STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2017AP1114-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JARMEL DONTRA CHISEM,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State rephrases the issues on appeal:

1. After the trial court denied Defendant-Appellant Jarmel Dontra Chisem's pretrial motion to sever his trial from that of co-defendant Howard Davis, a jury convicted Chisem of (1) first-degree reckless homicide while using a dangerous weapon PTAC (repeater) and (2) first-degree recklessly endangering safety while using a dangerous weapon PTAC (repeater). On appeal, Chisem argues that the trial court erred when it denied his motion to sever. He claims that his constitutional right to confrontation was violated by the admission of statements that co-defendant Davis made to acquaintances and/or cellmates.

The postconviction court denied this claim. It concluded that severance was unnecessary, and that the statements were not testimonial; therefore, the Confrontation Clause was not implicated.

This Court should affirm.

2. Chisem next claims that, assuming Davis's statements were nontestimonial, those statements were relevant only to Davis's motive and would not have been admissible if Chisem had been tried separately.

The postconviction court denied this claim, concluding that the trial court did not erroneously exercise its discretion by keeping the cases joined because the statements would have been admissible against Chisem in a separate trial.

This Court should affirm.

3. Third, Chisem argues that he is entitled to a new trial because the trial court was unaware that the State was going to introduce Davis's statements regarding motive.

The postconviction court denied Chisem's request for a new trial.

This Court should affirm because the record reflects that the trial court was aware of Davis's statements before trial, and yet it properly exercised its discretion when it denied Chisem's motion to sever.

4. Finally, Chisem claims that the trial court erroneously exercised its discretion when it allowed a State's witness to testify because a detective who recorded the conversation lost the recording.

The postconviction court denied this claim.

This Court should affirm.

INTRODUCTION

This case involves interlocking issues of severance, a defendant's right to confrontation, and criminal discovery. None of the issues Chisem raises warrants reversal.

This Court should apply *Crawford v. Washington*, 541 U.S. 36 (2004), and *State v. Nieves*, 2017 WI 69, 376 Wis. 2d 300, 897 N.W.2d 363, and conclude that the *Bruton* doctrine, as established in *Bruton v. United States*, 391 U.S. 123 (1968), applies only to instances in which a co-defendant's statements are testimonial. In this case, co-defendant Davis's statements to cellmates and acquaintances were admittedly nontestimonial and, therefore, Chisem's confrontation rights were not violated. Accordingly, the trial court did not err when it denied Chisem's motion to sever.

Chisem also fails to show that: (1) his defense was antagonistic to his co-defendant's defense, and (2) statements his co-defendant made to witnesses Jamil Tubbs and Fabian Edmond would not have been introduced against him in a separate trial. Similarly, this Court should determine that the co-defendant's nontestimonial statements to witnesses Jamil

Tubbs and Fabian Edmond did not violate any hearsay rules. And, with respect to State's witness Willie Nelson, even if his testimony constitutes inadmissible hearsay, such erroneous admission was harmless.

Next, any claim that the trial court did not know that the State would be offering evidence of the co-defendant's statements that could implicate Chisem does not stand. The record indicates that the court was well aware of the statements, and the court properly exercised its discretion when it denied Chisem's motion to sever based on those statements.

Finally, Chisem fails to prove that the trial court erroneously exercised its discretion when it allowed Willie Nelson to testify when a detective lost the recording of that conversation. There was no discovery violation because the State never had custody of the recording and, even if there was a discovery violation, the State showed good faith.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either publication or oral argument because it believes that the parties' briefs adequately cover the issues presented.

STATEMENT OF THE CASE

The complaint

The criminal complaint alleges the following facts. On the evening of June 6, 2014, the Milwaukee Police Department responded to a shooting complaint. (R. 1:2.) Upon arrival, Officer Ryan Fekete found victim Raymond Harris "lying face down in a large pool of blood," shot multiple times. Harris was pronounced dead on the scene. (R: 1:3.)

While Officer Fekete was tending to Raymond Harris, Officer Leon Davis observed a second injured individual, later

identified as JW, suffering from a gunshot wound to the right side of the abdomen. (R. 1:3.) JW indicated that he was with his friend "Ray" when he heard several gunshots, one of which struck him. (R. 1:3.) JW survived his injuries.

Detective Kent Corbett spoke with Harris's sister, Deion Smith. Smith informed Corbett that she was aware of an incident that occurred in the summer of 2013. Smith stated that her brother, Raymond Harris, had told her that he had shot "GT." (R. 1:3.) Smith identified "GT" as co-defendant Howard Davis. (R. 1:3.)

Police found surveillance video within the shooting's immediate proximity. (R. 1:3.) After their review, Detectives Nicholas Johnson and Charles Mueller spoke with Fabian Edmond because a video depicted Edmond's vehicle as being present at the scene of the homicide. (R. 1:3.) Edmond identified the second vehicle, a silver Saturn Outlook (Saturn), which was present at the homicide scene, as being driven by "J World," whom Edmond identified in a photograph as the defendant, Jarmel Dontra Chisem. (R. 1:3.) Edmond informed police that the front passenger in the Saturn was "GT," whom he identified in a photograph as co-defendant Davis. (R. 1:3.) Edmond also indicated that a few months prior to the shooting, "Lil Ray" (victim Raymond Harris) had shot "GT." (R. 1:3.) In a subsequent interview with police, Edmond indicated that he saw someone firing from the Saturn. (R. 1:3.) According to Edmond, while he was on North 16th Street, he observed muzzle flashes from the driver's side of the Saturn as he heard the gunshots. (R: 1:3.)

Police also spoke with Ernest Davis (Ernest), who informed police that he was with Edmond on the night of the shooting. (R. 1:3.) Ernest stated that while he was driving with Edmond, Ernest observed a silver Saturn, which he knew Chisem drove, stop in the middle of North 16th Street. Ernest then heard several gunshots and could see that the driver's window and rear driver side window were "lighting

up." (R. 1:3.) Ernest informed police that he later saw Chisem and Howard Davis together. (R. 1:3.) Chisem said to Ernest, "[t]his ain't never to be talked about again." (R. 1:3.)

Police located Chisem and the Saturn. They spoke with the listed owner of the Saturn, Verneadia Zollicoffer, who was Chisem's girlfriend. (R. 1:3.) Zollicoffer indicated that the only two people who drive the Saturn are herself and Chisem. (R. 1:3.)

Police also spoke with Antonio Bonaccorso. Bonaccorso indicated that he had known Davis and Chisem for an extended period of time. He indicated that while eating lunch, he heard co-defendant Davis and Chisem talking about a homicide. (R. 1:4.) Bonaccorso indicated that Davis stated that during the shooting, "[JW]" also got shot." (R. 1:4.) According to Bonaccorso, Davis stated that both he and Chisem were the shooters. (R. 1:4.) And, Bonaccorso said both Chisem and Davis "were just laughing about the homicide." (R. 1:4.)

The State charged Chisem with the following: Count 1, first-degree reckless homicide, PTAC, use of a dangerous weapon; Count 2, first-degree recklessly endangering safety, PTAC, use of a dangerous weapon; and Count 3, possession of firearm by felon. (R. 1.)

Pre-trial proceedings

Chisem pled not guilty. Prior to trial, Chisem moved to sever his case from co-defendant Davis. (R. 11.) Chisem filed the motion "in light of certain evidence that he anticipates will be admissible at trial against Mr. Davis that is wholly unrelated to him, and which cannot be linked to Mr. Chisem by the State's evidence." (R. 11:2.) Chisem also sought to exclude any evidence relating to retribution involving Davis against victim Raymond Harris as a motive for the shooting as irrelevant and prejudicial to Chisem. (R. 11:13.)

The State objected to Chisem's motion to sever. (R. 13.) The State argued that "[t]he fact that specific items of evidence will be used against only one defendant is not a unique situation and does not mandate severance." (R. 13:2.) It also argued that "antagonistic defenses [have not been] asserted," and that "the jury can be properly instructed to consider the crimes charged against each defendant and the evidence as it pertains to each defendant separately and distinctly." (R. 13:3.)

The trial court held a hearing. (R. 84.) After argument by both sides, it determined "that, pursuant to [Wis. Stat.] § 971," it would not sever the cases. (R. 85:2.) It explained:

> 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 is [sic] 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.
>
> I don't -- and if there's antagonistic defenses, it hasn't really been substantiated to what extent. And the fact that there might be a -- tendered that, the Court doesn't believe that to be grounds for severance either.

(R. 85:2–3.)

The trial

The case proceeded to trial, which lasted four days. During the trial, the State presented evidence from Deion Smith (victim Raymond Harris's sister). Smith testified that Harris shot co-defendant Davis in June 2013. (R. 89:98–99.) She also testified that Davis knew Harris had shot him but that "nobody ever brought it to the police." (R. 88:98–101.)

Victim JW testified that on the evening of June 6, 2014, he was in a vacant lot waiting for a family member to deliver

his vehicle. (R. 90:6.) JW was with victim Raymond Harris. "[T]hat's when we heard shots." (R. 90:7.) JW tried to run, but he fell and was struck by gunfire. (R. 90:8.) He was unable to see the person or persons who shot him. (R. 90:8–9.) All he could see was a blue truck. (R. 90:9.) JW also testified that he informed the police when they arrived on scene that it was possible that shots came from the blue truck. (R. 90:10–11.)

Ernest Davis (Ernest) testified that he saw Chisem driving the Saturn the day before the shooting. (R. 89:91.) Ernest testified that co-defendant Davis, known as "GT," is an older relative and that Chisem, known as "Jay World," is a friend of the family. (R. 89:84.) Ernest testified that "GT" and "Jay World" are good friends and that he has seen them together. (R. 89:85.) According to Ernest, he saw the Saturn (Exhibit 41) park, and a conversation occurred between people outside the vehicle and people inside the vehicle. (R. 89:92–93.) Then Ernest saw the Saturn drive down the block slowly. Next, he saw and heard shots fired from the Saturn. (R. 89:93.) Specifically, he saw two people shooting from the Saturn from both the driver's window and the rear driver's side window. (R. 89:94.) After the shooting, Ernest went to a house party where he saw both Chisem and Davis. (R. 89:95–96.) There, Chisem said to Ernest, "These words never to be spoke of again." (R. 89:96.)

Fabian Edmond testified that he knew both Chisem and Davis through family. (R. 89:23–24.) He told the jury that on the evening of June 6, 2014, he drove to the area of 16th and North Street to purchase marijuana with Ernest and Ernest's son. (R. 89:33.) Edmond noticed a gray truck that he saw earlier that day. Edmond testified that it was Jay World's (Chisem's) truck, and Edmond saw Chisem driving it earlier that day with Davis. (R. 89:46-48.) While parked at 16th and

North Street, Edmond "heard a shooting come out of the vehicle," which was right in front of him. (R. 89:37–38.).[1]

Edmond then left to go to a house party, where he saw both Chisem and Davis. Edmond testified, "[t]hat's when everybody got to saying Little Ray got shot." (R. 89:42.) Davis said to Edmond at the party, "eventually it was going to happen." (R. 89:42.)

After June 6, both Chisem and Davis went to Edmond's workplace and confronted Edmond. (R. 89:44.) Edmond testified:

> It was just giving me a 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.
>
> . . . .
>
> 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.

(R. 89:44.) Edmond testified that Chisem was with Davis when Davis gave Edmond the "fair warning." (R. 89:44.)

State's witness Kijuan Parker testified that he witnessed the shooting. (R. 91:12.) Parker saw a grey SUV and shots "coming from that way." (R. 91:15.)

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[1] Edmond also testified that he informed the police that it was the same gray truck that he saw Jay World driving earlier the same day. (R. 89:38.)

Vernicia Davis, who was a "very close" friend of the victim, Raymond Harris (R. 88:105), testified that Harris told her that he had previously shot "Howard [Davis], my cousin." (R. 88:105.) The State then questioned Vernicia about the relationship between Chisem and Davis:

> Q: Can you tell us the relationship between GT and Jay World?
>
> A: They best of friends. They grew up in my mama house. They all stayed at my mama. Howard Davis lived with my mom since he was 15. And Jarmel came when he was like 12 or 13 because his mother had passed.

(R. 89:14.)[2]

State's witness Jamil Tubbs testified that while he was housed with both defendants at the Milwaukee Secure Detention Facility, he was present during a conversation where both Chisem and Davis talked openly about a homicide in which they were involved. (R. 91:47.) Although Tubbs testified that he could not recall certain details of the conversation, he remembered speaking to Detective Matthew Bell and telling the detective that he was surprised at how freely and voluntarily Chisem and Davis discussed it. (R. 91:48.)

The State then called Detective Bell, who took Tubbs's statement. (R. 91:55.) Bell testified that Tubbs told him that Davis mentioned that he had shot JW in the face, but did not kill him. (R. 91:60.) Tubbs informed Bell at one point Chisem and Davis were laughing about it. (R. 91:60.) Tubbs also

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[2] Chisem states in his brief, "Although there was some evidence in the record of their friendship (R. 89:85), the evidence lacked a proper foundation." (Chisem's Br. 18.) But nothing in record 89:95 (which is Ernest Davis's testimony) suggests a lack of foundation or an objection and, also, Vernicia testified about their "best of friends" friendship as well.

informed Bell that Davis said something to Chisem about failing to hide the truck in the garage. (R. 91:60.)

Willie Nelson, a fellow inmate with Davis while Davis was at jail awaiting trial, also testified. (R. 90:78–79.) Nelson testified that Davis discussed specific facts of his case. Davis told Nelson that he had been shot by his cousin previously, and that he had had a "beef" with his cousin for a long time until "he came up dead." (R. 90:80.) According to Nelson, Davis told him that he tried to set up a false alibi and that Davis "handled that business" with a revolver. (R. 90:81.) Nelson testified:

> Q: During the conversation that you had with Mr. Davis, did he indicate whether he did this by himself or with any other individuals?
>
> A: It was some another guy with him. I don't know too much about him.

(R. 90:83.)

Detective Graham testified about his interview with Nelson. (R. 91:69.) According to Graham, Nelson told him that Davis said that during the "shooting" Davis was with "JB or Jay World, but he couldn't recall." (R. 91:71–72.) Graham testified that he recorded the interview and made a report, but that he had since lost the recording. (R. 91:69.) On cross-examination, however, Graham explained, "Just so we're clear, there is no requirement to record those interviews." (R. 91:78.) Graham elaborated:

> That is an option that I chose to do -- was to record those interviews. So if there's an out-of-custody interview of a person that's giving information about a homicide or what that person may have witnessed, typically there is no recording. I did record it. I did indicate in my report that I recorded it. I wasn't trying to hide anything.

(R. 91:78.)

Davis and Chisem both elected not to testify and, therefore, did not offer antagonistic testimony against each other.

At the close of the case, the court instructed the jury on party to a crime:

> The Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime, as a party to that crime, and may be convicted of that crime although the person who did not directly commit it.
>
> . . . .
>
> If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly commits it or committed it.
>
> A person intentionally aids and abets the commission of a crime when acting with knowledge or belief that another person's committing or intends to commit a crime, he knowingly either assists the person who commits the crime, or is ready and willing to assist, and the person who commits the crime knows of the willingness to assist.

(R. 92:28–29.) Additionally, the verdict form for Chisem was separate from Davis's verdict form. (R. 19:1–3.)

The jury convicted Chisem of first-degree reckless homicide PTAC while using a dangerous weapon (repeater), and first-degree recklessly endangering safety PTAC while using a dangerous weapon (repeater). (R. 93:5–7.) It found Chisem not guilty of possession of a firearm by a felon. (R. 93:8.) The jury convicted Davis of all three counts. (*See* R. 72:4.)

Postconviction proceedings

Chisem filed a postconviction motion requesting a new trial. (R. 54.) He argued that the trial court erred when it denied his motion to sever because evidence "relevant to Davis' liability also came in against Chisem and that evidence

would not have come in if Chisem had been tried separately and this prejudiced Chisem." (R. 54:1.) He admitted, however, that "[a]lthough 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." (R. 54:14.)

Chisem also argued that his "constitutional right to confrontation was violated because Davis' out-of-court statements were used as evidence against Chisem at their joint trial where Davis did not testify." (R. 54:14.) He claimed that this right to confrontation was violated when the court admitted Davis's statements through the testimony of other witnesses, such as Willie Nelson, Fabian Edmond, and Jamil Tubbs. (R. 54:14–17.)

The postconviction court denied Chisem's motion. (R. 72.) It determined that "[a]lthough the evidence of motive related factually to Howard Davis, the evidence was equally attributable to [Chisem] as a party to the crime, and therefore, the State would have been allowed to present the evidence of motive at a separate trial involving [Chisem] in order to put his actions into context for the jury." (R. 72:4.) The court continued: "The State would not have been required to present its case against [Chisem] as [a] random act of senseless violence under circumstances where motive was attributable to both defendants." (R. 72:4.)

The court also rejected Chisem's claim that Edmond's alleged hearsay statement that Davis gave him "fair warning" would not have been admissible at a separate trial. (R. 72:5.) The court determined that the statement was not a "statement or assertion of any fact for purposes of hearsay. . . . It was merely an instruction to a person who witnessed the shooting." (R. 72:5.) The court found that "[w]hile such an instruction could be construed as evidence of consciousness of guilt, such evidence is admissible and was admissible as to both defendants since they were acting together." (R. 72:5.)

The court next rejected Chisem's claim that Tubbs's statements included hearsay statements that would not have been admissible against Chisem in a separate trial. (R. 72:6.)

> According to Tubbs, as established by his own testimony and the testimony of Detective Bell, Chisem and Davis were together talking and laughing about the homicide. While [Chisem] attempts to play semantic games to distance himself from the conversation, the fact remains that he was party to that discussion and said nothing to deny or dispute his complicity. The court concurs with the defendant's "adoptive admissions" analysis and finds that Tubbs' testimony did not include hearsay statements that were inadmissible against [Chisem].

(R. 72:6.)

The court agreed with the State's concession, however, that Detective Graham's testimony that Nelson told him that Davis said that he was with "JB or Jay World, but he couldn't recall" was hearsay and would not have been admissible against Chisem at a separate trial. (R. 72:7.) But the court found such error "harmless." (R. 72:7.) The court reasoned that, even without Graham's testimony, the circumstantial evidence against Chisem was "more than sufficient to establish Chisem's complicity in the crimes, and therefore, there is no reasonable probability of a different outcome." (R. 72:7.)

The court also rejected Chisem's argument that the trial court erred when it denied his request to bar Detective Graham's testimony for failing to preserve the audio recording. The court determined that Chisem failed to make a showing that Graham acted in bad faith or that the evidence was potentially exculpatory. (R. 72:8.) Also, the court noted that Graham was cross-examined about his failure to preserve the evidence. (R. 72:8.)

Finally, the court determined that Chisem's constitutional right to confrontation was not violated because Davis's out-of-court statements were not testimonial in nature. (R. 72:8.) Rather, Davis's out-of-court statements were made to acquaintances and/or cellmates that were not covered by the Confrontation Clause. (R. 72:8.) And, even if those statements were testimonial, the court held, "there is no reasonable probability that the outcome of the trial would have been different without them." (R. 72:8.)

Chisem appeals. For clarity, the State responds to Chisem's appellate arguments in the order they appear in his appellate brief.

STANDARD OF REVIEW

This Court must determine whether Chisem's Confrontation Clause rights were violated by the trial court's failure to sever Chisem's trial from Davis's. The decision on whether to sever a trial of two defendants is a discretionary matter for the trial court. *State v. Shears*, 68 Wis. 2d 217, 234, 229 N.W.2d 103 (1975).

Whether a defendant's Sixth Amendment Confrontation Clause rights were violated by the admission of evidence at a joint trial "is a question of constitutional law subject to independent review." *State v. Mattox*, 2017 WI 9, ¶ 19, 373 Wis. 2d 122, 890 N.W.2d 256 (citing *State v. Williams*, 2002 WI 58, ¶ 7, 253 Wis. 2d 99, 644 N.W.2d 919). The Wisconsin Supreme Court has provided, "We generally apply United States Supreme Court precedents when interpreting" the Sixth Amendment and the analogous Article 1, Section 7 of the Wisconsin Constitution. *State v. Jensen*, 2007 WI 26, ¶ 13, 299 Wis. 2d 267, 727 N.W.2d 518.

This Court must also determine if the trial court erred when it admitted the statements that co-defendant Davis made to other witnesses. This Court reviews the trial court's decision to admit or exclude evidence "under an erroneous

exercise of discretion standard." *Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698. "An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial. The appellate court must conduct a harmless error analysis to determine whether the error 'affected the substantial rights of the party.'" *Id.* ¶ 30 (citation omitted). "If the error did not affect the substantial rights of the party, the error is considered harmless." *Id.* ¶ 30. "An error affects the substantial rights of a party if there is a reasonable probability of a different outcome." *State v. Kleser*, 2010 WI 88, ¶ 94, 328 Wis. 2d 42, 786 N.W.2d 144.

ARGUMENT

I. The trial court did not erroneously exercise its discretion when it denied Chisem's motion to sever.

A. Legal principles of severance

Under Wis. Stat. § 971.12(2),

> 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. 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.

The next subsection of the statute provides in part that "[i]f it appears that a defendant or the [S]tate is prejudiced by a joinder 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." Wis. Stat. § 971.12(3). In *Nieves*, the supreme court opined "that the primary harm Wis. Stat. § 971.12(3) is designed to prevent is the harm that results from a violation of an

individual's Confrontation Clause rights." *Nieves*, 376 Wis. 2d 300, ¶ 61. Finally, "Wisconsin courts have been reluctant to find that assertions of antagonistic defenses justify severance." *State v. Denny*, 120 Wis. 2d 614, 621, 357 N.W.2d 12 (Ct. App. 1984).

B. Legal principles of *Bruton* and *Crawford*

"Both the Sixth Amendment to the United States Constitution and the Wisconsin Constitution guarantee a criminal defendant the right to confront witnesses who testify against the defendant at trial." *Mattox*, 373 Wis. 2d 122, ¶ 20; *see also* U.S. Const. amend. VI; Wis. Const. art. 1, § 7. In contrast, "[t]he privilege, or right, to remain silent afforded by the Fifth Amendment comes into play when a defendant is compelled to give testimony that is incriminating." *State v. Sahs*, 2013 WI 51, ¶ 97, 347 Wis. 2d 641, 832 N.W.2d 80 (Roggensack, J., concurring) (citing *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984)). "A defendant tried jointly with a codefendant has a Sixth Amendment right to confront a testimonial, out-of-court statement of a codefendant who, in turn, has a Fifth Amendment right not to testify." *Nieves*, 376 Wis. 2d 300, ¶ 20.

Chisem centers his argument for severance on the ruling of the United States Supreme Court in *Bruton v. United States*, 391 U.S. 123 (1968), as codified in Wis. Stat. § 971.12(3). In *Bruton*, the United States Supreme Court determined that an out-of-court statement made by a co-defendant that inculpates a defendant cannot be introduced at trial when the co-defendant does not take the stand. *Bruton*, 391 U.S. at 126. The Court held that the

introduction of such statements violates the defendant's rights under the Confrontation Clause. *Id*.[3]

Since *Bruton*, the Supreme Court changed the framework under which courts analyze the Confrontation Clause, which now "limits the application of the Clause to testimonial statements." *Nieves*, 376 Wis. 2d 300, ¶ 24. In *State v. Crawford*, 541 U.S. 36 (2004) the Supreme Court held that 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." *Mattox*, 373 Wis. 2d 122, ¶ 24; *see also Crawford*, 541 U.S. at 68 ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

C. *Nieves*: There is no Confrontation Clause violation implicated by the admission of non-testimonial statements.

Last year, the Wisconsin Supreme Court recognized that "the *Bruton* doctrine was limited by *Crawford*." *Nieves*, 376 Wis. 2d 300, ¶ 35. The court concluded "that *Crawford v. Washington*, [541 U.S. 36 (2004)] and its progeny limited the application of the *Bruton* doctrine to instances in which a codefendant's statements are testimonial. Therefore, *Bruton* is not violated by the admission of a non-testifying codefendant's statements that are nontestimonial." *Nieves,* 376 Wis. 2d 300, ¶ 2. And, because the statements in *Nieves* were nontestimonial, the defendant's "confrontation rights [in

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[3] However, as the Wisconsin Supreme Court has indicated, the erroneous failure to sever defendants for trial when required by *Bruton* can be harmless. *See State v. King*, 205 Wis. 2d 81, 97–98, 555 N.W.2d 189 (Ct. App. 1996).

that case] were not violated. Accordingly, the circuit court did not err in denying Nieves' motion to sever the trials." *Id.*

Importantly, in this case, Chisem does *not* argue that the statements he challenges on appeal are testimonial. Rather, he argues that *despite the fact* that they "were all likely 'nontestimonial'" (Chisem's Br. 25), his confrontation rights were still violated (despite *Crawford*'s and *Nieves*' holdings).[4] Chisem argues that because the *Nieves* court did not specifically overrule *State v. Manuel*, 2005 WI 75, ¶ 25, 281 Wis. 2d 554, 697 N.W. 2d 811 "the law is somewhat uncertain" as to whether the Confrontation Clause protects only testimonial statements.[5] (Chisem's Br. 28.) Chisem is

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[4] Chisem makes one caveat: "although an argument might be made that the statements/threats that Davis made to Edmond [at his workplace] evinced a certain 'formality' about them that they could be considered testimonial." (Chisem's Br. 25, 50–51.) Chisem claims there is "a certain 'formality' about the way Davis confronted Edmond at his place of employment and issued a clear and unmistakable threat to Edmond what might happen if he were to talk to the police." (Chisem's Br. 50–51.) There is no such formality at Edmond's place of work (it is an informal setting, as opposed to a police station), and Davis did not make his statements to a law enforcement officer, but to an acquaintance. As this Court stated in *Nieves*, "statements to non-law enforcement individuals are unlikely to be testimonial." 376 Wis. 2d 300, ¶ 44.

[5] In *State v. Manuel*, the court held that nontestimonial statements should be evaluated for Confrontation Clause purposes. 2005 WI 75, ¶ 60, 281 Wis. 2d 554, 697 N.W.2d 811. As Chisem points out in his brief (Chisem's Br. 24 n. 8), *this* Court disagreed with *Manuel* and chose not to follow it in *Jensen*:

> We recognize that *Manuel*'s holding that nontestimonial statements should be evaluated for Confrontation Clause purposes is in direct conflict with *Giles*' [*v. California*, 554 U.S. 353 (2008)] holding that "only testimonial statements are excluded by the Confrontation Clause." We adhere to the *Giles* holding because the Supremacy Clause

mistaken. There is simply nothing "uncertain" about *Nieves*' holding: "We conclude that *Crawford v. Washington*, [541 U.S. 36 (2004)] and its progeny limited the application of the *Bruton* doctrine to instances in which a codefendant's statements are testimonial. Therefore, *Bruton* is not violated by the admission of a non-testifying codefendant's statements that are nontestimonial." *Nieves*, 376 Wis. 2d 300, ¶ 2.

Therefore, the State does not address co-defendant Davis's nontestimonial statements to Willie Nelson, Jamil Tubbs, and Fabian Edmond (Chisem's Br. 25–56) for purposes of alleged Confrontation Clause violations against Chisem. However, Chisem also argues 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." (Chisem's Br. 25.) The State will address Chisem's hearsay arguments individually in Issue II, below. But first, the State addresses Chisem's severance claim that evidence of Davis's motive to kill Harris would not have been admissible in a separate trial.

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

State v. Jensen, 2011 WI App 3, ¶ 26, 331 Wis. 2d 440, 794 N.W.2d 482.

D. Evidence that the victim Raymond Harris previously shot co-defendant Davis would still have been admissible in a separate trial.

Chisem argues that "an entire line of evidence relevant to Davis' liability also came in against Chisem" and that this evidence would not have been admissible had Chisem been tried separately. (Chisem's Br. 9). Specifically, Chisem argues that evidence of Davis's "motive to kill" would not had been admissible at a separate trial, and that such evidence prejudiced Chisem. (Chisem's Br. 10.) Chisem is referring to evidence that the victim, Raymond Harris, shot co-defendant Davis in June 2013, that Davis knew Harris was the shooter, and that Davis did not report the incident to police. (Chisem's Br. 12–13.)

As the postconviction court correctly concluded, this evidence would have been admissible in a separate trial. As the State argued to the postconviction court, Chisem was tried as a PTAC, and he shared "a motive with his co-actor and friend, Davis, and the motive evidence was therefore relevant and admissible on that ground." (R. 62:2.) The postconviction court agreed with the State: "Although the evidence of motive related factually to Howard Davis, the evidence was equally attributable to the defendant as a party to the crime, and therefore, the State would have been allowed to present the evidence of motive at a separate trial involving the defendant in order to put his actions into context for the jury." (R. 72:4.) The court continued, "[t]he State would not have been required to present its case against the defendant as random act of senseless violence under circumstances where motive was attributable to both defendants." (R. 72:4.)

But Chisem argues that a Seventh Circuit Court of Appeals case, *Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012),

provides guidance to this issue.[6] (Chisem's Br. 14–16.) *Smith* involved a claim of retaliation in violation of 42 U.S.C. § 1981 by a human resources manager. Because the plaintiff brought a claim of individual liability, the court concluded that he had to show that the manager (1) "participated in the decision to fire him," and (2) "was motivated by a desire to retaliate against him for his complaints of . . . discrimination." *Smith*, 681 F.3d at 892. The court held that the plaintiff failed to establish individual liability because, although he demonstrated that the human resources manager participated in the decision to terminate his employment, he failed to show that she was personally motivated by retaliatory animus. The human resources manager received complaints of harassment from the plaintiff without investigating them, occasionally refused to speak with the plaintiff, met with the deciding official in the lead-up to the plaintiff's termination, and prepared the plaintiff's termination report. *See id.* at 893, 895, 900. Against those facts, the court determined that her participation in the termination decision was sufficiently established but that, without more evidence that her "personal motives included retaliation," the plaintiff had failed to demonstrate retaliatory animus. *Id.* at 901.

Chisem argues that, "[l]ikewise, that fact that Chisem and Davis were seen together on the day of the homicide (at

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[6] *Smith* was overruled on other grounds by *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016). "Today we reiterate that 'convincing mosaic' is not a legal test. We overrule the opinions in the previous paragraph[, including *Smith*,] to the extent that they rely on 'convincing mosaic' as a governing legal standard. We do not hold that any of those cases was wrongly decided; our concern is only with the treatment of 'convincing mosaic' as if it were a legal requirement." *Ortiz*, 834 F.3d at 765.

the cook-out earlier in the day) and when Davis confronted Edmond . . . does not necessarily show that they acted with the same motive."[7] (Chisem's Br. 16.) While that may be plausible, evidence at trial *also* indicated that Davis and Chisem were "best of friends." (R. 89:14.) And as the State argued to the postconviction court:

> Chisem argues that this motive evidence pertains to co-defendant Davis only and that it was inadmissible against Chisem. 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 [S]tate 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.

(R. 62:2.) But if there were separate trials, the State would still be allowed to put the crimes in context rather than present the crime as a random act against a random victim. *See State v. Chambers*, 173 Wis. 2d 237, 255–56, 496 N.W.2d 191 (Ct. App. 1992) (providing that evidence may be admitted when it provides a context and is necessary to a full presentation of the case.) As party to a crime, and as being "best of friends," Davis's motive evidence for shooting Harris was relevant and attributable to Chisem.

Further, while Davis's motive may have been exclusive to Davis, the core of each defense was not. Both Chisem's and Davis's defense was that they were not involved in the shootings. The defenses were not mutually exclusive or

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[7] However, the State had *no* obligation to prove motive because motive is not an element of first-degree reckless homicide. Wis. Stat. § 940.02(1); Wis. JI–Criminal 1020. Rather, the State only had to prove that Chisem's conduct showed an utter disregard for human life. *Id.*

antagonistic because they had the same defense. *See Denny*, 120 Wis. 2d at 621.[8] Further, neither defendant testified at trial, and the trial court instructed the jury on the law of parties to a crime. As stated by the Seventh Circuit Court of Appeals: "Unless the defenses are so inconsistent that the *making* of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense *precludes* acquittal of other defendants, it is not necessary to hold separate trials." *United States v. Buljubasic*, 808 F.2d 1260, 1263 (7th Cir. 1987). And, as stated by our supreme court, "Wisconsin courts have been reluctant to find that assertions of antagonistic defenses justify severance." *Denny*, 120 Wis. 2d at 621. Accordingly, the trial court did not erroneously exercise its discretion when it denied Chisem's motion to sever.

II. Davis's statements to Jamil Tubbs and Fabian Edmond would have been admissible against Chisem in a separate trial, and the admission of Davis's statements to Willie Nelson was harmless error.

At Chisem's joint trial with co-defendant Davis, the motive for the shooting was that Davis was seeking vengeance against victim Raymond Harris because Harris had shot Davis about a year earlier. Chisem argues that this motive evidence pertains to co-defendant Davis only and that it was inadmissible against Chisem. Because Chisem admits that the statements he challenges on appeal were *nontestimonial* (Chisem's Br. 14–15), and because the United States Supreme Court and the Wisconsin Supreme Court have held that the

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[8] And as previously indicated, Chisem admitted in his postconviction motion that "[a]lthough 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." (R. 54:14.) Chisem also admits this in his appellate brief. (Chisem's Br. 19.)

Confrontation Clause applies only to testimonial statements (*Crawford* and *Nieves*), the State now addresses Chisem's argument that Davis's statements to Jamil Tubbs, Fabian Edmond, and Willie Nelson "were still prohibited by the hearsay rules and substantially prejudiced Chisem at trial." (Chisem's Br. 25.)

A. Davis's statements to Jamil Tubbs

Through Jamil Tubbs's testimony, the State established that while Tubbs was a jail inmate housed with both defendants he overheard a conversation where the two defendants talked openly about a homicide in which they were involved. (R. 91:47.) Tubbs testified that there was a statement made about the fact that "Chisem should have put the truck in the garage to hide it." (R. 91:48.) Chisem was party to the discussion, and he said nothing to deny or dispute his involvement in the homicide.

The State then called Detective Bell, who testified that Tubbs told him that Davis mentioned that he had shot JW in the face but did not kill him. (R. 91:60.) Tubbs informed Bell that at one point Chisem and Davis were laughing about it. (R. 91:60.)

Chisem argues that Davis's statements to Tubbs would not have been admissible against Chisem because they were only admissible as an admission by a party opponent against Davis. (Chisem's Br. 39.) Any statements Davis made to Tubbs, according to Chisem, were hearsay. (Chisem's Br. 41.) The State disagrees.

Wisconsin Stat. § 908.01(4)(b), entitled "Statements which are not hearsay," provides in part that a "statement is not hearsay if":

> (b) *Admission by party opponent.* The statement is offered against a party and is:
> 1. The party's own statement, in either the party's individual or a representative capacity, or

> 2. A statement of which the party has manifested the party's adoption or belief in its truth, or
> 3. A statement by a person authorized by the party to make a statement concerning the subject, or
> 4. A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or
> 5. A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Therefore, Wis. Stat. § 908.01(4)(b)2 provides that an out-of-court statement is not hearsay if it is offered against a party and is a statement of which the party has manifested the party's adoption or belief in its truth. These types of statements are termed "adoptive admissions." The supreme court explained this longstanding rule in *State v. Marshall*, 113 Wis. 2d 643, 655, 335 N.W.2d 612 (1983): "The rule is fairly to be deduced . . . that inculpatory statements, made in the presence and hearing of one accused of crime, which he, having opportunity to do so, does not deny, and the truth or falsity of which is in his personal knowledge, are admissions of the accused by acquiescence, and as such admissible in evidence" (citation omitted). Silence can be an adoptive admission. "A party declarant may adopt the statement of another by silence. This requires a showing that the party declarant was aware of the statement, and that it was of a type a reasonable person would have denied or qualified if it was untrue." Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 801.502 at 695–96 (3d ed. 2008) (footnote omitted).

In this case, the postconviction court correctly determined that Chisem's adoptive admissions were not hearsay statements that would be admissible against Chisem in a separate trial. (R. 72:6.) This Court should affirm. While Chisem argues that his silence does not mean that he adopted Davis's statement (Chisem's Br. 41 n.11), in the context of what was occurring, it was clear to Tubbs that Chisem and

Davis were talking about a homicide both Chisem and Davis had committed, and Chisem did not say or do anything to suggest he was denying what had happened.[9]

Finally, the State agrees with the postconviction court's determination that "[e]ven if [Chisem's] silence did not rise to the level of an adoptive admission, there was plenty of other circumstantial evidence of [Chisem's] complicity in the homicide," and "therefore, the admission of Tubbs's statement through the detective was harmless." (R. 72:6.)

Wisconsin's harmless error rule is codified in Wis. Stat. § 805.18(2):

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

The test for harmless error asks whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *State v. Harvey,* 2002 WI 93, ¶¶ 46–47, 254 Wis. 2d 442, 647 N.W. 2d 189.

In Chisem's case, a rational jury would have found Chisem guilty absent the alleged error because there was

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[9] Chisem also argues that the admission of Tubbs's, Edmond's, and Nelson's *nontestimonial* statements violated his confrontation rights (Chisem's Br. 20, 24, 28–31, 41–42, 51–52), and he therefore argues that this Court should apply "the *Manuel/Roberts* analysis." (Chisem's Br. 24.) As the State explained in Section "I.C." of this brief, *Crawford* and *Nieves* provide that the Confrontation Clause does not apply to nontestimonial statements, and therefore the "*Manuel/Robert* analysis" is improper.

overwhelming, compelling evidence apart from Tubbs's testimony that established Chisem's involvement in the crimes.

One, the video showed two vehicles, a blue one belonging to Edmond, and a Saturn SUV. (R. 90:21, 27, 48–49; 91:81.) The gunshots came from the Saturn. (R. 90:21, 24.)

Two, Fabian Edmond testified that he recognized the Saturn as Chisem's. (R. 89:36.) During the shooting, Edmond was able to see that there were two persons inside the Saturn, and he testified that he saw both Chisem and Davis in the Saturn shortly before the shooting. (R. 89:36–38, 46–48.) After the shooting, Chisem was with Davis when Davis issued his "fair warning" to Edmond. (R. 89:44.)

Three, Kijuan Parker, a witness to the shooting, saw a grey SUV and shots "coming from that way." (R. 91:15.)

Four, Ernest saw Chisem driving the Saturn before the shooting. (R. 89:91.) A witness to the shooting, Ernest saw two people firing shots from the Saturn. (R. 89:93–94.) Earnest testified that Davis was sweating after the shooting and discarded his shirt in the garbage. (R. 89:95.) Chisem approached Ernest after the shooting and told him the matter was not to be discussed again. (R. 89:96.)

Five, when Chisem was arrested, a Saturn, matching the descriptions of the shooters' car, was in the driveway at his and his girlfriend's residence. (R. 90:52–53.) Chisem's girlfriend, Zollicoffer, established she did not drive the Saturn on June 6, 2014. (R. 92:7.)

Therefore, it is clear beyond a reasonable doubt that a rational jury would have found Chisem guilty absent the alleged error of admitting Tubbs's statement.

B. Davis's statements to Fabian Edmond

Fabian Edmond witnessed the shooting and testified that the following day, both defendants came to his workplace and suggested to him that if the police were to contact him, he should say nothing and instead ask for a lawyer. (R. 89:44.) Edmond characterized this to the jury as a "fair warning." (R. 89:44.)

The postconviction court determined that Davis's statement to Edmond "was not a statement or assertion of any fact for purposes of hearsay." (R. 72:5.) On appeal, Chisem argues that while it is generally true that instructions are not considered assertions, there are exceptions. (Chisem's Br. 48–49.) According to Chisem, an exception exists in this case because Davis's statement is an "implicit assertion[ ] of fact. . . . that he (and perhaps by implication Chisem) had killed Raymond Harris." (Chisem's Br. 49.)

The State disagrees. As the postconviction court described Davis's "fair warning" to Edmond: it did not "directly implicate himself or [Chisem] in the homicide. It was merely an instruction to a person who witnessed the shooting." (R. 72:5.) Therefore, it was not an "assertion" within the meaning of the hearsay rule. *See State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 427, 351 N.W.2d 758 (Ct. App. 1984) ("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." (citation omited)).

And Davis's "fair warning" is admissible against Chisem for other reasons: Chisem's act of accompanying Davis while Davis instructed Edmond not to cooperate with police is an act evidencing consciousness of guilt. "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 principle criminal charge." *State v. Bauer*, 2000 WI App 206, ¶ 6, 238 Wis. 2d 687, 617 N.W.2d 902 (citation omitted). When Davis (accompanied by Chisem) instructed Edmond not to cooperate with law enforcement, it showed that the co-defendants wanted Edmond to withhold information that would implicate them.

Also, even if Davis's statement to Edmond could be construed as an admission, it would have been admissible in a separate trial under Wis. Stat. § 908.01(4)(b)5, as a statement by a conspirator of a party during the course of, and in furtherance of, a conspiracy. While Chisem notes that he was not charged with conspiracy (Chisem's Br. 53), as the postconviction court determined, he did not need to be charged with a conspiracy for the court to find that a conspiracy existed for purposes of Wis. Stat. § 908.0l(4)(b)5. (R. 72:5 n.5.) As provided in *State v. Dorcey*, 103 Wis. 2d 152, 157, 307 N.W.2d 612 (1981):

> Under [Wis. Stat. § 908.01(4)(b)5], statements of a co-conspirator made "during the course and in furtherance of the conspiracy" are admissible against any or all parties to the conspiracy. By definition such statements do not constitute hearsay and are therefore outside the rule which excludes hearsay testimony. . . . In order for the statements to be admissible, however, it must be established that there is a conspiracy between the declarant and the party to the suit. Not all of the elements of the substantive crime of conspiracy need be proven, however, and the defendant *need not be charged with conspiracy*.

(emphasis added) (citation omitted). In this case, the evidence was sufficient to show that Davis and Chisem were in a conspiracy to cover up their involvement in Harris's death, which is what motivated them to confront Edmond.

While Chisem next argues that the conversation between Davis and Edmond did not take place in furtherance of a conspiracy because the crimes had already been

completed (Chisem's Br. 53), the conspiracy need not be limited to the commission of the crimes. In Wisconsin, "a conspiracy continues during the course of the concealment." *Bergeron v. State*, 85 Wis. 2d 595, 613 n.9, 271 N.W.2d 386 (1978) (citation omitted). "A statement by a co-conspirator is in furtherance of the conspiracy if it reassures and keeps the other participants cohesive in their illegal endeavor, or apprises them of developments." *State v. Whitaker*, 167 Wis. 2d 247, 262, 481 N.W.2d 649 (Ct. App. 1992); *see also Gelosi v. State*, 215 Wis. 649, 656, 255 N.W. 893 (1934) (providing that a conspiracy continues "while the conspirators continue to be active in taking measures to prevent the discovery of the crime or the identity of those connected with its perpetration.").

Finally, similar to Davis's statement to Tubbs in which Chisem remained silent, such silence would have been admissible as adoptive admission under Wis. Stat. § 908.01(4)(b)2. *See Blinka*, *supra*: "A party declarant may adopt the statement of another by silence. This requires a showing that the party declarant was aware of the statement, and that it was of a type a reasonable person would have denied or qualified if it was untrue." Therefore, Davis's statements to Edmond would have been admissible in a separate trial.

C. Davis's statements to Willie Nelson

With respect to witness Nelson, in Chisem's pretrial motion to sever, he did not raise the testimony of Willie Nelson as one of the grounds for severance. (R. 11.) Therefore, the circuit court was denied its opportunity to address Chisem's claim that it should grant severance on the grounds of Nelson's testimony. Chisem has therefore forfeited this argument, and he provides no compelling reasons for this Court to ignore forfeiture. *See State v. Kaczmarski*, 2009 WI App 117, ¶ 9, 320 Wis. 2d 811, 772 N.W.2d 702. However, as

demonstrated below, even if Chisem has not forfeited this argument or, even if this Court in its discretion chooses to address the argument, the Court should reject it.

As previously indicated, Nelson testified that he was a fellow inmate with Davis while Davis was at the jail awaiting trial. (R. 90:77–78.) Davis told Nelson that he had been shot by his cousin (Harris) previously, and that he had had a "beef" with Harris until Harris "came up dead." (R. 90:80.) Davis told Nelson that he tried to set up a false alibi and that Davis "handled that business" with a revolver. (R. 90:81.) Nelson also testified that "some other guy [was] with [Davis,]" but that he did not know much about him. (R. 90:83.) The State then called Detective Graham, who interviewed Nelson. Graham testified that Nelson told him that Davis said that Davis did the crime along with "JB or Jay World" (R. 91:71–72.)

At the postconviction proceedings, the State conceded that "Chisem is correct that this testimony was hearsay as to Chisem and would not have been admissible at a separate trial." (R. 62:7; 72:7.) The postconviction court agreed. (R. 72:7.) However, as the postconviction court correctly held, the admission of the testimony was harmless. (R. 72:7.)

A rational jury would have found Chisem guilty absent the error because there was overwhelming, compelling evidence apart from the testimony that established Chisem's involvement in the crimes:

One, video showed two vehicles, a blue one belonging to Edmond, and a Saturn SUV. (R. 90:21, 27, 48–49; 91:81.) The gunshots came from the Saturn. (R. 90:21, 24.)

Two, Fabian Edmond testified that he recognized the Saturn as Chisem's. (R. 89:36.) During the shooting, Edmond was able to see that there were two persons inside the Saturn, and he testified that he saw both Chisem and Davis in the Saturn shortly before the shooting. (R. 89:36–38, 46–48.)

After the shooting, Chisem was with Davis when Davis issued his "fair warning" to Edmond. (R. 89:44.)

Three, Kijuan Parker, a witness to the shooting, saw a grey SUV and shots "coming from that way." (R. 91:15.)

Four, Ernest saw Chisem driving the Saturn before the shooting. (R. 89:91.) A witness to the shooting, Ernest saw two people firing shots from the Saturn. (R. 89:93–94.) Earnest testified that Davis was sweating after the shooting and discarded his shirt in the garbage. (R. 89:95.) Chisem approached Ernest after the shooting and told him the matter was not to be discussed again. (R. 89:96.)

Five, when Chisem was arrested, a Saturn, matching the descriptions of the shooters' car, was in the driveway at his and his girlfriend's residence. (R. 90:52–53.) Chisem's girlfriend, Zollicoffer, established she did not drive the Saturn on June 6, 2014. (R. 92:7.)

Six, Jamil Tubbs testified that he was present when both defendants were openly discussing the shooting. (R. 91:47.)

Because of this overwhelming evidence establishing Chisem's guilt, this Court should affirm the postconviction court's harmless error decision. (R. 72:7.) There is no reasonable probability of a different outcome had the testimony been excluded.

Finally, Chisem makes the argument that "the cumulative effect, not only of this error, but combined with the other ones discussed in the brief, caused him substantial prejudice" and, therefore, he is entitled to a new trial. (Chisem's Br. 33–34, 44.) In *State v. Harris*, 2008 WI 15, ¶ 110, 307 Wis. 2d 555, 745 N.W.2d 397, the supreme court provided that "[t]he cumulative effect of several errors may, in certain instances, undermine a reviewing court's confidence in the outcome of a proceeding." In this case, the alleged errors viewed cumulatively were harmless, not

prejudicial. Their cumulative effect did not contribute to the verdict against Chisem or undermine confidence in the verdict. As demonstrated in the State's harmless error analysis above, the State had overwhelming evidence establishing Chisem's guilt absent the admission of the alleged hearsay statements.

III. Chisem is not entitled to a new trial when the trial court knew that the State would introduce statements that Davis made to witnesses implicating Chisem.

Chisem next argues that the postconviction court erred when it denied his motion for a new trial because the State never advised the trial court that it would use Davis's statements (to Tubbs, Edmond, and Nelson) to implicate Chisem. (Chisem's Br. 57.)

Wisconsin Stat. § 971.12(3), entitled, "Relief from prejudicial joinder," provides:

> 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 the district attorney 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.

According to Chisem, "the [S]tate never advised the court of its intent to use Davis' statements implicating Chisem prior to trial." (Chisem's Br. 57.) But, had the State notified the trial court, "the trial court would have been required to grant a severance." (Chisem's Br. 58.)

First, Tubbs, Edmond, and Nelson were listed in the State's witness list. (R. 5:1.) Second, in his motion to sever

prior to trial, Chisem informed the court of Davis's statements to Tubbs and Edmond, which is the reason Chisem requested the severance. (*See* R. 11:6–8, 10–12.) Specifically, Chisem provided in his motion to sever that he "makes this request in light of certain evidence that he anticipates will be admissible at trial against Mr. Davis that is wholly unrelated to him, and which cannot be linked to Mr. Chisem by the State's evidence." (R. 11:2.) The State responded to Chisem's motion:

> [*T]here is also evidence that will be produced that will implicate Mr. Davis solely*. There is also evidence that will be produced that will implicate Mr. Chisem solely. The fact that specific items of evidence will be used against only one defendant is not a unique situation and does not mandate severance.

(R. 13:2) (emphasis added). The State aptly noted, "there has not been antagonistic defenses asserted," and that "there has not been any indication that either defendant will claim that they were an innocent bystander or spectator and that the co-defendant was the shooter." (R. 13:2–3.)

Therefore, any claim that the trial court did not *know* that the State would be offering evidence of Davis's statements that would implicate Chisem does not stand. The court knew, and it properly exercised its discretion when it denied Chisem's motion to sever.

Additionally, even if Wis. Stat. § 971.12(3) had been violated, any error was harmless when viewed in light of the overwhelming evidence against Chisem. Admission of the witnesses's statements did "not affect the substantial rights" of Chisem. *See* Wis. Stat. § 805.18(1). As already argued in the above harmless-error analysis, Chisem would have been convicted without the testimony. And finally, as the supreme court recently announced in *Nieves*, "the primary harm Wis. Stat. § 971.12(3) is designed to prevent is the harm that results from a violation of an individual's Confrontation

Clause rights." 376 Wis. 2d 300, ¶ 61. Because there was no Confrontation Clause violation in this case, as argued above, the primary harm Wis. Stat. § 971.12(3) is designed to prevent was not implicated.

IV. The trial court did not erroneously exercise its discretion when it admitted Nelson's testimony.

As previously indicated, Detective Graham testified about his interview with Nelson. (R. 91:69.) Nelson told Graham that Davis said that during the "shooting" Davis was with "JB or Jay World, but he couldn't recall." (R. 91:71–72.) Graham testified that he recorded the interview, but that he lost the recording. (R. 91:69.) Graham explained that "there is no requirement to record those interviews."

> That is an option that I chose to do -- was to record that interview. So if there's an out-of-custody interview of a person that's giving information about a homicide or what that person may have witnessed, typically there is no recording. I did record it. I did indicate in my report that I recorded it.

(R. 91:78.)

But prior to Nelson's testimony, Chisem objected to Nelson testifying because "we were unable to actually hear the conversation that was recorded [by Detective Graham]." (Chisem's Br. 60 (citing R. 91:5–7).) A sidebar occurred, and the court denied Chisem's objection. (*Id.*)

Chisem's final argument on appeal is that because there is nothing in the record that indicates the court stated that the State showed "good cause" for its failure to produce Detective Graham's lost recording, he is entitled to a new trial. (Chisem's Br. 64 (citing *State v. Martinez*, 166 Wis. 2d 250, 258–59, 61, 479 N.W.2d 224. (Ct. App. 1991))). Chisem is incorrect.

To put this issue in the proper legal framework, if this Court first determines that the State violated its discovery

obligations under Wis. Stat. § 971.23(1)(b), *only then* does this Court determine whether the State had "good cause" for failing to disclose. *State v. DeLao*, 2002 WI 49, ¶ 51, 252 Wis. 2d 289, 643 N.W.2d 480. But because there was no discovery violation in this case, this Court need not reach the issue of good cause.

Wisconsin Stat. § 971.23(2m) requires the State to turn over what is within its "possession, custody, or control." Here, the State never had "possession, custody, or control" of Detective Graham's recording. So it could never turn over the recording to the defense, and it had no way of getting it—the recording was gone. While Chisem relies on *Martinez,* that case is inapposite because in *Martinez* the State failed to disclose evidence that it once had in its possession. 166 Wis. 2d at 254, 257.

In this case, because there was no discovery violation, the trial court was not required to address "good cause" on the record. (*See* Chisem's Br. 64.)

Finally, even assuming for the sake of argument that the State violated a discovery violation, the postconviction court (1) found that there is no showing that Detective Graham acted in bad faith (he was not required to record the interview), and (2) recognized that Graham was cross-examined about his failure to preserve the evidence. (R. 72:8.) And, as argued above, the State never had "possession, custody, or control" of the recording. The State therefore demonstrated good cause for its alleged violation of the discovery statute. Chisem is not entitled to relief on this claim.

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 22nd day of January, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,271 words.

Dated this 22nd day of January, 2018.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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

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 this 22nd day of January, 2018.

_____
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