inadmissible other bad acts introduced for an improper purpose. These facts were admitted in error. Defendant asserts this error also contributed to his conviction and provides additional support in favor of his motion for a new trial.

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.

A. Relevant facts.

During its direct of the State's DNA expert, Jennifer Honkanen, the State elicited that a piece of gun grip found in defendant Reinwand's vehicle yielded discernible DNA (325:189). The expert was unable to tie the DNA to a specific person (325:190). However, in the process of his cross-examination, defense attorney Troy Nielsen opened the door to evidence regarding the 2008 testing of the gun grip, previously excluded by the court (325:223-24). Instead of the jury hearing evidence that tests were inconclusive as to whether defendant's DNA was on the grip, the jury was allowed to hear that there was a fairly high statistical likelihood defendant's DNA was on the gun handle, that only one in 61,000 people had that DNA array, including defendant (325:230).

B. Trial counsel was ineffective.

In *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305, the Wisconsin Supreme Court discussed ineffective assistance of counsel. In *Thiel*, the court said:

> In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's representation was deficient. (citation omitted). The defendant must show that he or she was prejudiced by deficient performance. Counsel's conduct is constitutionally deficient if it fall below an objective standard of reasonableness. (citation omitted). When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." (citation omitted). Counsel need not be perfect, indeed not even very good, to be constitutionally adequate. (citation omitted). In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (citation omitted). Id. at ¶¶18-20.

Defendant Reinwand asserts trial counsel was ineffective in authorizing the admission of the 2008 DNA testing results. Prior to trial, the defense moved to exclude the 2008 results (79). The court had ruled the 2008 testing results were inadmissible at trial (9/24/14 tr. at 6-9, App. at 123-26). Trial counsel's action in opening the door to the 2008 results was deficient performance. Given the pretrial motion, trial counsel obviously knew the importance of keeping out the 2008 test results as it related to the gun grip. Nevertheless, and without any discernible benefit to the defense, defense counsel questioned the State's DNA expert regarding 2008 results at trial (325:216). Defense counsel's actions left the court with no reasonable alternative but to authorize the 2008 test result as it related to the gun grip out of fairness to the State.

It was deficient performance by trial counsel to introduce some of the 2008 test results without recognizing the reality that this would trigger the admissibility of the gun grip result. Trial counsel had to know that he could not discuss some of the 2008 test results without the trial court allowing the State to do so as well.

As to prejudice, it is readily apparent the action was prejudicial. Instead of the jury hearing defendant Reinwand's DNA was not identified on the gun grip, the jury heard that statistically, it was extremely likely that defendant Reinwand had handled the gun grip or that he was a victim of an incredible coincidence.

Defendant Reinwand does not contend this error in itself is sufficient to warrant a new trial. However, this error, coupled with the errors outlined above, provides further support for defendant Reinwand's motion for a new trial.

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

Defendant was convicted of first-degree intentional homicide. Such an offense is always going to be grave and serious. The penalty of the offense is a mandatory life sentence. However, parole eligibility could have been set in as little as 20 years. There was also the possibility of defendant receiving a life sentence, without the possibility of parole, the most onerous sentence possible in the State of Wisconsin. Defendant received the most onerous penalty possible in the State of Wisconsin.

When one looks at the record, it appears the defense all but conceded a life sentence without the possibility of parole. During the postconviction motion hearing, defense counsel admitted he believed defendant was going to get a life sentence no matter what he argued (331:29). Defense counsel's argument barely spanned two pages of the transcript (329:198-99). It did not include any potentially favorable information about defendant Reinwand (329:198-99). The defense did not request a presentence report or a continuance after nine days of trial (329:191-93). It did not request an opportunity to compile and to provide mitigating information about defendant to the trial court (329:191-94).

In *State v. Pote*, 2003 WI App 31, ¶41, 260 Wis.2d 426, 659 N.W.2d 82, the court said:

> We conclude that Pote suffered prejudice on account of his counsel's failure to adequately represent him at the resentencing. Had counsel made the relevant mitigating arguments legitimately available to Pote on this record, or had he taken steps that would have permitted another attorney to do so on another day, it is "reasonably probable" Pote would have received something less than the maximum sentence. *See McCleary v. State*, 49 Wis.2d 263, 275, 182 N.W.2d 512 (1971) ("[T]he legislature intended that maximum sentences were to be reserved for a more aggravated breach of the statutes, and probation or lighter sentences were to be used in cases where the protection of society and rehabilitation of the criminal did not require a maximum or near-maximum sentence."). In short, Pote could not have fared any worse than he did and our "confidence in the outcome" of the sentencing proceeding is "undermine[d]." *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Like the defendant in *Pote*, defendant Reinwand could not have fared worse than he did. Only a cursory argument was made on his behalf. No effort was made to discuss things like defendant's love of his grandchildren and his family or medical information about his memory issues and how that may have affected his presentation to others. Given the serious nature of the conviction, the cursory presentation was de facto deficient performance; more was required by defense counsel. As defendant received a maximum sentence, and no effort was made to present mitigating information about defendant, he was prejudiced as a result. If defendant is denied a new trial, defense 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: 9/29/2018

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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 10975 words.

Dated: 9/29/2018

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Philip J. Brehm

APPENDIX CERTIFICATION

I certify that filed with this brief, as part of this brief, an appendix complying with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court entries; (3) the findings or opinions of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning related to those issues.

I further certify if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: 9/29/2017

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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: 9/29/2015

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Philip J. Brehm

INDEX TO APPENDIX