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STATE OF WISCONSIN
SUPREME COURT
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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

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TABLE OF CONTENTS

CASES CITED

ARGUMENT

Summary of argument

The State makes three substantial arguments why defendant should not prevail on this issue. First, the State suggests the relevant statements made by decedent D.M. are not testimonial hearsay. Second, the State argues that if the statements are testimonial hearsay, they were properly admitted under a forfeiture by wrongdoing analysis. Third, the State argues that regardless of whether the statements were improperly admitted, any error in their admission was harmless. Defendant will address each of these arguments.

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

A. *Ohio v. Clark*.

The State argues that the trial court erred in finding D.M.'s statements to others were testimonial (State's brief at 27). The State makes this argument based on the law set forth in *Ohio v. Clark,* 135 S.Ct. 2173 (2015). In *Clark,* the issue was the admissibility of statements made by a three-year old victim of abuse to a teacher. In *Clark,* the court set forth an updated framework for an analysis of whether a witness's statements are testimonial. In *Clark,* the court recognized the *Crawford*[1] court had not exhaustively defined what "testimonial hearsay." *Id.* at 2179. At a minimum, it included "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* The *Clark* court said a statement cannot fall within the Confrontation clause unless its primary purpose was testimonial. *Id.* In *Clark,* the court found the child victim's statement to the teacher was made to meet an emergency and not to establish evidence against the defendant. *Id.* at 2181.

[1] *Crawford v. Washington,* 541 U.S. 36 (2004).

The court found that since very young witnesses would not have a keen understanding of the concept of prosecuting the perpetrator, there would typically not be an intent on the part of a child to ensure his or her statement to a third party would serve as a substitute for trial testimony. *Id.* at 2182. The court recognized statements made to a person other than law enforcement made it less likely to be testimonial. *Id.* However, in *Clark,* the court did say:

> In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to person other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers.

The State quotes *State v. Mattox,* 2017 WI 9, ¶32, 373 Wis.2d 122, 890 N.W.2d 256, which discusses *Clark:*

> *Clark* instructs that some factors relevant in the primary purpose analysis include: (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 of the statement given.

Defendant asserts the trial court correctly concluded the relevant statements were testimonial when it decided this issue on 6/24/14, almost one year before *Ohio v. Clark* was decided on 6/18/15. *Clark* does nothing to seriously call into the questions the correctness of the trial court's ruling on this point. Unlike in *Clark,* the relevant statements were not made to meet an ongoing emergency. They were not made by a three-year old child, but rather an adult, who would have had an appreciation of the utility of such statements at a future trial. Finally, regardless of whether the statements were made to law enforcement or a layperson, the relevant statements were obviously made by D.M. to create an out-of-court substitute for trial testimony. Why else would D.M. have made the statements? Essentially, he said to each witness, "If

I am not around to testify about what defendant said to me or what defendant did to me, you will be able to recount these statements at a later trial." The focus should be on the relevant statements within the conversation, not the entirety of the relevant conversation. In other words, some portions of a conversation would properly be categorized as nontestimonial while others portions may be testimonial.

It cannot be said the trial court erred in determining the relevant statements were testimonial. This court should uphold the trial court's ruling.

B. Forfeiture by wrongdoing.

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. The State concedes as much in its brief (State's brief at 28-29). The State argues that if it can be shown the decedent was going to be a witness against defendant's interest, that is sufficient to invoke forfeiture by wrongdoing (State's brief at 32). It argues, that any contrary rule would reward unscrupulous defendants who kill potential witnesses before they testify (State's brief at 36).

The State's argument on this point is logically infirm. The State seems to acknowledge that a defendant can kill a person because he hates him and forfeiture by wrongdoing rule does not apply per *Giles.* Apparently in this situation, there is nothing unscrupulous about the defendant's actions in killing the witness against him. However, if a defendant kills a person, and the decedent had the potential of being a witness against an interest of the defendant in some civil or criminal matter, no matter how insignificant, then forfeiture by wrongdoing applies, regardless of whether that was the real motivation for the homicide.

C. The error was not harmless.

For the reasons previously argued, the above error was not harmless. The relevant evidence was huge component of the State's case. Had this evidence not been presented, the State's case would have been substantially weakened.

CONCLUSION

For the reasons set forth above and in defendant brief-in chief, defendant should be granted a new trial. In the alternative, defendant should be granted a resentencing.

Dated: 12/9/2018

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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 1841 words.

Dated: 12/9/2018

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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: 12/9/2018

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Philip J. Brehm