STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2017AP001114-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JARMEL DONTRA CHISEM,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE JEFFREY A. WAGNER PRESIDING

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STATEMENT OF THE ISSUES

1. Did the circuit court misuse its discretion by denying Chisem's motion to sever himself from his codefendant Howard Davis and ordering that they be tried to together?

Circuit Court Answer: No.

2. Were Chisem's confrontation rights violated when his codefendant's out-of-court hearsay statements were introduced at their joint trial and the codefendant exercised his Fifth Amendment privilege not to testify, depriving Chisem of his right to cross examine his codefendant?

Circuit Court Answer: No.

3. Did the trial court misuse its discretion under the discovery statute when it allowed Willie Nelson to testify

even though a police detective negligently lost the recorded interview?

Circuit Court Answer: No.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication. This case can be decided on the basis of the record alone and well established principles of law.

STATEMENT OF THE CASE

On August 24, 2014 a criminal complaint (R1) was filed in the Milwaukee County Circuit Court charging the defendant with: (Count One) party to the crime of first degree reckless homicide while using a dangerous weapon as a repeater, contrary to Wis. Stat. §§ 940.02(1), 939.05, 939.62(1)(c) and 939.63(1)(b); (Count Two) party to the crime of first degree recklessly endangering safety while using a dangerous weapon as a repeater, contrary to Wis. Stat. §§ 941.30(1), 939.05, 939.62(1)(c) and 939.63(1)(b); (Count Three) possession of a firearm by a felon as a repeater, contrary to Wis. Stat. §§ 941.29(2) and 939.62(1)(b). Chisem was joined with Codefendant Howard Davis in counts one and two. Count 4 of the complaint charged Davis with possession of a firearm by a felon as a repeater.

The complaint (R1) alleged that on June 6, 2014, Officer Ryan Fekete of the Milwaukee Police Department responded to a shooting in the area of 16th Street and West North Avenue in the City of Milwaukee. Upon arrival, he observed a black male, later identified as Raymond Harris,

lying face down in a large pool of blood. Harris appeared to have multiple gunshot wounds. (R1:2-3) Officer Fekete attempted life saving measures until the Milwaukee Fire Department took over. Mr. Harris was pronounced dead on the scene.

As Officer Fekete, was tending to Harris, Officer Leon Davis observed a second injured person, later identified as Jacques Walker, suffering from a gunshot wound to the right side of his abdomen. Walker indicated he was with his friend "Ray" when he heard several gunshots, one of which struck him.

Detective Kent Corbett spoke with Raymond Harris' sister, Deion Smith. Ms. Smith stated that her brother told her that he had shot a person by the name of "GT" in the summer of 2013. Ms. Smith subsequently identified "GT" as Howard Davis.

During their investigation of the case, Milwaukee police detectives reviewed surveillance video of the incident and identified a vehicle at the scene of the homicide as a vehicle belonging to a person named Fabian Edmond. Edmond was interviewed and he identified the second

vehicle in the video, what appeared to be a Saturn Outlook, as a vehicle being driven by "J World." Edmond later identified that person from a photograph as Jarmel Chisem. He stated that the front passenger was "GT," who he identified in a photograph as Howard Davis. Edmond indicated that those were the only two individuals he saw in the vehicle.

Edmond further stated that a few months ago, "Lil Ray" [i.e., the victim Raymond Harris] had shot "GT." In a subsequent interview, Edmond indicated that he saw someone firing from the silver Saturn Outlook. He stated that while he was on North 16th Street, he observed muzzle flashes from the driver's side of the Outlook as he heard gunshots.

The detectives also spoke with Ernest Davis. Davis indicated that he was with Edmond at the time of the incident. Davis stated that while he was driving with Edmond he observed a silver Saturn truck, which he knows to be driven by Jarmel Chisem. The vehicle was stopped in the middle of North 16th Street. He then heard several gunshots and could observe that the driver's window and

rear driver's side window were "lighting up." Earnest Davis later saw Chisem and Howard Davis together. Earnest Davis stated that Chisem said, "This ain't never to be talked about again."

Police Officer Stephanie Seitz received information that Chisem and a silver Saturn Outlook may have been involved in the homicide of Raymond Harris. Based on this information, she responded to 4835 North 41st Street. At that location Seitz located both Chisem and a Saturn Outlook. Detective Dennis Devalkenaere later spoke with the listed owner of the Saturn Outlook, Verneadia Zollicoffer. Zollicoffer indicated that the only two people who drive the Saturn Outlook are herself and Jarmel Chisem. (R1:3).

Detective Timothy Graham spoke with Antonio Bonaccorso. (R1:4) Bonaccorso indicated that he had known both Davis and Chisem for an extended period of time. He indicated that while eating lunch, he heard Davis and Chisem talking about a homicide. Davis stated that during the shooting "Jaque" also got shot. Davis said that both himself and Chisem were the shooters. Bonaccorso noted

that both Chisem and Davis were laughing about the homicide.

On December 23, 2014 Chisem filed a motion to sever defendants. (R11) In that motion, Chisem argued that he should be tried separately from Davis for essentially two reasons. First, a claim that evidence might be introduced against Davis at the joint trial that might not be admissible against Chisem if Chisem were tried separately. In particular, the evidence that Davis had a motive to kill Harris because Harris had shot him. (R11:1-13) Second, a claim that Davis and Chisem might raise antagonistic defenses. (R11:14)

On January 5, 2015 a hearing was held on Chisem's motion to sever and on the motions in limine filed by the state and Codefendant Davis.[1] (R84)

Chisem's attorney argued "that under ***Haldane,***[2] we are talking about an entire line of evidence that has

[1] The case had actually been scheduled for trial that day but both the state and the defense requested an adjournment. (R84:2-3)

[2] ***Haldane v. State,*** 85 Wis. 2d 182, 189, 270 N.W.2d 75, 78 (1978)

absolutely nothing to do with my client Mr. Chisem." (R84:12). Counsel for Chisem argued:

> Retribution evidence, as I've deemed it in the motion that was filed on the previous date, deals with the fact that my client has been grouped into this incident allegedly based upon retribution evidence proffered by Deion Smith and Aaliyah Holloway and Vernicia Davis, along with other people who are going to be called as witnesses by the state.
> ……..
>
> Mr. Chisem is going to be sitting in front of a jury, curative instruction or not, being grouped with this family, which the Davises are really the crux of all of this, this dispute between Raymond Harris and members of the Davis family, that I don't think is going to be a development that can be unwound, so to speak.
>
> In other words, if the state is going to be arguing that Mr. Chisem and Mr. Davis are friends and have been together, known each other forever, the implicit argument being, well, a friend is going to shoot somebody else in retribution, but in fact, we have no link to Mr. Chisem. He's not put at the scene of this shooting back with Harris.

(R84:12-13)

The following day, January 6, 2015, the circuit court denied the defendant's motion to sever. (R85:2-3):

> As to the severance issue, the court believes that, pursuant to § 971, that the court's not going to sever the cases. The court would try them as joined together. The fact that there's some evidence that may be greater than evidence on another individual really doesn't – it's not a specific – it's a factor to consider, but it's not certainly a ground for severance. And the court believes that a jury is able to follow the instructions in keeping the – in reaching separate conclusions as to the facts in the case.
>
> The final fact is that the court's not going to allow for severance pursuant to the statute.

(R85:2-3)

On February 27, 2015 a final pretrial was held. (R86) The court clarified its prior rulings and the case was continued on the trial calendar for March 9, 2015.

From March 9 to March 11, 2015 Chisem and Davis were tried together. Chisem was convicted on Count One (PTAC first degree reckless homicide while using a dangerous weapon as a repeater) and Count Two (PTAC first degree recklessly endangering safety while using a dangerous weapon as a repeater). Chisem was found not guilty on Count Three (possession of a firearm by a felon). (R93:6-8) The evidence and testimony presented at trial

will be discussed in connection with the arguments raised below.

On May 8, 2015 Chisem appeared before Judge Wagner for sentencing. (R94) On Count One, the court imposed a sentence of 40 years to the Wisconsin State Prisons. That sentence was divided up into 28 years of initial confinement followed by 12 years of extended supervision. On Count Two, the court imposed a sentence of 9 years, divided up into 7 years of initial confinement followed by 2 years of extended supervision. The sentences were ordered to run consecutive to each other, but concurrent to any other sentence the defendant was serving. (R94:39)

On March 1, 2017 Chisem filed a motion for postconviction relief. (R56) On April 14, 2014 the state filed a response to the Chisem's postconviction motion. (R62) On May 12, 2017 Chisem filed a reply to the state's response. (R70) On May 26, 2017 the trial court filed a decision and order denying Chisem's postconviction motion. (R72)(See Appendix at A1-A9) Chisem now appeals to this court and demands a new trial for the following reasons:

ARGUMENT

I. THE CIRCUIT COURT MISUSED ITS DISCRETION WHEN IT DENIED CHISEM'S MOTION TO SEVER HIMSELF AND DAVIS FOR TRIAL BECAUSE AN ENTIRE LINE OF EVIDENCE RELEVANT TO DAVIS' LIABILITY ALSO CAME IN AGAINST CHISEM AND THAT EVIDENCE WOULD NOT HAVE BEEN ADMISSIBLE IF CHISEM HAD BEEN TRIED SEPARATELY AND THIS SUBSTANTIALLY PREJUDICED CHISEM

A. Standard of Review

Generally, questions of consolidation or severance are within the trial court's discretion. ***State v. Locke,*** 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). On review, the decision of the trial court will not be disturbed unless there has been a misuse of discretion. ***Kluck v. State,*** 223 Wis. 381, 387-388, 269 N.W. 683 (1937).

When a motion for severance is made, the trial court must determine what, if any, prejudice would result from a trial on the joined offenses. ***Locke,*** 177 Wis. 2d at 597. The court must then weigh this potential prejudice against the interests of the public in conducting a trial on the multiple counts. ***Id.***

An erroneous exercise of discretion, in the balancing of these competing interests, will not be found unless the defendant can establish that failure to sever the counts caused "substantial prejudice." ***Id.*** In evaluating the potential for prejudice, courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant. ***State v. Bettinger,*** 100 Wis.2d 691, 695, 303 N.W.2d 585, 587 (1981).

B. Evidence That Davis Had a Motive to Kill Harris Would Not Have Been Admissible Against Chisem if Chisem Had Been Tried Separately and it Caused Chisem Substantial Prejudice

Although the decision to join or sever defendants is a discretionary decision, joinder and severance of defendants in a criminal case is also governed by Wis. Stat. §§ 971.12(2), (3), and (4).[3] A trial court has power to try

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[3] "971.12. Joinder Of Crimes And Of Defendants. . . . (2) Joinder Of Defendants. Two or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting one or more crimes.

defendants together when they are charged with the same offenses arising out of the same transaction and provable by the same evidence. ***Haldane v. State,*** 85 Wis. 2d 182, 189, 270 N.W.2d 75, 78 (1978). As the Wisconsin Supreme Court stated in ***Lampkins v. State,*** 51 Wis.2d at 572, 187 N.W.2d at 168: "Consolidation is a procedural mechanism which avoids repetitious litigation and facilitates the speedy administration of justice." ***Id.***

Nevertheless, there may be "circumstances where a joint trial would be unduly prejudicial to the interests of

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Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

"(3) Relief From Prejudicial Joinder. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if he intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

"(4) Trial Together Of Separate Charges. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment."

either or both of the defendants; and in that case the interests of administrative efficiency must yield to the mandates of due process. Such circumstances are found where the defendants intend to advance "conflicting or antagonistic defenses." ***Id.*** (citing ***Lampkins,*** 572, 187 N.W.2d at 168). Severance may also be granted where there is danger that an entire "line of evidence" relevant to the liability of only one defendant may be treated as evidence against all defendants by the trier of fact simply because they are tried jointly. ***Id.***

1. Line of Evidence

At trial, the state called the victim's sister, Deion Smith, as a witness for the state. (R88:98-103) Over defense counsel's hearsay objection, Smith testified that she had spoken with her brother (Raymond Harris) about him shooting Howard Davis in June 2013 and her brother told her that "Bitch ass nigger supposed to be dead." (R88:99) Her brother (Raymond Harris) told her that he shot Davis ("GT").[4] (R88: 100, 102-03)

[4] Although the trial court ruled that the Harris"s statements would come in under the statements against interest exception

The state also called Vernecia Davis, a friend of Raymond Harris' mother. She testified that she was very close with the Raymond Harris and that she had known Harris for a long time. She testified that in June or July of 2013, Harris was at her house and they had a conversation. Harris told her that he had shot Howard Davis. (R88:106,115-16) Davis testified that on the day following that conversation, she spoke with Howard Davis. Howard Davis told her that the Little Ray had shot him. (R88:107) Vernecia Davis testified that neither she nor Howard Davis reported the incident to the police, but that she wanted to have Little Ray (Harris) sent to jail for shooting him. (R88:107-08) She further indicated that Howard Davis told her not to say anything about the shooting. [5] (R88:123)

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to the hearsay rule, the court did so because it concluded that they were relevant to the issue of whether Howard Davis had a motive to kill Harris. This evidence would certainly be relevant and probative of Davis' guilt, but would not be relevant as to Chisem's involvement. If Chisem had been tried separately, this evidence would not have been admissible

[5] Howard Davis' statements to Vernecia Davis would be admissible against Davis as a statement by a party opponent. See Wis. Stat. § 908.01(4)(b). However, these statements would not have been admissible against Chisem if Chisem had been tried separately, not only because Davis was not a party opponent of , but also, and more importantly, because Davis's

In its response to Chisem's postconviction motion, the state argued that Chisem was a party to the crime, and "[a]s such, he shared a motive with his co-actor and friend, Davis, and the motive evidence was therefore relevant and admissible on that ground." In support of that proposition, the state cited ***State v. Chambers,*** 173 Wis. 2d 237, 255, 496 N.W.2d 191 (Ct. App. 1992). ***Chambers*** merely stands for the proposition, *inter alia*, that an acceptable basis for the admission of other acts evidence "arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case." It does not support an argument that anytime two or more persons are found to be a party to a crime, they necessarily share the same motive.

There appears to be a dearth of authority in Wisconsin on this issue. In ***Smith v. Bray,*** 681 F.3d 888 (7th Cir. 2012), Smith claimed he endured serious racial harassment from his immediate supervisor and was fired for complaining about it. ***Id.*** at 890. Smith brought an

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statements would be irrelevant to whether Chisem had a motive.

action under 42 U.S.C. 1981 naming a number of defendants including his immediate supervisor (Bianchetta) and the human resources manager (Bray). ***Id.*** Smith alleged that Bray conspired with Bianchetta to retaliate against him for complaining about the racial discrimination, in violation of § 1981. ***Id.*** Smith had settled his case with Bianchetta and the other defendants, so the issue was whether Smith could prove that Bray had conspired with Bianchetta to retaliate. ***Id.*** at 890. The Seventh Circuit held that Smith had not offered sufficient admissible evidence to allow a reasonable jury to find that Bray was motivated by a desire to retaliate against him for his complaints of race discrimination. ***Id.*** at 892.

The court found that although Bray had participated in Smith's termination, there was not enough admissible evidence to show that Bray acted with a retaliatory motive, i.e., she caused Smith's termination because he had complained about discrimination. ***Id.*** at 900. The court noted that Bianchettas' statement to Smith that getting a lawyer would be the "worst thing he could do" and that Smith was going to be "sorry" were direct evidence of only

Bianchettas retaliatory animus – not Bray's. The statements did not provide direct evidence that Bray herself acted with an unlawful motive. ***Id.*** at 901

The court also observed:

> In a case of individual liability, evidence of [that legitimate] concerted action should not be interpreted too easily as evidence of a conspiracy so that one person's admission of an unlawful motive is attributed to another.

Id. at 905. (brackets indicate language specific to Bray's case that would not apply in Chisem's case). The court also observed that "Bray's refusal to talk with Smith falls short of proving that she was aware of any unlawful motive of Bianchetta's. It may show some concert of action between Bianchetta and Bray, but it does not indicate that they shared a common unlawful motive." ***Id.***

Likewise, the fact that Chisem and Davis were seen together on the day of the homicide (at the cook-out earlier in the day) and when Davis confronted Edmond outside his place of work and threatened Edmond, does not necessarily show that they acted with the same motive. The evidence at trial may have shown some concert of action between

Chisem and Davis, but it did not establish that that they shared a common motive. Put another way, evidence that they may have been parties to a crime does not necessarily mean they shared the same motive as argued by the state in its response to the defendant's postconviction motion.[6]

In its response to the defendant's postconviction motion, the state complains:

> To take Chisem's argument to its logical extension, he is arguing that at a separate trial involving only Chisem, the jury would have heard nothing about motive; instead the state would have been required to present its case against Chisem as a random act of violence perpetrated for no apparent reason against a random victim.

(R62:2)

That is not accurate. At Chisem's separate trial, the state could still present evidence that Chisem and Davis were seen together on the day of the homicide, that a vehicle resembling Chisem's car was seen near the scene of

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[6] It is not difficult to imagine a situation where two persons could be parties to a crime but not share similar motives: A (wife) hires B (hitman) to kill C (A's husband). A assists B by driving B to a location near C's mistress' house. B shoots C from the passenger window while the car is still moving ("drive-by shooting"). A's motive is to seek revenge against C for infidelity and to cash in on a life insurance policy. B's motive is simply to get paid for his work.

the shooting, and that Chisem was seen together with Davis at Edmond's place of employment (concerted action). Moreover, while motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the state is not required to prove motive on the part of a defendant in order to convict. *See* Wis JI—Criminal 175.

Finally, the state also implicitly argued in its response to Chisem's postconviction motion that Chisem was motivated to assist Davis because they were "friends." ("…he [Chisem] shared with his co-actor *and friend* . . ."). (R62:2)(emphasis added). Although there was some evidence in the record of their friendship (R89:85), the evidence lacked a proper foundation.

Davis and Chisem should have been tried separately. Severance is not only appropriate but necessary where "there is danger that an entire line of evidence relevant to the liability of only one defendant may be treated as evidence against all defendants by the trier of fact simply because they are tried jointly. See ***Haldane,*** 85 Wis. 2d at 189. Chisem asserts that at a separate trial, evidence of Davis' motives would not be relevant and inadmissible.

Presentation of this evidence at the joint trial likely caused the jury to improperly ascribe and impute Davis' motive to Chisem.

2. Antagonistic Defenses

Although Chisem argued during pretrial proceedings that there was a possibility that Chisem and Davis might present antagonistic defenses, that turned out not to be the case.

II. CHISEM'S CONSTITUTIONAL RIGHT TO CONFRONTATION WAS VIOLATED BECAUSE DAVIS' OUT-OF-COURT HEARSAY STATEMENTS WERE USED AS EVIDENCE AGAINST CHISEM AT THEIR JOINT TRIAL WHERE DAVIS DID NOT TESTIFY

A. Standard of Review.

This court reviews de novo whether a statement is admissible as a hearsay exception, ***State v. Joyner***, 2002 WI App 250, ¶16, 258 Wis. 2d 249, 653 N.W.2d 290, and whether admission of hearsay evidence poses a confrontation clause violation, ***State v. Manuel***, 2005 WI 75, ¶25, 281 Wis. 2d 554, 697 N.W.2d 811, and whether a confrontation violation was harmless, ***State v. King***, 2005 WI App 224, ¶22, 287 Wis. 2d 756, 706 N.W.2d 181.

B. Chisem was Substantially Prejudiced by the Admission of Hearsay Evidence Which Also Violated His Confrontation Rights.

The Confrontation Clause of the Sixth Amendment grants criminal defendants the right to confront witnesses brought against them and is applicable to the states via the Fourteenth Amendment. ***Pointer v. Texas*,** 380 U.S. 400, 403 (1965); *see also* ***State v. Manuel*,** 2005 WI 75, ¶ 36, 281 Wis. 2d 554, 574, 697 N.W.2d 811. Article I, § 7 of the Wisconsin Constitution also guarantees this right. *See* ***Manuel*,** 281 Wis. 2d 554, ¶36. This guarantee includes the right to cross-examine the prosecution's witnesses. *See* WIS. CONST. art. I, § 7; *see also* ***Pointer***, 380 U.S. at 404. As such, in the context of a joint trial, the confession of one defendant is inadmissible against the other unless the confessing defendant testifies and is subject to cross-examination. *See* ***Bruton v. United States*,** 391 U.S. 123, 126, 137 (1968). Wis. Stat. § 971.12(3) provides a mechanism for complying with the ***Bruton*** requirement in the Wisconsin Statutes. *See* ***State v. King*,** 205 Wis. 2d 81, 97, 555 N.W.2d 189 (Ct. App. 1996).

Under ***Bruton,*** the U.S. Supreme Court evaluated the Confrontation Clause under the analytical framework set forth in ***Ohio v. Roberts,*** 448 U.S. 56 (1980). *See* ***State v. Nieves,*** 2017 WI 69, ¶ 25. "The touchstone of the Confrontation Clause under ***Roberts*** was the notion of 'reliability.'" ***Id.*** Under ***Roberts,*** "an unavailable witness's out-of-court statement [could] be admitted so long as it has adequate indicia of reliability – i.e., falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" ***Id.*** (quoting ***Roberts,*** 448 U.S. at 66).

In ***State v. Nieves,*** 2017 WI 69, ¶¶ 2, 25-33, the Wisconsin Supreme Court noted that the United States Supreme Court decision in ***Crawford v. Washington***[7] "fundamentally altered" (***Id.*** at ¶ 26) the way in which courts analyze the Confrontation Clause. The Wisconsin Supreme Court concluded that ***Crawford*** and its progeny limited the application of the ***Bruton*** doctrine to instances in which a codefendant's statements are "testimonial." ***Id.*** at ¶¶ 2, 28. ***Bruton*** is not violated by the admission of a

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

non-testifying codefendant's statements that are not testimonial. ***Id.*** at ¶ 2. In ***Crawford*** the U.S. Supreme Court "held a defendant's right to confrontation is violated if the trial court receives into evidence out-of-court statements by someone who does not testify at the trial if those statements are 'testimonial' and the defendant has not had 'a prior opportunity' to cross-examine the out-of-court declarant." ***Id.*** at ¶ 28 (citing ***State v. Mattox,*** 2017 WI 9, ¶ 24, 373 Wis. 2d 122, 890 N.W.2d 256 and ***Crawford,*** 541 U.S. at 68).

Concerning the application of the Confrontation Clause to nontestimonial statements, the ***Nieves*** court stated:

> The Court in ***Crawford*** did not directly address the application of the Confrontation Clause to nontestimonial statements. However, subsequent Supreme Court cases have seized on what ***Crawford*** insinuated; the Confrontation Clause applies only to testimonial statements. *See* ***Davis v. Washington,*** 547 U.S. 813, 823 (2006). It follows that the Confrontation Clause does not apply to nontestimonial statements. ***Id.***; *See also* ***Michigan v. Bryant,*** 562 U.S. 344, 359 (2011) (reasoning "the admissibility of a [non-testimonial] statement is the concern of state and federal rules of evidence, not the Confrontation Clause"); ***Whorton v. Bockting,*** 549 U.S. 406, 420 (2007) ("Under

> ***Crawford,*** on the other hand, the Confrontation Clause has no application to [non-testimonial] statements . . . .").
>
> Consequently, as a threshold matter, a defendant cannot show that his or her rights under the Confrontation Clause were violated before first showing that the allegedly impermissible statements were testimonial.

Nieves, 2017 WI 69, ¶¶ 29-30.

The ***Nieves*** court concluded that "[w]e are not the first state to conclude that ***Crawford*** limited the application of the ***Bruton*** doctrine to testimonial statements." ***Id.*** at ¶ 33.

Although the above-quoted language suggests clearly that the Wisconsin Supreme Court was limiting application of the Confrontation Clause to testimonial statements and excluding its application to all nontestimonial statements, the court did not even mention its very explicit prior pronouncement flatly to the contrary:

> While the ***Crawford*** Court abrogated ***Roberts*** by highlighting its shortcomings and failures, the Court declined to overrule ***Roberts*** and expressly stated that the states were free to continue using ***Roberts*** when dealing with nontestimonial hearsay. We accept Manuel's argument that ***Roberts*** ought to be retained for nontestimonial statements, as we agree that evidence that may be admissible under the hearsay rules may nevertheless still be inadmissible under the

> Confrontation Clause. Therefore, we join the jurisdictions that have used ***Roberts*** to assess nontestimonial statements.

State v. Manuel, 2005 WI 75, ¶ 60, 281 Wis. 2d 554, 586, 697 N.W.2d 811.

One would think, given the unambiguous statements in ***Nieves,*** that the Wisconsin Supreme Court would have explicitly overruled ***Manuel,*** in whole or in part, or at least discussed it. Given this uncertainty in the law, counsel will apply the ***Manuel/Roberts*** analysis to the nontestimonial statements at issue here.[8] The statements Davis made to

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[8] Counsel is cognizant of this court's refusal to follow ***State v. Manuel.*** In ***State v. Jensen,*** 2011 WI App 440, ¶ 26, 331 Wis. 2d 440, 458-59, 794 N.W.2d 482, 491. This court recognized ***Manuel's*** holding that nontestimonial statements should be evaluated for Confrontation Clause purposes. ***Id.*** However, this court chose not to follow it:

> Unlike Jensen, we do pay heed to the entirety of the ***Giles***' decision. In so doing, we recognize that ***Manuel***'s holding that nontestimonial statements should be evaluated for Confrontation Clause purposes is in direct conflict with ***Giles***' holding that "only testimonial statements are excluded by the Confrontation Clause." We adhere to the ***Giles***' holding because the Supremacy Clause of the United States Constitution compels adherence to United States Supreme Court precedent on matters of federal law, *although it means deviating from a conflicting decision of our state supreme court. See* ***State v. Jennings,*** 2002 WI 44, ¶ 3, 252 Wis.2d 228,

Willie Nelson, Jamil Tubbs and Fabian Edmond (discussed below) were all likely "nontestimonial," although an argument might be made that the statements/threats that Davis made to Edmond evinced a certain "formality" about them that they could be considered testimonial. In the final analysis, however, Chisem asserts that even if introduction of Davis' statements did not violate his confrontation rights, the statements were still prohibited by the hearsay rules and substantially prejudiced Chisem at trial.

1. Davis' Statements to Willie Nelson.

Willie Nelson was a fellow inmate with Howard Davis while Davis was in jail awaiting trial. (R79:7) Nelson testified that Davis discussed specific facts of his case with him. Davis told him that he had been jumped and shot by his cousin previously and that he had a "beef" with his cousin for a long time after that until "he came up dead." (R79:7) Nelson testified that Davis told him that he tried to set up a false alibi and that he "handled his business" with

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> 647 N.W.2d 142. Thus, Jensen's reliance on ***Manuel,*** for his assertion that the nontestimonial statements should have been excluded, fails. (emphasis added)

a .45 or .357 revolver. Nelson testified that Davis said that there was another guy with him but that he "didn't know too much about him." (R79:7) Clearly, Davis statements to Nelson would have been non-testimonial under ***Nieves*** because it was a statement from one jail inmate to another. See ***Nieves,*** 2017 WI 69, ¶ 45.

Not satisfied with Nelson's failure to specifically name Chisem as the other guy, the state called Detective Graham to shore up Nelson's testimony. Graham had interviewed Nelson concerning statements made by Davis while Nelson and Davis were fellow inmates at the county jail. Graham testified that he had made an audio recording of the interview but that he had inadvertently lost the entire recording device and audio tape. (R79:7) Detective Graham testified that Nelson told him that Davis said that he was with "JB or Jay World," but he couldn't recall:

> ASSISTANT DISTRICT ATTORNEY: Did Mr. Nelson tell you whether Mr. Davis had told him whether he did it by himself? When I say *he* I mean Mr. Davis had done it by himself or whether he had done it in the accompany of another individual?
>
> DETECTIVE GRAHAM: He indicated that Mr. Davis told him that he was with

> another individual. He couldn't remember the exact name. He believed it was JB or Jay World, but he couldn't recall.

(R91:72)

As the state conceded in its response to Chisem's postconviction motion, "Chisem is correct that this testimony was hearsay as to Chisem and would not have been admissible at a separate trial." (R62:7) Chisem asserts that Detective Graham's testimony[9] was highly prejudicial hearsay[10] because it specifically identified Chisem by name ("JB or Jay World"). Nelson's testimony did not. (R79:7) Graham's testimony identified Chisem as the person who assisted Davis in the homicide. Nelson simply referred to "another guy."

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[9] Nelson's testimony that Davis said there was "another guy with him but he didn't know much about him" was an assertion of fact, i.e., that a second person was involved in the homicide. Graham's testimony as to what Nelson told him Davis had said ("JB or Jay World") could actually be described as double hearsay.

[10] Wis Stat. § 908.01 Definitions. The following definitions apply under this chapter: (1) STATEMENT. A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion. (2) DECLARANT. A "declarant" is a person who makes a statement. (3) HEARSAY. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

As noted above the law is somewhat uncertain. As the ***Nieves*** court noted, the U.S. Supreme Court in ***Crawford*** "declined to overrule ***Roberts*** and expressly stated that the states were free to continue using ***Roberts*** when dealing with nontestimonial hearsay." Moreover, the ***Nieves*** court did not specifically overrule (nor even mention) ***Manuel*** and its dictate that "***Roberts*** ought to be retained for nontestimonial statements, as we agree that evidence that may be admissible under the hearsay rules may nevertheless still be inadmissible under the Confrontation Clause. Therefore, we join the jurisdictions that have used ***Roberts*** to assess nontestimonial statements." Consequently, Chisem applies the ***Roberts*** test as follows.

Roberts established a two-part test to determine the admissibility of out-of-court statements under the Confrontation Clause: First, the witness must be "unavailable" at trial. Second, the statement of the unavailable witness must bear adequate "indicia of reliability." This second prong could be inferred without more in a case where the evidence fell within a firmly

rooted hearsay exception or upon a showing of "particularized guarantees of trustworthiness." ***Manuel,*** 2005 WI 75, ¶ 61.

Applied to the instant case, Davis invoked his Fifth Amendment Right not to testify at trial so Davis was clearly "unavailable."

The second step requires that the statement of the unavailable witness bears adequate indicia of reliability, which could be shown if Davis' statements fell within a firmly rooted hearsay exception. A hearsay exception is firmly rooted if, in light of longstanding judicial and legislative experience, it rests on such a solid foundation that admission of virtually any evidence within it comports with the substance of the constitutional protection. ***Id.*** at ¶ 64 (citations, quotations and alterations omitted). This test is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proved over time to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath and cross-examination at a trial. ***Id.*** (citations and quotations omitted).

The only two potential hearsay exceptions that arguably apply to Davis' statements to Nelson are contained in Wis. Stat. § 908.045(2) (Statement of Recent Perception) and Wis. Stat. § 908.045(4) (Statement Against Interest). Neither of these exceptions is firmly rooted. *See* ***State v. Murillo,*** 2001 WI App 11, ¶ 24, 240 Wis. 2d 666, 679, 623 N.W.2d 187 (Statement Against Interest not firmly rooted), and ***State v. Manuel,*** 2005 WI 75, ¶ 67, 281 Wis. 2d 554, 588, 697 N.W.2d 811 (Statement of Recent Perception not firmly rooted).

The only remaining issue is whether Davis' statements to Nelson contain particularized guarantees of trustworthiness. To evaluate whether statements contain particularized guarantees of trustworthiness, the following quotation is found in ***State v. Manuel***:

> [W]e consider the "totality of the circumstances, but ... the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." [***Idaho v. Wright,*** 497 U.S. 805, 819 (1990)]. Some factors that have been considered in assessing the reliability of a statement include spontaneity, consistency, mental state, and a lack of motive to fabricate. ***Id.*** at 821. We look to see "if the declarant's truthfulness is so clear from the surrounding

> circumstances that the test of cross-examination would be of marginal utility ...." ***Id.*** at 820. In other words, we examine whether the statement is "so trustworthy that adversarial testing would add little to its reliability." ***Id.*** at 821.

Id. at ¶ 68.

It cannot be argued that Davis' "truthfulness is *so clear* from the surrounding circumstances that the test of cross-examination would be of marginal utility." (emphasis added). It would be difficult to describe either Davis or Nelson as "particularly worthy of belief." A review of Nelson's testimony does not indicate whether Davis' statements were spontaneous or not. Davis' mental state cannot be ascertained by the testimony of either Nelson or Graham. There was inconsistency in the testimony of Nelson and Graham as to what Davis said. Nelson described the person who assisted Davis as "another guy," whereas Graham specifically identified Chisem ("JB or Jay World") as the person who helped Davis.

Moreover, although the focus is on Davis as to whether he had a motive to fabricate his statements to Nelson, one must not forget that Nelson likely had his own pending criminal case(s). Inmates will often volunteer to

testify against a fellow inmate in the hope that the state may give them consideration in their own case. Although the focus is on Davis' motive to fabricate, it should be remembered that Nelson had a strong motive to fabricate ("surrounding circumstances")

Given that Davis' statements to his fellow inmate do not contain "particularized guarantees of trustworthiness," Chisem's confrontation rights were violated and he is entitled to a new trial.

As it did postconviction, the state will likely argue that even if there was error, it was harmless. Wisconsin's harmless error rule appears in Wis. Stat. § 805.18. It is made applicable to criminal proceedings by Wis. Stat. § 972.11(1), and prohibits reversal in those cases for errors that do not affect the substantial rights of a defendant. ***State v. Nelson,*** 2014 WI 70, ¶ 29, 355 Wis. 2d 722, ___, 849 N.W.2d 317 (citations omitted, quotation marks omitted). As with its federal counterpart, the Wisconsin rule accords a strong presumption that an error is subject to a harmless-error review. ***Id.*** (citations omitted, quotation marks omitted). Accordingly, most constitutional errors can

be harmless and only a very limited class of cases require automatic reversal. ***Id.*** (citations omitted, quotation marks omitted).

For purposes of determining when to apply harmless error review, the United States Supreme Court has set forth a dichotomy of error types. ***Id.*** at ¶ 30. (citation omitted). First, there are trial errors, which occur during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt. ***Id.*** (citations omitted, quotation marks omitted)). The second type of error is structural. These defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply errors in the trial process itself. ***Id.*** This latter type of error is so intrinsically harmful as to require automatic reversal. ***Id.*** The Wisconsin Supreme Court has adopted this framework for analyzing harmless error. ***Id.*** at ¶ 31 (citations omitted).

Assuming that the error here falls into the first category, Chisem asserts that the cumulative effect, not

only of this error, but combined with the other ones discussed in this brief, caused him substantial prejudice. The Wisconsin Supreme Court has discussed this "cumulative error" approach in assessing multiple deficiencies in an ineffective assistance of counsel context:

> We now address ***Strickland*'s** prejudice prong. To find prejudice, we must find that the effect of these multiple deficiencies prejudiced Thiel and undermined confidence in the outcome of the trial. *See* ***Strickland,*** 466 U.S. at 694; ***Johnson,*** 153 Wis. 2d at 129.
>
> This court has never specifically addressed the issue of how to calculate prejudice arising from multiple deficiencies by trial counsel when the specific errors, evaluated individually, do not satisfy the prejudice standard in ***Strickland***. Several circuits of the United States Court of Appeals have addressed the appropriateness of looking at the cumulative effect of multiple instances of deficient performance by counsel when assessing prejudice. The consensus appears to hold that when a court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice. *See* ***Washington v. Smith***, 219 F.3d 620, 634-35 (7th Cir. 2000) ("Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess `the totality of the omitted evidence' under ***Strickland,*** rather than the individual errors."); ***Harris* v. Wood,** 64 F.3d 1432, 1439 (9th Cir. 1995). Although some circuits have decided to the contrary, we adopt the reasoning of the courts that have held that

> prejudice should be assessed based on the cumulative effect of counsel's deficiencies.

State v. Thiel, 2003 WI 111, ¶¶ 58-59, 264 Wis. 2d 571, 602-05, 665 N.W.2d 305.

Therefore, even if this court concludes that the evidence (Davis' statements to Nelson) was not harmful enough in and of itself to warrant a new trial, Chisem asserts that the cumulative effect of this error and the other errors discussed in this brief resulted in cumulative prejudice to Chisem.

2. Davis' Statements to Jamil Tubbs.

Jamil Tubbs was also called as a witness for the state. (R91:44-54). Tubbs testified that he was a fellow inmate of both Chisem and Davis while they were all incarcerated together at the secure detention facility in June 2014. Id. at 45. Tubbs testified that his roommate at the facility was an individual by the name of Antonio Bonaccorso. Chisem and Davis were also incarcerated in the same area of the facility. Id. at 45-46. Tubbs testified that there was an occasion where he and his roommate were together with Chisem and Davis in the same area. Id.

at 46. Initially, Tubbs denied that there was any discussion about a homicide between the four of them. Id. at 47. Tubbs then gave the following testimony:

> ASSISTANT DISTRICT ATTORNEY: Do you remember while you were sitting at the table whether Mr. Davis or Mr. Chisem were also talking about a truck?
>
> TUBBS: Yes.
>
> ASSISTANT DISTRICT ATTORNEY: And there was some statement about the fact that Mr. Chisem should have put the truck in the garage to hide it?
>
> TUBBS: Yes.
>
> ASSISTANT DISTRICT ATTORNEY: You did. You do remember Mr. Davis telling Mr. Chisem that?
>
> TUBBS: Not – I just – I just remember about a truck.
>
> ASSISTANT DISTRICT ATTORNEY: Did you tell Detective Bell that Mr. Davis asked Mr. Chisem why he didn't put the truck in the garage to hide it from the police?
>
> TUBBS: I don't remember, no
>
> ASSISTANT DISTRICT ATTORNEY: No?
>
> TUBBS: I can't recall.
>
> ASSISTANT DISTRICT ATTORNEY: Do you remember telling Detective Bell you

> were surprised how freely and voluntarily they were discussing the shooting?
>
> TUBBS: Yes.

Id. at 48.

So, Tubbs indicated only that he remembered something being said about a truck that should have been hidden in a garage, but he was not able to say whether Davis or Chisem made the statement. Under the rules enunciated in ***Crawford/Nieves***, Davis' statements would be considered "nontestimonial" because it was a statement made from one inmate to another. *See* ***Nieves,*** 2017 WI 69, ¶ 45.

The state subsequently called Detective Matthew Bell as a witness. Detective Bell had interviewed Tubbs at the county jail concerning statements made by Davis and Chisem.

> ASSISTANT DISTRICT ATTORNEY: Did you talk to Mr. Tubbs about whether or not *Mr. Chisem and Mr. Davis* had made any mention of a homicide that *they* had been involved in?
>
> DETECTIVE BELL: Yes. Mr. Tubbs discussed that.

ASSISTANT DISTRICT ATTORNEY: What did Mr. Tubbs tell you he overheard?

DETECTIVE BELL: He had said *while sitting at a table with the two defendants and Mr. Bonaccorso*, that he was surprised at the discussion that *they* were having regarding the homicide.

ASSISTANT DISTRICT ATTORNEY: Did Mr. Tubbs specifically mention any facts of that homicide while he was talking to you?

DETECTIVE BELL: He did.

ASSISTANT DISTRICT ATTORNEY: What did he say?

DETECTIVE BELL: He had said that *Mr. Davis mentioned*, while they were all sitting at this table, that he had shot Jaques in the face but didn't kill him.

ASSISTANT DISTRICT ATTORNEY: And did he indicate whether *the demeanor of Mr. Chisem and Mr. Davis* was during this conversation?

DETECTIVE BELL: Yes. He was surprised how freely *they* were discussing this and *their* frankness while discussing this matter.

ASSISTANT DISTRICT ATTORNEY: Did he ever indicate whether *they* laughed during the conversation about it.

DETECTIVE BELL: Yes. He talked at one point that *they were laughing* about it.

> ASSISTANT DISTRICT ATTORNEY: Did Mr. Tubbs make any mention of conversation about a truck that was involved?
>
> DETECTIVE BELL: Yes. He specifically mentioned that there was a conversation regarding quote, unquote a truck.
>
> ASSISTANT DISTRICT ATTORNEY: And what was the nature of that conversation?
>
> DETECTIVE BELL: He had said that during this conversation, *Mr. Davis had mentioned to Mr. Chisem* something to the effect of why didn't you hide that truck in the garage. Something to that effect.

(R91:59-60)(emphasis added)

The assistant district attorney began his questioning by inquiring whether "Mr. Chisem *and* Mr. Davis had made any mention of a homicide that *they* had been involved in," but then elicited only statements allegedly made by Davis. The statements would be admissible against Davis as an admission by a party opponent, but they would not be admissible against Chisem for this reason. If Chisem had been tried separately, Davis' statements to Tubbs would not have been admissible.

Moreover, there were four people sitting at this table and the testimony is unclear concerning the assistant

district attorney's and Detective Bell's use of the terms "they," "their," and "them." While Tubbs was sitting at the table with the two defendants and Mr. Bonaccorso, he was surprised at the discussion "they" were having, but there is no indication to what extent Chisem participated in that conversation. In response to the question of "the demeanor of Mr. Chisem *and* Mr. Davis" during the conversation, Bell could only relate that Tubbs was surprised about how freely "*they* were discussing this and *their* frankness while discussing this matter." Was Tubbs referring to both of the defendants and Mr. Bonoccorso, or did the terms "they" and "their" refer only to Davis and Bonaccorso? When Bell testifies that "*they* were laughing," it is unclear that Chisem was also laughing. Concerning Bell's testimony about the truck, Chisem had no way of cross examining Davis about his alleged statement to Chisem that he (Chisem) should have parked the truck in the garage to hide it from police, or "[s]omething to that effect."

Any statements Davis made to Tubbs were hearsay.[11] To determine whether admission of these statements also violated Chisem's confrontation rights the ***Manuel/Roberts*** analysis (discussed above, supra., pp. 36-37) must be employed.

Davis was unavailable at trial. The second prong of the ***Manuel/Roberts*** test is whether the statement of the unavailable witness must bear adequate "indicia of reliability." This second prong could be inferred without more in a case where the evidence fell within a firmly rooted hearsay exception or upon a showing of "particularized guarantees of trustworthiness." ***Manuel,*** 2005 WI 75, ¶ 61.

The only two potential hearsay exceptions that arguably apply to Davis' statements to Tubbs (or in his presence) are contained in Wis. Stat. § 908.045(2)

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[11] Postconviction, the state argued that Davis' statements to Tubbs were not hearsay because Chisem remained silent while Davis was talking about the truck, and thus, Davis' statements were "adoptive admissions" by Chisem. See Wis. Stat. § 908.01(4)(b)2. The record does not support an assertion that by remaining silent, Chisem "adopted" or "purposely acknowledged the truth" of Davis' statements. Chisem's silence did not amount to "an unambiguous and knowing approval or adoption of the offered statement." See ***State v. Rogers,*** 196 Wis. 2d 817, 830-32, 539 N.W.2d 897 (Ct. App. 1995).

(Statement of Recent Perception) and Wis. Stat. § 908.045(4) (Statement Against Interest). Neither of these exceptions is firmly rooted. *See* ***State v. Murillo,*** 2001 WI App 11, ¶ 24, 240 Wis. 2d 666, 679, 623 N.W.2d 187 (Statement Against Interest not firmly rooted), and ***State v. Manuel,*** 2005 WI 75, ¶ 67, 281 Wis. 2d 554, 588, 697 N.W.2d 811 (Statement of Recent Perception not firmly rooted).

The only remaining issue is whether Davis' statements to Tubbs contain particularized guarantees of trustworthiness. They do not. It cannot be argued that Davis' "truthfulness is *so clear* from the surrounding circumstances that the test of cross-examination would be of marginal utility." (emphasis added) It would be difficult to describe either Davis or Tubbs as "particularly worthy of belief." A review of Tubbs' testimony does not indicate whether Davis' statements were spontaneous or not. There was inconsistency in the testimony of Tubbs and Detective Bell. Tubbs initially denied hearing any conversation at all between Davis, Chisem, Bonocorso, and himself. When pressed further about whether Davis made a statement to

Chisem that he should have hid the truck, Tubbs was only able to say that he remembered "something about a truck" and he specifically denied telling Detective Bell that Davis asked Chisem why he (Chisem) did not put the truck in the garage to hide it from the police. Conversely, Detective Bell testified that Tubbs said that during his interview of Tubbs, Tubbs stated that Mr. Davis had mentioned to Mr. Chisem something to the effect of "why didn't you hide that truck in the garage. Something to that effect." There is nothing in the testimony of either Tubbs or Bell that indicate Davis' mental state except that certain participants may have been laughing, but it is not clear that Chisem was one of them. ("they," "them," "their,")

As with Nelson's testimony, although the focus is on whether Davis had a motive to fabricate his statements to Tubbs, one must not forget that Tubbs likely had his own pending criminal case(s). Inmates will often volunteer to testify against a fellow inmate in the hope that the state may give them consideration in their own case. Tubbs certainly had a motive to fabricate ("surrounding circumstances")

Davis' statements to his fellow inmate, Tubbs, do not contain "particularized guarantees of trustworthiness." Consequently, Chisem's confrontation rights were violated and he is entitled to a new trial.

The state will likely argue that even if there was error, it was harmless. The rules concerning harmless error are discussed above, supra., pp. 41-44. Once again, Chisem maintains that the cumulative effect of the many errors discussed in this brief require a new trial.

3. Davis' Statements to Fabian Edmond.

Fabian Edmond testified that he had known both of the defendants for a long time and he identified both of them in court. (R89:24-25) Edmond testified that prior to the shooting, he was at a cook-out party at Howard Davis' grandmother's house. Both Howard Davis and Chisem were also at the cook-out. (R89:23-26) Edmond testified that he left the party in his blue Suburban truck with Earnest Davis and Earnest's son, Eddie Davis. (R89:26) After driving around for a while (R89:26-32), Edmond eventually ended up in the area of the shooting at 16th Street and North Avenue (R89:32-33) with the intent to purchase

"some weed." (R89:33-34) He saw a gray truck which he had seen earlier that day at the cook-out. (R89:34-36) He testified that the vehicle belonged to Chisem, or that at least Chisem was driving it earlier that day. (R89:36-37) While Edmond was attempting to purchase marijuana, he heard shooting coming from the gray truck which was right in front of him. (R89:37-38). He could not see who was doing the shooting.[12] (R89:37,52) He left the area in a hurry and went back to the cook-out. (R89:39-41) He indicated that when he arrived he had to break up a fight that erupted amongst people at the cook-out because they had already learned that "Little Ray" (Harris) had been shot. (R89:41-42)

The next day Edmond went to work at a Kentucky Fried Chicken where he was a manager. (R89:41-42) Edmond testified that Howard Davis called him on the phone and asked if he could come by and speak with him:

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[12] Earnest Davis was a passenger in Edmond's vehicle at the time of the shooting. Like Edmond, he testified that the shots were coming from a vehicle that looked like the one Chisem had been driving earlier that day, but he did not testify that he was able to identify Chisem or Davis as being in the vehicle at the time of the shooting. (R89:93-94,107-08)

ASSISTANT DISTRICT ATTORNEY: After June 6, 2014, did you have further contact with GT [Howard Davis] or Jay World [Chisem]?

EDMOND: Yes, sir.

ASSISTANT DISTRICT ATTORNEY: And where was that?

EDMOND: It was at my job.

ASSISTANT DISTRICT ATTORNEY: What happened?

EDMOND: They came by my job, you know what I'm saying, in the morning because I'm a manager. So I had to open. I had to go to work the next day. After everything happened, I had to work the next day. So I was at work. And he called me. He said can he come speak to me. I said sure, why not.

ASSISTANT DISTRICT ATTORNEY: You said he, who are you talking about he?

EDMOND: I mean GT. He asked can he come speak to me. I said sure, why not. Because they don't come to my job. So the store wasn't open, so he asked me can he come. Can I step outside. I couldn't – I can't let anybody in the building if the building not open yet.

ASSISTANT DISTRICT ATTORNEY: Did you talk to – when you said it was GT that called?

EDMOND: Yes, sir.

ASSISTANT DISTRICT ATTORNEY: And was it just GT that came to KFC?

EDMOND: No. GT and Jay World.

ASSISTANT DISTRICT ATTORNEY: And what happened when GT and Jay World appeared at the KFC?

EDMOND: It was just giving me fair warning. Like, if they – he was just giving me a fair warning, you know what I'm saying. They got my name, they got our names out on the street. If anybody come talk to you, whatever, you know what I'm saying, you don't know nothing. Just tell them you need a lawyer. I'm like, why would I need a lawyer, I didn't do nothing.

ASSISTANT DISTRICT ATTORNEY: And –

EDMOND: It was just like a fair warning. Like, you know, he like –like a role model to me, really, in the street, you know what I'm saying. Like he took care of me, looked after me, giving fair warning because I never been in a situation. So me thinking him – he was just giving me a fair warning. Like if someone talk to you, just you know what I'm saying, got to me.

ASSISTANT DISTRICT ATTORNEY: And that was a statement that was made by GT, but Jay World was there at the time?

EDMOND: Yes, sir.

ASSISTANT DISTRICT ATTORNEY: After this conversation with GT and [sic]

> Jay World, did you have contact with police?
>
> EDMOND: No.

(R89:43-45)

Postconviction, the state argued that Davis' statements/threats to Edmond were not "assertions" within the meaning of the hearsay definition. (R62:2-3). Rather, Davis's statements were instructions, which are not assertions. (R62:3)

"Hearsay" is defined as: "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Wis. Stat. § 908.01(3). "The hearsay rule does not prevent a witness from testifying as to what he heard; it is rather a restriction on the proof of fact through extrajudicial statements." ***Dutton v. Evans,*** 400 U.S. 74, 88, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970).

It is generally true that commands, instructions, and questions are not considered assertions because they are not expressions of a fact, opinion, or condition, but instead are telling someone to do something or asking someone for

information. ***State v. Kutz,*** 2003 WI App 205, ¶ 41, 267 Wis. 2d 531, 564, 671 N.W.2d 660. However, this rule is subject to exceptions. The fact that Davis' statements to Edmond can be characterized as instructions or threats does not automatically mean that Davis' statements did not contain *implicit* assertions of fact. ***Id.*** at ¶¶ 42-43 (emphasis added). The court in ***Kutz*** concluded that included in the meaning of an "assertion" under Wis. Stat. § 908.01(1) is an expression of fact, opinion, or condition that is *implicit* in the word of an utterance, as long as the speaker intended to express that fact, opinion or condition. ***Id***. at ¶ 46 (emphasis added).

Implicit in Davis' "fair warning" to Edmond was an expression of fact that might be stated as follows: "I killed Raymond Harris, you know that I did and you had better keep your mouth shut about it." Consequently, Davis' statements to Edmond were hearsay statements because Davis' implicitly acknowledged that he (and perhaps by implication Chisem) had killed Raymond Harris.

In determining whether Chisem's confrontation rights were violated, it must first be determined whether

Davis statements/threats to Edmond were testimonial or nontestimonial. In ***State v. Nieves,*** 2017 WI 69, ¶ 38, the Wisconsin Supreme Court adopted the "primary purpose test" used by the U.S. Supreme Court in determining whether a statement is testimonial. Statements may be testimonial when the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. ***Id.*** In addressing this issue, the ***Nieves*** court, citing ***Ohio v. Clark,***[13] discussed whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. ***Nieves,*** 2017 WI 69, ¶ 40. The court in ***Clark*** acknowledged the applicability of the primary purpose test, but cautioned that even though statements to individuals who are not law enforcement officers could conceivably raise concerns, such statements are much less likely to be testimonial. ***Id.*** In these situations, it is "the formality of the setting in which the statements were given…"

Arguably, there was a certain "formality" about the way Davis confronted Edmond at his place of employment

[13] ***Ohio v. Clark,*** 576 U.S. ___, 135 S. Ct. 2173, 2181 (2015)

and issued a clear and unmistakable threat to Edmond what might happen if he were to talk to the police. If this court agrees that Davis statements were made under circumstances sufficiently formal, this court could conclude that Davis statements/threats to Edmond were testimonial. If so, then admission of these statements against Chisem violated Chisem's confrontation rights.

Assuming (more likely) that Davis' statements to Edmond were nontestimonial, then application of the ***Manuel/Roberts*** analysis for nontestimonial statements is indicated. Davis was unavailable. The second prong of the ***Manuel/Roberts*** test is whether the statement of the unavailable witness bears adequate "indicia of reliability." This second prong could be inferred without more in a case where the evidence fell within a firmly rooted hearsay exception or upon a showing of "particularized guarantees of trustworthiness." ***Manuel,*** 2005 WI 75, ¶ 61.

The only two potential hearsay exceptions that might apply to Davis' statements to Edmond are contained in Wis. Stat. § 908.045(2) (Statement of Recent Perception) and Wis. Stat. § 908.045(4) (Statement Against Interest).

Neither of these exceptions is firmly rooted. *See* ***State v. Murillo*** and ***State v. Manuel.***

The only remaining issue is whether Davis' statements/threats to Edmond contained particularized guarantees of trustworthiness. They do not. Given the surrounding circumstances, Davis statements could not be viewed as spontaneous. Davis called Edmonds before confronting him and, on his way over to confront Edmond, Davis presumably thought about what he would be saying to Edmond. His statements/threats were thought out beforehand.

As argued above, Davis is not an individual who is "particularly worthy of belief." (CCAP Davis) It cannot be said that Davis' "truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." It would be difficult to describe Davis as "particularly worthy of belief."

Finally, Chisem maintains that the error was not harmless and that he was substantially prejudiced by the admission of Davis' statements to Edmond. Chisem had no

way of cross examining Davis about these threats/statements.

The state might also argue that this conversation would have come in anyway if Chisem had had a separate trial because Davis' comments could also be construed as "[a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy." See Wis. Stat. § 908.01(4)(b)(5). However, the offenses for which Chisem (and Davis) were on trial for (PTAC First Degree Reckless Homicide/Dangerous Weapon, PTAC First Degree Recklessly Endangering Safety/Dangerous Weapon) had already been completed at the time this conversation between Davis and Edmond took place, so the conversation did not take place "during the course and in furtherance of the conspiracy."[14] Had Davis and Chisem been charged out

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[14] In ***Bergeron v. State,*** 85 Wis. 2d 595, 613, 271 N.W.2d 386 (1978), the court noted that the admission of hearsay in that case depended upon a factual question as to when the conspiracy began and terminated, and that the trial court must rule on the admissibility of such statements or acts. The appellate court will treat this finding as any other finding of fact, and that the termination of a conspiracy cannot be determined by any hard and fast rule. In ***Bergeron,*** the court further noted:

> The federal rule is that a conspiracy terminates with the accomplishment or failure of the unlawful objective, and

with Intimidation of a Victim for this incident at KFC, there might be an argument for admitting this conversation between Davis and Edmond against Chisem as statements made "during the course of and in furtherance of a conspiracy."

Additionally, the state did not present the jury with an argument that Chisem and Davis were parties to the crimes as coconspirators.[15] Rather, the state's party to the

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> an out-of-court statement made during the concealment phase of the conspiracy is inadmissible. ***Dutton v. Evans,*** 400 U.S. 74, 81, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), citing ***Lutwak v. United States,*** 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953); ***Krulewitch v. United States,*** 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949). Wisconsin has not adopted the federal rule. It has been stated that a conspiracy continues during the course of the concealment, ***Gelosi v. State,*** 215 Wis. 649, 655-56, 255 N.W. 893 (1934) where in a conspiracy to commit murder the conspiracy continued until the body was disposed of. In the defendant's case there is nothing to indicate concealment was part of the conspiracy plan.

[15] Wis. Stat. § 939.05(2) provides that a person can be a party to a crime in one of three ways:

(a) Directly commits the crime; or

(b) Intentionally aids and abets the commission of it; or

(c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it.

crime theory was based on the assertion that Davis and Chisem either directly committed the offenses, or were aiders and abettors. The jury was not instructed on conspiracy; they were only given instructions that Davis and/or Chisem could be found guilty if they either directly committed the crime or they acted as aiders and abettors.[16]

In fact, the state could not have proven conspiracy in this case because there was no evidence of planning, or an agreement between Davis and Chisem. Any arguable "stake" that Davis had in the venture (e.g., revenge against Harris for shooting him in the face) would not have been shared by Chisem. Therefore, the state cannot argue that

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See also ***State v. Tourville,*** 2016 WI 17, ¶ 44, 367 Wis. 2d 285, 307, 876 N.W.2d 735.

Substantively, the elements necessary to prove a conspiracy are:

(1) An agreement among two or more persons to direct their conduct toward the realization of a criminal objective.

(2) Each member of the conspiracy must individually consciously intend the realization of the particular criminal objective. Each must have an individual stake in the venture. ***Bergeron v. State,*** 85 Wis. 2d 595, 606-07, 271 N.W.2d 595 (1978), *citing* ***State v. Nutley,*** 24 Wis.2d 527, 556, 129 N.W.2d 155, 167 (1964).

[16] See R92:28-37

efforts to conceal the crime (here, GT's attempts to dissuade Edmond from giving information to the police) were efforts to conceal the homicide and were therefore part of the conspiracy and "in furtherance of the conspiracy." GT's statements to Edmond were not part of "the conspiracy," because no "conspiracy" had been proven. The state did not rely on that theory.

III. CHISEM IS ENTITLED TO A NEW TRIAL UNDER WIS. STAT. § 972.12(3) BECAUSE SEVERANCE IS MANDATORY UNDER THAT SECTION WHERE A DISTRICT ATTORNEY WILL USE THE STATEMENT OF A CODEFENDANT (DAVIS) WHICH IMPLICATES ANOTHER DEFENDANT (CHISEM) IN THE CRIME CHARGED……

Wis. Stat. § 971.12(3) provides:

> The district attorney shall advise the court prior to trial if he intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge *shall* grant a severance as to any such defendant. [Emphasis added]

The application of a particular set of facts to a legal standard is a question of law which a reviewing court reviews de novo. ***Kimberly-Clark Corp. v. Labor and***

Industry Review Com'n, 138 Wis. 2d 58, 66, 405 N.W.2d (Ct. App. 1987).

The record does not demonstrate that the state ever advised the court of its intent to use Davis' statements implicating Chisem prior to trial. A review of the state's pretrial court filings does not reveal any notice of intent to use Davis' statements implicating Chisem. Counsel has reviewed the state's motion in limine (R6), and the state's response to the defendant's motions. (R13) Neither of these filings advise the court of the state's intent to use Davis' statements implicating Chisem. The witness list filed by the state (R5) does list Nelson, Tubbs and Edmond as witnesses, but it does not indicate that these witnesses would be used to elicit statements by Davis implicating Chisem.

Counsel has also reviewed the pretrial transcripts and can find no instance where the state advised the court that it would use Davis' statements to implicate Chisem at their joint trial. In particular, the transcripts of the motion hearings held on January 5, 2015 and January 6, 2015 reveal that the state did not advise the court that

statements made by Davis inculpating Chisem would be used against Chisem. It goes without saying that had the state done that, the trial court would have been required to grant a severance.

IV. THE CIRCUIT COURT MISUSED ITS DISCRETION IN ALLOWING WILLIE NELSON TO TESTIFY BECAUSE THE COURT DID NOT USE THE CORRECT LEGAL STANDARD ("GOOD CAUSE") AND BECAUSE DETECTIVE GRAHAM'S NEGLIGENCE IN LOSING NELSON'S RECORDED INTERVIEW DOES NOT CONSTITUTE "GOOD CAUSE" UNDER THE DISCOVERY STATUTE

This court may reverse a discretionary decision if the circuit court applies the wrong legal standard. ***State v. Behnke,*** 203 Wis. 2d 43, 58, 553 N.W.2d 265, 272 (Ct. App. 1996).

Wis. Stat. § 971.23[17] entitled "Discovery and inspection" largely controls the scope of the State's

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[17] (1) WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all

statutory discovery obligations in criminal cases. ***State v. DeLao,*** 2002 WI 49, ¶ 17, 252 Wis. 2d 289, 300, 643 N.W.2d 480. The portion of the statute that is the focus here is subsection (1)(e).

On December 23, 2014 Chisem's attorney filed a "Motion in Limine by the Defendant." In Paragraph 2 of that document, the defendant demanded "[e]xclusion of any relevant written or recorded statement not previously disclosed to the defendant where no good cause is shown for the failure to disclose."

Immediately before State's witness Willie Nelson testified, the parties and the court held an unrecorded sidebar conference. Transcript March 10, 2015 P.M., p. 76. The following morning, the court and the parties discussed what occurred during the sidebar conference:

> THE COURT: And Mr. Novack, you wanted to put something on the record? We had a sidebar yesterday as to the admissibility of that witness who testified.

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of the following materials and information, if it is within the possession, custody or control of the state:

. . . .

(e) Any relevant written or recorded statements of a witness named on a list under par. (d)….

MR. NOVACK: Correct. I have an objection to Mr. Nelson testifying. According to police reports, Detective Graham, when he interviewed Mr. Nelson, recorded that conversation on the handheld recorder. I believe two months ago or more, I think in December, I requested a copy of that. And I was informed that Detective Graham I believe lost the recording device or misplaced it. And it's not known where it is. And so I objected to Mr. Nelson testifying because we were unable to actually hear the conversation that was recorded.

MS. CHRISTOPHERSON: For the record, I also join in that for the same reasons.

THE COURT: And the state wanted to say anything?

MR. APOLLO: Your Honor, as I indicated, exclusion of that witness is a very drastic measure given what the circumstances were. And I indicated to the court that Detective Graham is available. He can testify about the circumstances. There was a report generated of that report. It had been turned over in advance. They were aware of at least what Detective Graham wrote in his report that the witness had said. The witness was present. It would be cross-examined. Detective Graham is present and able to be examined as to what happened to the recording. And there's any number of other available options other than completely excluding the witness.

THE COURT: All right. And the court did deny the motion by defense and agreed with the state's represented – as they represented here right now on the record and what they represented at the sidebar. The court will agree with the state.

MS. CHRISTOPHERSON: And just for the record, I understand the court's ruling for – on behalf of Mr. Chisem, in addition to what counsel for Mr. Davis said, my point simply was, while this is not a custodial interview, efforts were made to record it. There is a jury instruction with regard to destruction of evidence or failure to produce evidence that I mentioned in the sidebar. I understand the court's ruling at this point it's being treated as though it's not a custody interview just like Ms. Davis and other witnesses would testify, I know that's why the court made the ruling. But, again, my only point was for credibility and potential issues in that regard. That's why we objected as well. But I understand the court's ruling. Thank you.

THE COURT: That comes after the court's already ruled.

MS. CHRITOPHERSON: Judge, I just wanted to make my record.

THE COURT: Then you should have made your record before the court ruled if you had something to say about it, right?

MS. CHRISTOPHERSON: I'm sorry, Judge.

(R91:5-7)

Later that morning, Detective Graham testified concerning the lost recording. Graham testified that he didn't just lose the recording of the interview of Willie Nelson. He lost the entire recording device and had to pay back the Milwaukee Police Department for it. Id. at p. 69. Graham testified that he did not intentionally lose the recorder. Id.

Absent a showing of good cause, the evidence the State failed to disclose must be excluded. Wis. Stat. § 971.23(7m). *See also* ***Delao,*** 2002 WI 49 at ¶ 51, 252 Wis. 2d at 313. However, if the State can show good cause for its failure to disclose, the circuit court may exclude the evidence or may grant other relief such as a recess or continuance. Section 971.23(7m). *See also* ***Id.*** The burden of proving good cause rests on the State. ***State v. Martinez,*** 166 Wis. 2d 250, 257, 479 N.W.2d 224, 228 (Ct. App. 1991).

Chisem's case is like ***Martinez***. In ***Martinez,*** the state lost a tape recorded statement. The trial court found that the state's actions were "simply negligence" and not

done in bad faith. ***Martinez,*** 166 Wis. 2d at 258. This court stated:

> Reduced to its simplest terms, the state's explanation for its failure to comply with Martinez' discovery demand was that the evidence was "lost." This explanation, however, begged the question before the court. No one disputed that the tape was lost. Rather, the question before the court was "why" or "how." The state's minimal explanation did not meaningfully address this crucial question. Instead, the state offered the trial court a few skeletal facts showing that the tape was lost. But the state offered nothing of substance as to how the tape was actually inventoried, processed, stored or subsequently handled.
>
> The trial court concluded that the state's actions were "simply negligence" and not done in bad faith. We disagree that the facts permitted this conclusion. Instead, the limited facts offered by the state allowed for a host of speculative (not reasonable) inferences as to the state's conduct--good faith, negligence, recklessness, intentional conduct, or bad faith. This points to the fundamental problem--the failure of the state to meet its burden under the statute.
>
> Nor are we are prepared to say that negligence or lack of bad faith constitutes "good cause" as a matter of law for all cases under sec. 971.23(7), Stats., as the trial court's decision might suggest. While an assessment of the state's conduct in such terms may be relevant to the question of "good cause," it is not

> necessarily controlling. Ultimately, the question of whether the state has met its burden to establish "good cause" must depend on the specific facts of the case. Even if the facts could be read to support the trial court's "negligence/no bad faith" conclusion, this still begs the question of "good cause" under the statute.

Id. at 258-59.

The court then remanded the matter back to the trial court for a hearing as to whether or not there was "good cause" under sec. 971.23(7). ***Id.*** at 261.

In Chisem's case, it does not appear in the record that the trial court discussed the term "good cause" in deciding that Nelson's testimony would be admitted.[18] It appears that the court did not use the correct legal standard ("good cause") when it ruled that Nelson's testimony would be admitted. Discretion contemplates factual findings based upon an examination of the evidence and the application of those facts to the proper legal standards. ***State v. Martinez,*** 150 Wis. 2d 62, 71, 440 N.W.2d 783 (1989). Misuse of discretion if the circuit court's

[18] Perhaps the court used that term during the sidebar conference immediately before Nelson's testimony.

factual findings are unsupported by the evidence, or if the court applied an erroneous view of the law. ***Id.***

Moreover, under ***Martinez,*** even simple negligence may not constitute good cause. It would appear that the proper test is to examine each case "on the specific facts." This would appear to be a "totality of the circumstances" type of test.

CONCLUSION

For all of the foregoing reasons the Defendant asks that his judgment of conviction be reversed and that the matter be remanded to the circuit court with an order for a new trial

Dated this 19th day of November, 2017.

_____
Hans P. Koesser, Bar #1010219

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a brief produced with a proportional serif font. The brief contains 10,986 words.

_____
Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names 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 produced to preserve confidentiality and with appropriate references to the record.

_____

Hans P. Koesser, Bar No. 1010219

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