STATE OF WISCONSIN

# COURT OF APPEALS

DISTRICT I

Appeal No. 2017AP001114-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JARMEL DONTRA CHISEM,

Defendant-Appellant.

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# DEFENDANT-APPELLANT'S REPLY BRIEF

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

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### I. THIS COURT SHOULD FOLLOW THE ROBERTS/MANUEL ANALYSIS IN DECIDING WHETHER CHISEM'S CONFRONTATION RIGHTS WERE VIOLATED BY INTRODUCTION OF DAVIS' NON-TESTIMONIAL HEARSAY STATEMENTS

The State argues that there is nothing uncertain about the ***Nieves'*** holding and that "[t]herefore, the State does not address co-defendant Davis' nontestimonial statements to Willie Nelson, Jamil Tubbs and Fabian Edmond for purposes of alleged Confrontation Clause violations against Chisem." State's Brief at p. 19.

Chisem counters by asserting that there is nothing uncertain about the holding in ***Manuel***:

> 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 (emphasis added).

As counsel previously noted in his Brief-In-Chief, ***Crawford*** did not specifically overrule ***Roberts*** and ***Nieves*** did not specifically overrule ***Manuel.*** Consequently, this court should follow the dictates of ***Roberts*** and ***Manuel.*** These cases have not been overruled and are still mandatory, binding precedent for this court. Applying the ***Roberts/Manuel*** analysis to Davis' out-of-court hearsay statements would be a way of harmonizing the two apparently conflicting lines of authority (i.e., ***Roberts/Manuel v. Crawford/Nieves***).[1] The ***Crawford/Nieves*** test could be used when testimonial statements are involved, and the ***Roberts/Manuel*** test could be used when nontestimonial statements are at issue.

In this case there are good reasons why this court should apply the ***Roberts/Manue***l analysis to Davis' nontestimonial out-of-court hearsay statements.

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[1] Counsel applied the ***Roberts/Manuel*** test to Davis' statements and concluded that the introduction of Davis' statements violated Chisem's confrontation rights. See Chisem's Brief-In-Chief at pp. 28-32 (Willie Nelson), 41-44 (Jamil Tubbs) and 51-52 (Fabian Edmond).

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact". ***Maryland* v. *Craig,*** 497 U. S. 836, 845 (1990). Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. ***Crawford v. Washington,*** 541 U.S. 36, 74 (2004)(J. Rehnquist, concurring).[2] The U.S. Supreme Court has recognized that certain statements such as spontaneous declarations, statements made in the course of procuring medical services, dying declarations, and countless other hearsay

[2] Although Chief Justice Rehnquist delivered a concurring opinion, he dissented from the court's decision to "overrule" ***Ohio v. Roberts. Crawford,*** 541 U.S. at 69. In ***State v. Nieves,*** 2017 WI 69, ¶ 26, 376 Wis. 2d 300, 897 N.W.2d 363, the Wisconsin Supreme Court referred to ***Crawford*** as "repudiating" and "*categorically overruling*" ***Roberts***. In ***State v. Manuel,*** 2005 WI 75, ¶ 60, 281 Wis. 2d 554, 586, 697 N.W.2d 811, the supreme court said that "[w]hile 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." (emphasis added).

exceptions are reliable due to the circumstances under which they were made. ***Id.*** That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions. ***Id.***

Likewise, the fact that Davis' statements were nontestimonial should have no bearing on whether admission of the statements violated Chisem's confrontation rights. This court should apply the test used in ***Roberts*** and ***Manuel,*** an approach designed to ensure that the out-of court statements are reliable. As Chisem argued in his Brief-In-Chief (see fn. 1, above), Davis' statements to Nelson, Tubbs and Edmond did not fit into a "firmly rooted" hearsay exception. Davis' purported statements also did not contain "particularized guarantees of trustworthiness."

To evaluate whether statements contain particularized guarantees of trustworthiness, the court should consider the "totality of the circumstances" under which the statements were made. ***Manuel,*** 2005 WI 75, ¶ 68. The relevant circumstances include only those that surround the making of the statement and that render the

declarant particularly worthy of belief. ***Id.*** Here, the circumstances surrounding Davis' statements to his cell mates is highly suspicious.

Although Davis was the alleged "declarant" of the statements, the statements were first revealed to the authorities when Nelson and Tubbs were interviewed by the police. Documents such as statements prepared in anticipation of litigation pose special problems and normally should not be admissible when "'sources of information or other circumstances indicate lack of trustworthiness.'" ***State v. Williams,*** 2002 WI 58, ¶ 39, 253 Wis. 2d 99, 120-21, 644 N.W.2d 919 (citing *7 Wisconsin Practice* § 803.6, 627 (2d ed. 2001)). "'This consideration will most often come into play where there is some question about the motivation behind the making of the record.'" ***Id.***

Witness statements taken from a defendant's cell mates by law enforcement officers are prepared in anticipation of prosecution. Such statements are prepared primarily to aid in the prosecution of the defendant. The statements taken from Nelson and Tubbs were for no other purpose but the prosecution of Davis and Chisem. Nelson

and Tubbs would have had a motivation to assist the state in the hope of getting a better deal in their own cases. Law enforcement and the state have a motive to secure evidence needed to convict Davis and Chisem. Consequently, the circumstances surrounding the statements Davis allegedly made to his cell mates are tainted by a motive to fabricate. ***Manuel,*** 2015 WI 75, ¶ 68.

Chisem asserts his confrontation rights were violated by the introduction of Davis' statements to Nelson, Tubbs and Edmond. Even if Chisem's confrontation rights were not violated, Chisem is still entitled to a new trial because the statements were hearsay and very prejudicial and harmful to Chisem's case. The error in admitting these statements was not harmless and there is a reasonable probability that the result of Chisem's trial would have been different if Chisem had been tried separately and Davis' hearsay statements were not admitted.

In his Brief-In-Chief, Chisem has already addressed the State's arguments that statements made to Tubbs (adoptive admission) and Edmond (instructions are not

assertions of fact/statement of a conspirator) were not hearsay.

Likewise, counsel believes he has adequately addressed the State's argument that evidence of Davis' motive (revenge) would have been admissible at Chisem's trial had Chisem been tried separately. In this regard, counsel would offer one further observation. During postconviction proceedings and on this appeal, the state has advanced the argument that Chisem's motive to assist Davis was due to the fact that they were "friends." This assumption requires further scrutiny. Most people have limits as to what they will do for a friend. It would seem that most, if not all people would not go so far as to assist a friend to murder another human being when they do not share the friend's underlying motive to kill.

## II. THE STATE LEGISLATURE HAS NOT CHANGED OR MODIFIED WIS. STAT. § 971.12(3) SINCE CRAWFORD WAS DECIDED IN 2004 AND THE MEANING OF THE STATUTE IS PLAIN AND UNAMBIGOUS

The interpretation and application of a statute are questions of law that this court reviews de novo. ***State v.***

***Williams,*** 2013 WI App 74, ¶5, 350 Wis. 2d 311, 315, 833 N.W.2d 846, 848. Statutory construction begins with the language of the statute. ***Id.,*** ¶ 6 (citations omitted). If the meaning of the statutory language is plain, this court's inquiry ends. *Id.* This court must presume that the legislature "says in a statute what it means and means in a statute what it says," and this court will give the language its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special meaning. ***Id.*** "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." ***Id,*** If, however, the analysis does not yield one plain meaning, but instead reveals that the statutory language reasonably gives rise to two or more reasonable interpretations, the language is ambiguous. ***Id.*** In that event, this court may look to extrinsic sources of legislative intent, such as legislative histories, to ascertain the meaning of the statute. ***Id.***

Wis. Stat. § 971.12(3) is clear and unambiguous. It provides in pertinent part:

> 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.

(emphasis added).

The statute leaves no room for discretion. The district attorney was required to specifically advise the court that it intended to use Davis' statements against Chisem. The district attorney did not do that. The district attorney advised the court that it would produce evidence that would implicate Davis solely and evidence that would implicate Chisem solely. See State's Brief at p. 34. The state did not indicate that Davis' statements would be used to implicate Chisem (e.g., Detective Graham's testimony that Nelson told him that the person who assisted Davis "was JB or Jay World, but he couldn't recall."). See Defendant's Brief-In-Chief at pp. 26-27. Based on the statements made to the court by the district attorney, Davis' statements would have implicated Davis solely.

Even if the state did adequately inform the court that it would be using Davis' statements to implicate Chisem, then the court was obligated by the statute to sever the cases for trial.

The state goes on to argue that even if the statute had been violated, "any error was harmless when viewed in light of the overwhelming evidence against Chisem." State's Brief at p. 34. At pp. 31-32 of the State's brief, the State discusses the "overwhelming" evidence against Chisem and cites six separate items of evidence that the state describes as overwhelming. Each will be considered in turn:

> *One,* video showed two vehicles, a blue one belonging to Edmond and a Saturn SUV. The gunshots came from the Saturn.
>
> *Two,* Fabian Edmond testified that he recognized the Saturn as Chisem's. 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 David in the Saturn shortly before the shooting. After the shooting, Chisem was with Davis when Davis issued his "fair warning" to Edmond.

State's Brief at p. 31.

Fabian Edmond did testify that he recognized the Saturn as Chisem's, but he did not provide any detail as to

how he knew the vehicle was Chisem's. He provided no information as to the license plate number or any other descriptive information that would specifically identify the vehicle as Chisem's. Notably, although Edmond indicated there were two persons in the vehicle, he was not able to specifically identify Chisem or Davis as being the occupants of the Saturn SUV that he saw at the time of the shooting.[3] The state further alleges:

> *Three,* Kijuan Parker, a witness to the shooting, saw a grey SUV and shots "coming from that way."

State's Brief at p. 32.

Once again, no identification of either Chisem or Davis as the occupants of the "grey SUV." Also, no certainty concerning precisely where the shots were fired from, just a general direction.

> *Four,* Ernest saw Chisem driving *the Saturn* before the shooting. A witness to

[3] Counsel recognizes this is not evidence and not part of the record, but counsel has ascertained that between 2006 and 2010 there were 76,984 Saturn Outlooks that were sold in the United States. The greater Milwaukee area has a population of about one million people, or roughly 1/300 of the United States population. Divide 76,984 by 300 and the result is that there are approximately 256 Saturn Outlooks on the streets in the greater Milwaukee area, assuming that Saturn Outlooks are evenly distributed throughout the United States.

> the shooting, Ernest saw *two people* firing shots from *the Saturn*. Ernest testified that Davis was sweating after the shooting and discarded his shirt in the garbage. Chisem approached Ernest after the shooting and told him *the matter* was not to be discussed again.

State's Brief at p. 32 (emphasis added).

Once again, a reference to "the Saturn" without any additional identifying information. "Two people firing shots" but no testimony that the two people were Chisem and Davis. There was testimony that Davis was sweating and took off his shirt at the barbeque party and the state suggests/implies/insinuates that Davis was sweating as a physiological response to the excitement of the shooting. The barbeque party and the shooting occurred during the summer on June 6, 2014.[4] Chisem's purported statement that "the matter was not to be discussed again" could refer to a variety of different things.

> *Five,* when Chisem was arrested, a Saturn matching the description of the shooter's car was in the driveway at his and his girlfriend's residence.

[4] Weather records show that Milwaukee had a high of 77 degrees on that date and a dew point of 52.

See fn. 3, above.

> *Six,* Jamil Tubbs testified that he was present when both defendants were openly discussing the shooting.

Tubbs' testimony was not that clear, See Defendant's Brief-In-Chief at pp. 36-40.

## III. FOR PURPOSES OF THE CRIMINAL DISCOVERY STATUTES THIS COURT VIEWS AN INVESTIGATIVE POLICE AGENCY WHICH HOLDS RELEVANT EVIDENCE AS AN ARM OF THE PROSECUTION AND THE STATE OF WISCONSIN

The State asserts that "the State never had 'possession, custody, or control' of Detective Graham's recording." State's Brief at p. 36. That argument was squarely rejected by this court in ***State v. Martinez,*** 166 Wis. 2d 250, 260, 479 N.W.2d 224, 229 (Ct. App. 1991). In ***Martinez,*** the trial court reasoned that the actions of the police authorities in losing a tape should not be visited upon the state as the prosecuting entity. This court rejected that argument:

> For purposes of the criminal discovery statutes, we view an investigative police agency which holds relevant evidence as an arm of the prosecution. In most criminal cases, the evidence against the

> accused is garnered, stored and controlled by the investigating police agency. Depending upon local practice, many courts and district attorneys entrust the custody and control of such material to the police even after it has been elevated to formal evidentiary status in a criminal proceeding.
>
> The trial court's reasoning would apparently sanction the loss of relevant evidence only if committed by the district attorney's office, but not by the principal investigative agency. This distinction is neither reasonable nor valid.

***Id.*** *See also* ***State v. Sturgeon,*** 231 Wis. 2d 487, 499, 605 N.W.2d 589 (Ct. App. 1999).

The audio tape was in Detective Graham's possession and he lost it. Therefore, the tape was in the "possession, custody and control" of the State. The State's entire argument collapses on this basis. Chisem suspects that if the tape had not been lost, it would not show that Nelson said to Graham "[h]e believed it was JB or Jay World, but he couldn't recall." See Defendant's Brief-In-Chief at pp. 26-27.

## 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 for a new trial.

Dated this 12th day of October, 2018.

_____
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 2,353 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.

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