STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2020-AP-32-CR

vs.

Trial No. 07-CF-1

OSCAR C. THOMAS,

Defendant-Appellant.

Appeal from a judgment of conviction entered August 1, 2018
and an order denying postconviction relief entered December 26, 2019
in the Circuit Court of Kenosha County,
Honorable Bruce E. Schroeder, Judge, presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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3. Whether the Circuit Court erred in failing to strike an objectively bias juror.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are requested in this appeal.

STATEMENT OF THE CASE

Procedural history

A complaint dated January 3, 2007 charged Mr. Thomas with three counts: first degree intentional homicide in violation of Wis. Stat. §940.01(1)(a); first degree sexual assault in violation of Wis. Stat. §940.225(1)(a); and false imprisonment in violation of Wis. Stat. §940.30. Mr. Thomas was convicted of these three charges after a jury trial on June 11-14, 2007 before the Honorable Bruce E. Schroeder.

Mr. Thomas appealed, and this Court affirmed his convictions in 2010-AP-1606-CR. The Wisconsin Supreme Court denied review. Mr. Thomas pursued federal habeas corpus relief, resulting in the decision in *Thomas v. Clements*, 789 F.3d 760 (7th Cir. 2015), *reh'g den.* 797 F.3d 445. After the remand ordered in that decision, Mr. Thomas was granted a new trial.

Mr. Thomas again proceeded to jury trial on January 22-29, 2018 before the Honorable Bruce E. Schroeder. He was convicted of all three charges. On July 19, 2018 Judge Schroeder imposed sentences which included a sentence on the homicide count of life imprisonment without possibility of release.

On October 17, 2019 Mr. Thomas filed postconviction motions seeking dismissal of the sexual assault and a new trial on all remaining charges. On December 26, 2019 Judge Schroeder issued an order denying the postconviction motions. Although this order was issued more than 60 days after the filing of the postconviction motions, it was timely pursuant to this Court's order of January 13, 2020.

The offenses

On December 27, 2006 at 3:24 a.m., police were dispatched to a medical call at 4716 37th Avenue, Apartment 3, in Kenosha. 316: 37-38, 145. Officer Farchione, the first to arrive, entered the building and met Defendant Oscar Thomas, who led her to the victim, Joyce Oliver-Thomas. 316: 145-146. Ms. Oliver-Thomas was face-up on the floor in a back bedroom, in a bra and underwear, with a pillow under her head and a comforter beneath her; her skin was warm but she was not conscious or breathing, so Officer Farchione started chest compressions until medical personnel arrived. 316: 39, 146-148. Rescue personnel removed Ms. Oliver-Thomas from the apartment while continuing resuscitation efforts. 316: 52.

Three officers responding to the scene spoke to Mr. Thomas on the scene regarding events leading up to the 911 call. 316: 39-52, 148-151, 168-170. Mr. Thomas identified Ms. Oliver-Thomas as his wife, indicating that they had been married, had gotten divorced, and had gotten back together. 316: 45, 168. Mr. Thomas said Ms. Oliver-Thomas had an ear infection and that she had trouble breathing when she slept. 316: 44, 46, 151. Mr. Thomas was in the basement of the four-plex apartment building with his friend, Alfonso Platt, but he went several times to check on Ms. Oliver-Thomas. 316: 40, 44-45, 46, 148. On one of these occasions, Ms. Oliver-Thomas was half-asleep and was gurgling; Mr. Thomas woke her, and she appeared to be okay. 316: 47. Mr. Thomas went for a walk with Mr. Platt, then returned to check again on Ms. Oliver-Thomas. 316: 47, 149. Mr. Thomas found Ms. Oliver-Thomas on the floor in the bedroom with her hands around her neck; when he turned her over, she was turning bluish and had white foam around her mouth. 316: 39-40, 48, 150, 168. Mr. Thomas called 911. 316: 48, 157, 168.

One of the officers on the scene conducted a pat-down search of Mr. Thomas and found a crack pipe. 316: 41-43.

Alfonso Platt confirmed that on the night of Ms. Oliver-Thomas' death, he was with Mr. Thomas in the basement, as this is where they used crack together. 318: 125-126, 134. Mr. Thomas would go check on his wife, and was gone an hour. 318: 127, 136-137. Mr. Platt had never met Ms. Oliver-Thomas, and had not entered the Thomas' apartment. 318: 130, 134. At one point, Mr. Platt and Mr. Thomas left the apartment building, walked a short distance, and then returned; Mr. Platt returned to the basement, while Mr. Thomas went upstairs. 138: 137, 140. Less than an hour later, Mr. Platt heard sirens. 138: 141-142. Mr. Platt saw Mr. Thomas speaking with an officer; Mr. Platt hid in the basement, but spoke to police later in the day. 138: 142. Mr. Platt never heard any altercation between Mr. Thomas and his wife, did not observe any injuries to Mr. Thomas, and did not notice Mr. Thomas being sweaty or disheveled. 318: 149.

Mr. Thomas gave three formal recorded statements to police.

Mr. Thomas first statement was to Det. May, who found Mr. Thomas at the hospital; Mr. Thomas agreed to come to the station with Det. May to be interviewed, but was not under arrest. 319: 18-21. Det. May typed up a

summary of the interview and gave Mr. Thomas a chance to make corrections and additions; Mr. Thomas then signed the summary. 319: 21-22, 24. Det. May read this summary to the jury. 319: 31-36. In this statement, Mr. Thomas indicated after dinner, Mr. Platt came by and he and Mr. Platt smoked crack in the basement, but Mr. Thomas would check on his wife, who had been complaining of chest pain and that her ear hurt. 319: 32-33. Throughout the night, he alternately smoked crack in the basement with Mr. Platt and went up to the apartment to check on Ms. Oliver-Thomas. 319: 33. After midnight, while in the apartment checking on Ms. Oliver-Thomas, Mr. Thomas watched a porn video, and then engaged in consensual sex with Ms. Oliver-Thomas. 319: 33. During this sex, they fell off the bed together, but Ms. Oliver-Thomas had no visible injury, and complained of none, except that her chest was still hurting. 319: 33-34. Ms. Oliver-Thomas went back to bed, and Mr. Thomas rejoined Mr. Platt in the basement, but continued to check on his wife periodically. 319: 34-35. Mr. Thomas and Mr. Platt left the apartment and then returned, and Mr. Thomas again checked on Ms. Oliver-Thomas and found her on the floor next to the bed. 319: 35. Her face and arms were blue,

and Mr. Thomas turned her over to check her. 319: 35. Mr. Thomas called 911, and was told to check for breathing or a pulse. 319: 35. Finding neither, he followed instructions to perform chest compressions until a female officer arrived and took over. 319: 35.

Mr. Thomas' second recorded statement was to Det. Labatore, who found Mr. Thomas on the street; Mr. Thomas agreed to make another statement and Det. Labatore took him to the station. 319: 53. While initially not under arrest, Mr. Thomas was placed under arrest in the course of the interview, but waived *Miranda* rights and agreed to speak further. 319: 54-55, 57. Detective Labatore prepared a written summary of Mr. Thomas' statement, which incorporated changes by Mr. Thomas. 319: 58. Detective Labatore read this summary to the jury. 319: 68-76. In this statement, Mr. Thomas indicated: He smoked crack with Mr. Platt in the basement, but kept going back upstairs to belay Ms. Oliver-Thomas' suspicions regarding why he was in the basement. 319: 71. Ms. Oliver-Thomas was lying down, complaining her chest hurt. 319: 71-72. Mr. Thomas left Mr. Platt to purchase more crack, then went to check on Ms. Oliver-Thomas and to break off and retain a portion of the crack

he had purchased. 319: 72. Mr. Thomas ingested the retained crack, took some prescribed medications, and watched a porn video. 319: 73. Mr. Thomas initiated sex with Ms. Oliver-Thomas, with her consent; during this sex, they fell out of bed, but Ms. Oliver-Thomas said she would be all right. 319: 73-74. After the sex, Ms. Oliver-Thomas used the bathroom and Mr. Thomas resumed smoking crack and watching his porn video. 319: 74. Mr. Platt knocked at the door, and Mr. Thomas told him he would rejoin him later in the basement. 319: 74. When Ms. Oliver-Thomas come out of the bathroom, Mr. Thomas reinitiated sex, during which he rolled Ms. Oliver-Thomas over and they went back on the floor. 319: 74-75. Mr. Thomas had his left arm around Ms. Oliver-Thomas' neck, and while he did not believe he was squeezing hard, Mrs. Thomas yelled for him to stop and kicked the floor. 319: 75. Ms. Oliver-Thomas told Mr. Thomas she loved him, said he should quit playing, and threatened to bite him, at which point Mr. Thomas turned her loose. 319: 75. Ms. Oliver-Thomas was "breathing funny" and looking at Mr. Thomas. 319: 75. Mr. Thomas got up and left. 319: 75. Mr. Thomas and Mr. Platt left the apartment building, but then Mr. Thomas came back for his cigarettes. 319: 75-76. He

retrieved them without seeing Ms. Oliver-Thomas, then left again to give a cigarette to Mr. Platt. 319: 76. Upon again returning to the apartment, Mr. Thomas found Ms. Oliver-Thomas face down on the floor. 319: 76. Mr. Thomas call her name and shook her, and she made a gurgling sound and passed gas; he rolled her over and saw she had urinated. 319: 76. When he tried to pick her up and put her on the bed, her face hit the bed, then she fell and her face hit the floor. 319: 76. He called 911 and, as instructed, did chest compressions until an officer came and took over. 319: 76. Mr. Thomas stated he believed he was "accidentally responsible" for Ms. Oliver-Thomas' death, and was uncertain if mixing crack and his medications made him so rough with Ms. Oliver-Thomas. 319: 76.

On December 31, 2006 Mr. Thomas filled out an inmate request slip asking to again speak to a detective investigating his wife's death. 319: 104-105. In response, Det. May conducted a third interview with Mr. Thomas on January 2, 2007. 319: 106. In this statement, Mr. Thomas told of a crack dealer named Greg whom Mr. Thomas had owed $500 and failed to pay; Mr. Thomas believed that Greg must have been the person who strangled Ms. Oliver-

Thomas while Mr. Thomas was out of the apartment with Mr. Platt. 319: 106-107. Mr. Thomas provided a physical description of Greg, but no address or contact information. 319: 107.

Dr. Mary Maitland performed an autopsy on Ms. Oliver-Thomas on December 27, 2006. 316: 189-191. Dr. Maitland diagnosed four maladies: strangulation; blunt force injuries to the face; pulmonary congestion and edema; and, hepatomegaly and steatosis; this last condition is having a big, fatty liver, and was not the cause of death. 316: 193-194. Dr. Maitland concluded the cause of death was "strangulation due to physical assault." 316: 213. Another doctor, called by the defense, opined that Ms. Oliver-Thomas died due to compression force to the neck consistent with the defendant's account of events. 320: 52.

Sexual assault

In several of his statements to police Mr. Thomas mentioned or described having sex with Ms. Oliver-Thomas. One of the officers who spoke to Mr. Thomas on the scene testified that Mr. Thomas said he had sex with Ms. Oliver-Thomas a couple hours before the incident. 316: 51-52, 86. Mr. Thomas recounted sexual activities in

two of his formal recorded statements police.

In his first statement, to Detective Mays, Mr. Thomas indicated that after watching a pornographic video, he had consensual sex with Ms. Oliver-Thomas; although they fell out of bed during this sex, Ms. Oliver Thomas had no apparent injury or complaint. 319: 33-34. Mr. Thomas then left the apartment to smoke crack with a friend in the basement, but checked on Ms. Oliver-Thomas several times before finding her on the floor, not breathing, and Mr. Thomas called 911. 319: 34-35. In this statement, Mr. Thomas made no mention of a second episode of sexual activity, and did not mention having his arm around Ms. Oliver-Thomas' throat. 319: 40.

In his second statement, to Detective Labatore, Mr. Thomas recounted smoking crack with a friend in the basement, but returning to the apartment to check on Ms. Oliver-Thomas to allay suspicion. 319: 70-73. During one of these times in the apartment, after watching a pornographic video, Ms. Thomas had consensual sex with Ms. Oliver-Thomas, during which they fell out of the bed. 319: 73. While on the floor, the sex continued, during which Mr. Thomas had his left arm around Ms. Oliver-Thomas' throat. 319: 74. Mr. Thomas then went to the

bathroom, watched more of the video, and got on top of Ms. Oliver-Thomas and "humped" her hip with his arm around her neck; Ms. Oliver-Thomas struggled, told him to stop, that she loved him, and threatened to bite him, so he stopped. 319: 75. Ms. Thomas left the apartment with his friend, but returned and found her face down on the floor, called 911 and performed CPR. 319: 75-76.

A rape kit was done on Ms. Oliver-Thomas in the course of her autopsy the examination of which would usually produce evidence of recent sexual intercourse had it occurred, but no physical evidence was found to suggest or support that Mr. Thomas and Ms. Oliver-Thomas had sex on the night of her death. 318: 33-34; 319: 121-123. Specifically, Mr. Thomas DNA was not in the rape kit. 319: 123. The medical examiner testified that while she always considers the possibility of a sexual motive in cases of strangulation, she found no genital injuries or other evidence of forced sex in her examination of Ms. Oliver Thomas. 318: 32-33.

DNA evidence

No reference was made in the State's case-in-chief to any positive finding of DNA. The only expert from the crime lab testified as to the presence of cocaine in Mr.

Thomas' blood and on a crack pipe. 318: 98, 101. Detective May recalled that the rape kit testing did not result in finding Mr. Thomas' DNA. 319: 119, 123.

During the State's cross-examination of defense medical examiner, the prosecutor brought up crime lab reports, and the defense objected:

> Q. Okay. But in those crime lab reports, you are aware that there was some analysis done?
>
> MR. COTTON: Objection.
>
> MR. BINGER: It's what he relied on in his opinion.
>
> MR. COTTON: I'm objecting to going into the details of reports that haven't been introduced into evidence, though. It's a back door –
>
> THE COURT: If he examined it, then it's presumably something he discounted or relied upon. The objection is overruled.

Apx. 106; 320: 88. After reviewing a three-page crime lab report, the defense medical examiner testified that Mr. Thomas' DNA was found under Ms. Oliver-Thomas' fingernails, which were clipped during the autopsy. Apx. 106-107; 320: 88-89. In addition, Ms. Oliver-Thomas' DNA was found in swabs of Mr. Thomas'

fingernails. Apx. 107; 320: 89.

During the prosecutor's (Mr. Binger's) closing argument, and in the course of responding to a defense objection, the prosecutor referred to DNA evidence:

> [MR. BINGER:] You would have to be high on crack to think that there is any other explanation for Joyce Oliver-Thomas's death than that Oscar Thomas killed her, but it was more than just killing. It was brutal, vicious, violent, choking the life out of her for minutes while she struggled, while she pled for her life, "Stop, stop, I love you, I love you" -- while she bit her own tongue and swallowed two to three ounces of her own blood while she is dying, while he is scratching up her face with his free hand, with his right hand, trying to cover her mouth.
>
> MR. COTTON: I'm going to object to that. I'm objecting to this demonstrative. There is no evidence of that, Judge.
>
> MR. BINGER: Closing argument, Your Honor.
>
> THE COURT: Well, no, no, no. Confined to the evidence.
>
> MR. BINGER: And the evidence supports this theory, Your Honor. We have testimony of the scratches on her face. ***We have testimony that it could have been caused by DNA. Her DNA is found under his fingernails.*** We have testimony from the neighbor

> downstairs.
>
> THE COURT: All right, as long as you are clear this is your theory, and that –
>
> MR. BINGER: Absolutely. It is my closing argument, Your Honor. I'm presenting to the jury my theory of how Joyce Oliver-Thomas died, and I think the evidence supports that. This is exactly what I think happened. Oscar Thomas placed his left arm around her throat and squeezed, compressing her neck while using his other hand to muzzle her nose and her mouth to keep her quiet and to speed up her death, and ***that's how she got the scratches on her face***.

Apx. 108-109; 321: 37-38 (emphasis added).

Juror Cruz and Witness Cruz

Voir dire

Early in jury selection proceedings, the prosecutor read a lengthy list of witnesses to prospective jurors. 315: 57-58. Included in this witness list were "Erika and Victor Cruz." 315: 57. The court inquired if prospective jurors knew the witnesses listed. 315: 58. The following exchange occurred:

> THE COURT: Anybody else in the second row?
>
> (Hand is raised.)
>
> THE COURT: Ms. Cruz Vargas?

MS. CRUZ VARGAS: I think I'm related to two of the people that he said, the Erika and Victor Cruz.

THE COURT: Okay. What would be the nature of your relationship?

MS. CRUZ VARGAS: I'm pretty sure we are cousins.

THE COURT: Do you socialize with them?

MS. CRUZ VARGAS: No, but –

THE COURT: But what?

MS. CRUZ VARGAS: But the name is familiar, so yeah.

THE COURT: Are you related to Tom Cruise?

MS. CRUZ VARGAS: I could be, yes. No, not that Tom Cruise, no.

THE COURT: All right. Well, there are Tom Cruises that used to have a commercial, actually. How did I get on that? Assuming they are related to you, do you think that would affect your judgment in this case at all?

MS. CRUZ VARGAS: No.

THE COURT: Okay. Thank you. Anybody else, second row?

Apx. 110-111; 315: 60-61. Neither counsel moved to strike Ms. Cruz Vargas. She sat on the jury. 315: 158-159.

Testimony of Erika Cruz

Erika Cruz testified at Mr. Thomas' trial. 316: 117-143. (Victor Cruz did not testify.) She was the second witness, and the first citizen-witness, called by the State. She was the only witness to testify as to events personally perceived at the time and place of the death of Joyce Oliver-Thomas.

On December 27, 2016 Ms. Cruz lived at 4716 37th Avenue in a lower apartment immediately below the Thomas' apartment, along with her brother, uncle, son and baby. 316: 118-121. At about 2:00 a.m. that day she was awakened by sounds coming from the apartment above of people fighting and screaming. 316: 118-121. Ms. Cruz did not know the people in the apartment above, but had seen them. 316: 122, 133.

Ms. Cruz heard a woman say "Stop, stop, I love you, I love you." 316: 126. Then she heard something big fall hit the floor. 316: 127. She heard many noises, and moving furniture, she heard steps walking around and heard the apartment's door open. 316: 127.

Through her window, Ms. Cruz saw Mr. Thomas leave the building. 316: 127-128. Perhaps 10 or 15 minutes later, she saw Mr. Thomas return with another person and come back into the apartment building. 316: 128-129. Mr. Thomas had something in his hands which Ms. Cruz described as "black, obscure, dark." 316: 129. Ms. Cruz described this thing to police as a garbage bag, but never claimed it was a woman's purse and did not know if it was a purse. 316: 140-141. The two men went upstairs and Ms. Cruz heard sounds like people moving things, and heard someone say something like "My God." 316: 129, 142. Five to ten minutes later police arrived. 316: 130, 142-143.

Ms. Cruz did not call the police. 316: 134. When police knocked on her door that morning, Ms. Cruz did not speak with them because she did not speak English then, did not have papers and was scared. 316: 130-131. However, later that day she spoke to Officer Renteria both in her home and at the station, in Spanish. 316: 130.

ARGUMENT

I. The evidence as to first degree sexual assault was insufficient, as it consisted entirely of Mr. Thomas' uncorroborated statement.

The standard of review for sufficiency of the evidence is the same, regardless of whether the prosecution's case is based upon direct evidence or circumstantial evidence:

> We hold that the standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Poellinger, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). The court in *Poellinger* noted that juries routinely are instructed that in a circumstantial case, the jury must acquit unless the evidence cannot be reconciled to support any reasonable theory consistent with innocence. 153 Wis.2d at 502, 451 N.W.2d at 755 (text

and footnote 3). However, while this is a rule which guides the deliberations of the jury, it does not constitute the rule on appellate review:

> Although the trier of fact must be convinced that the evidence presented at trial is sufficiently strong to exclude every reasonable hypothesis of the defendant's innocence in order to find guilt beyond a reasonable doubt, this court has stated that that rule is not the test on appeal.

Poellinger, 153 Wis.2d at 503, 451 N.W.2d at 756.

Despite the general *Poellinger* rule, conviction for a crime may not be grounded on the confession or admission of the accused alone. *State v. Verhasselt*, 83 Wis.2d 647, 661, 266 N.W.2d 342 (1978). While a confession need not be verified in every detail, at a minimum, corroboration of a significant fact is required:

> All the elements of the crime do not have to be proved independently of an accused's confession; however, there must be some corroboration of the confession in order to support a conviction. Such corroboration is required in order to produce a confidence in the truth of the confession. The corroboration, however, can be far less than is necessary to establish the crime independently of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.

Jackson v. State, 29 Wis.2d 225, 232, 138 N.W.2d 260 (1965) quoting *Holt v. State*, 17 Wis.2d 468, 480, 117 N.W.2d 626 (1962). A fact is "significant" so as to satisfy the corroboration rule if it verifies that the offense of conviction actually occurred:

> A significant fact is one that gives confidence that the crime the defendant confessed to actually occur. [sic] A significant fact need not either independently establish the specific elements of the crime or independently link the defendant to the crime. Rather, the State must present at least one significant fact that gives confidence that the crime the defendant has been convicted of actually did occur.

State v. Bannister, 2007 WI 86, ¶31, 302 Wis.2d 158, 734 N.W.2d 892. *See*, *also*, *Smith v. United States*, 348 U.S. 147 (1954):

> The corroboration rule, at its inception, served an extremely limited function. In order to convict of serious crimes of violence, then capital offenses, independent proof was required that *someone* had indeed inflicted the violence, the so-called *corpus delicti*. Once the existence of the crime was established, however, the guilt of the accused could be based on his own otherwise uncorroborated confession.

Smith at 153-154 (emphasis by the court). *Smith* extended

the corroboration rule so as to apply even in crimes in which no tangible injury is inflicted (e.g. tax evasion) and thus no *corpus delicti* exists.

The origin of the corroboration rule explains its purpose: After a man went missing and his bloody hat was found, a confessor admitted to murder and implicated his brother and mother. Years after the confessor and the two others were executed, the missing man reappeared, alive. Thus, a rule was created to ensure that something more than a person's confession establishes that a crime actually happened before a person may be convicted. *See*, *Bannister*, ¶24, discussing *Perry's Case*, 14 Howell St. Tr. 1312 (1660).

When a court considers whether a defendant's confession is corroborated, the court is considering the sufficiency of the evidence to support the conviction, and not addressing merely a rule of admissibility. *Bannister*, ¶¶32-33. Thus, when a court determines that a defendant's confession is not corroborated, Double Jeopardy prevents a retrial and the remedy is dismissal with prejudice. *Burks v. United States*, 437 U.S. 1 (1978); *State v. Ivy*, 119 Wis.2d 591, 350 N.W.2d 622 (1984).

In Mr. Thomas' case, while he disputes that he

intentionally killed Ms. Oliver-Thomas, the medical examiner testified that someone caused her death by applying pressure to her neck and throat, and that the injuries were not self-inflicted or accidental. 317: 14, 19-20. While this does not prove intent, it does establish that someone's actions caused her death. Likewise, as the prosecutor argued, the act of choking someone confirms the existence of restraint necessary for false imprisonment. Thus, Mr. Thomas' statements are corroborated by other evidence with respect to the homicide and false imprisonment charges.

However, nothing in the evidence aside from Mr. Thomas' statements suggests any sexual contact or sexual assault. While a rape kit was done, its results do not confirm any sexual activity. The autopsy revealed no evidence of sexual activity, consensual or otherwise. Simply stated, but for Mr. Thomas' statements, no evidence supports the contention that Mr. Thomas (or anyone) sexually assaulted Joyce Oliver-Thomas on December 27, 2006.

II. The Circuit Court erred in permitting the prosecutor to introduce hearsay DNA evidence through cross-examination of the defense expert and to argue therefrom that the DNA evidence was substantive evidence of guilt

Generally, a witness may testify only as to matters of which the witness has personal knowledge. Wis. Stat. §906.02. However, persons with specialized knowledge may testify in the form of opinion as to conclusions drawn by the person from facts or data reviewed by the person. Wis. Stat. §907.02(1). While the bases for such opinion need not be admissible, inadmissible bases may not be elicited by the proponent of the expert:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

Wis. Stat. §907.03. This statute allows admission of an expert's opinion even when the opinion is based in part on inadmissible hearsay. *State v. Watson*, 227 Wis.2d 167, ¶67, 595 N.W.2d 403 (1999).

Although an expert's opinion may be based on inadmissible hearsay, the hearsay underlying the opinion is not thereby rendered admissible: "Wisconsin Stat. §907.03 is not a hearsay exception." *Watson*, ¶77; see also *State v. Weber*, 174 Wis. 2d 98, 107, 496 N.W.2d 762, 766 (Ct. App. 1993) ("Hearsay data upon which the expert's opinion is predicated may not be automatically admitted into evidence by the proponent and used for the truth of the matter asserted unless the data are otherwise admissible under a recognized exception to the hearsay rule."). Thus, the court in *Watson* admonished against not only admission of hearsay bases for an expert's opinion "through the front door of direct examination." but also admission "through 'the back door' of cross-examination." *Watson*, ¶¶78-79. The Court in *Watson* noted the numerous pitfalls in dealing with hearsay bases for expert opinions by quoting a series of questions from Professor Blinka:

> What should be done with the experts' inadmissible bases? Does the experts' reliance validate the otherwise inadmissible information, thereby transforming it into admissible evidence? Conversely, should the court bar any mention of the tainted bases while permitting only the expert's testimony about the opinion? Or should the judge instruct the jury to consider the inadmissible bases for whatever bearing they have on the cogency of the expert's opinion testimony, but not for any other purpose? If the judge elects the latter course, what exactly does such an instruction mean? And if such limiting instructions are meaningless, is Rule 703 [§ 907.03] a device that allows a party to simply parade inadmissible evidence before the jury in direct contravention of the exclusionary rules?

Watson, ¶79 (bracketed insertion by the Court), quoting Daniel D. Blinka, *"Practical Inconvenience" or Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703*, 20 Am. J. Trial Advoc. 467, 468 (1997).

Watson concerned a preliminary hearing in a Chapter 980 commitment proceeding. An expert testified to an opinion that Mr. Watson's prior false imprisonment offense was sexually motivated; this opinion was based solely on a hearsay statement contained in a presentence report attributed by the victim to Mr. Watson. The State

asserted that even at trial the hearsay statement could be used without substantiation, but the *Watson* Court rejected this assertion based not only on Mr. Watson's statutory right to cross-examine but also his constitutional right to confrontation, noting that hearsay rules and the Confrontation Clause protect similar interests. *Watson*, ¶88.

The Sixth Amendment provides that every accused shall enjoy the right "to be confronted with the witnesses against him." Similarly, Article I, §7 of Wisconsin's Constitution guarantees the right of the accused "to meet the witnesses face to face."

The Confrontation Clause was once applied in close conjunction with hearsay rules, and was held to allow admission of an out-of-court statement if such statement falls within a "firmly rooted hearsay exception" or otherwise bears "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). This approach to the Confrontation Clause has been abandoned, at least with respect to statements deemed testimonial: under this new standard, the Confrontation Clause allows admission of "[t]estimonial statements of witnesses absent from trial ... only where the declarant is

unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

Crawford did not precisely define what statements are deemed testimonial and noted various possible formulations without expressly accepting any one. *Crawford*, 541 U.S. at 51-52. However, the court noted two categories of statements which would satisfy any of testimonial: *ex parte* testimony at a preliminary hearing; and, statements taken by police officers in the course of interrogations, whether sworn or unsworn. *Crawford*, 541 U.S. at 52.

After *Crawford*, the Supreme Court issued three decisions addressing Confrontation Clause issues involving forensic evidence: *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 547 (2011); *Williams v. Illinois*, 567 U.S. 50 (2012).

Melendez-Diaz was a drug case in which the prosecution introduced three notarized “certificates of analysis” stating that substances attributable to the defendant were cocaine. These certificates were introduced without testimony from the author of the

certificates. The Court found that these certificates were testimonial, as they had a clear "evidentiary purpose" and were "'made under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial.'" 557 U.S. at 310-311 (quoting *Crawford*). The Court rejected the State's argument that the certificates were presumptively reliable results of "neutral scientific testing" and concluded that the defendant had a right to cross-examine the author of the certificates. 557 U.S. at 318.

Bullcoming was a drunk driving case in which the prosecution entered a crime lab report showing the defendant's blood alcohol concentration through a crime lab analyst who was *not* the author of the report. While this witness was familiar with crime lab procedures, the witness did not participate in the testing which resulted in the report. *Bullcoming* rejected such surrogate testimony, holding that the "accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Bullcoming*, 564 U.S. at 652.

Williams was a rape case in which the alleged

victim's vaginal swabs were sent to an outside laboratory which produced a DNA profile. A witness from the crime lab testified that this DNA profile from the outside lab matched a DNA profile of the defendant produced by the crime lab. No one from the outside laboratory testified. The decision in *Williams* resulted in a 4-1-4 split decision with no rationale enjoying majority support and creating confusion as to its precedential value. *See, e.g., State v. Dotson*, 450 S.W.3d 1, 68 (Tenn.2014) ("The Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value"); *State v. Michaels*, 219 N.J. 1, 31, 95 A.3d 648, 666 (N.J. 2014) ("We find Williams's force, as precedent, at best unclear"). In Wisconsin, *Williams*' holding, as opposed to its rationale, must be followed only where a defendant and the defendant in *Williams* are in "substantially identical positions." *State v. Deadwiller*, 2013 WI 75, ¶32, 350 Wis.2d 138, 834 N.W.2d 362. Where such substantially identical positions are not present, *Williams* is not binding. *State v. Griep*, 2015 WI 40, ¶42, 361 Wis.2d 657, 863 N.W.2d 567.

In Oscar Thomas' trial, the prosecution did not introduce or seek to introduce any evidence in its case-in-

chief that Mr. Thomas' DNA was under Ms. Oliver-Thomas' fingernails, or that Ms. Oliver-Thomas' DNA was under Mr. Thomas' fingernails. Instead, the prosecutor brought up the crime lab DNA report in cross-examining Dr. Williams, the medical examiner retained by the defense. Apx. 106; 320: 88. Counsel immediately objected that the report had not been introduced into evidence and started to further object: "It's a back door –" Apx. 106; 320: 88. The Court apparently interrupted defense counsel mid-sentence to rule: "If he examined it, then it's presumably something he discounted or relied upon. The objection is overruled." Apx. 106; 302: 88. The prosecutor proceeded to confirm that Dr, Williams had read the Wisconsin state crime lab report, and that the report stated that Mr. Thomas' DNA was under Ms. Oliver-Thomas' fingernails and Ms. Oliver-Thomas' DNA was under Mr. Thomas' fingernails. Apx. 107; 320: 89.

The concern defense counsel apparently sought to raise regarding evidence through the "back door" reflects the practice against which the Court in *Watson* admonished; using experts to introduce hearsay through the back door. *Watson*, ¶¶77-78. While an expert's opinion

may be based upon inadmissible hearsay, this does not mean the hearsay is itself admissible to prove the matter asserted.

Cross-examination regarding the hearsay sources upon which an expert relies may be serve as a proper basis for impeachment of the expert's conclusions. Wis. Stat. §907.05. However, the proper purpose of such cross-examination must be to "'assist the jury in evaluating the expert's opinion, not to prove the substantive truth of otherwise inadmissible information.'" *State v. Heine*, 2014 WI App 32, ¶10, 844 N.W.2d 409 (2014), quoting *United States v. Pablo*, 696 F.3d 1280, 1288 (10th Cir. 2012). In responding to Mr. Thomas' objection to cross-examination of the defense expert regarding DNA findings, the trial court recognized no such distinction. Rather, the Court ruled that if the expert either "discounted or relied upon" the DNA, it was fair game, and overruled the objection. Apx. 106; 320: 88.

Once the objection was overruled, the prosecutor elicited from the defense medical examiner that his review of the DNA showed that Mr. Thomas' DNA was found on Ms. Oliver-Thomas' fingernail clippings, and that Ms. Oliver-Thomas' DNA was found under Mr. Thomas'

fingernails. Apx. 107: 320: 89. Without the prosecutor asking a specific question about the relationship of the DNA to the witness' conclusions, the witness discounted its importance: "They are living in a consensual marriage. A finding of the DNA, they could be scratching each other's back." Apx. 107: 320: 89. The prosecutor pursued the DNA issue no further in cross-examination.

In closing argument, however, the prosecutor cited the DNA evidence not to discredit the opinion of the defense medical examiner, but for the truth of the matter: i.e, that Mr. Thomas and Ms. Oliver-Thomas each had the other's DNA under the fingernails. He argued this finding in support of this theory that Mr. Thomas scratched Ms. Oliver-Thomas' face. Apx. 108-109; 321; 37-38. This was improper on grounds of hearsay.

The admission of the DNA findings also violated Mr. Thomas' right to confront the witnesses against him. Certainly, the prosecutor could not have simply introduced the DNA report, even were it in the form of an affidavit or otherwise formally certified, without affording an opportunity to cross-examine the author of the report. *Melendez-Diaz*, 557 U.S. 305 (2009). Likewise, the prosecutor could not have introduced the DNA report

through a surrogate laboratory technician who had not prepared the DNA report or participated in the DNA testing, even if such surrogate witness were familiar with the crime lab's testing procedures. *Bullcoming*, 564 U.S. 647 (2011).

The facts in Mr. Thomas' case fall show less support for admission of laboratory findings than were present in *Bullcoming*. The surrogate witness in *Bullcoming*, while not involved with the laboratory testing in the case, was at least a qualified witness with respect to the gas chromatograph machine used in the testing and was able to testify to operation of the machine, the results of the defendant's test, and the established procedures of the crime lab. *Bullcoming*, 131 S.Ct. at 2713. This, however, was not sufficient to satisfy the demands of the Confrontation Clause, for the defendant could not probe what the analyst did or perceived in the course of testing, and was unable to "expose any lapses or lies on the certifying analyst's part." *Bullcoming*, 131 S.Ct. at 2715.

The witness through whom the State introduced DNA findings against Mr. Thomas was medical examiner from out-of-state who, so far as the record reveals, knows nothing of DNA testing procedures, either generally or as

performed in the Wisconsin crime lab. Exposing any "lapses or lies" by the testing analyst through this witness was not possible. Thus, based on *Bullcoming*, this court should hold that Mr. Thomas' right to confrontation was violated by introducing of DNA test results without producing the testing analyst.

As an alternative form of analysis of a Confrontation claim, a court may look to the primary purpose of an out-of-court statement to determine if such statement is testimonial. Under this primary purpose test, "the dispositive 'question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the [out-of-court statement] was to creat[e] an out-of-court substitute for trial testimony.'" *State v. Mattox*, 2017 WI 9, ¶3, 373 Wis.2d 122, 890 N.W.2d 256, (bracketed words by the court) quoting from *Ohio v. Clark*, 576 US 1 (2015).

Mattox was a reckless homicide case based on an allegation that the defendant provided drugs caused the victim's death. At issue was whether the medical examiner could render an opinion as to the cause of death based in part on a toxicology report when the toxicologist did not testify. The court in *Mattox* turned to the Clark primary

purpose test only after determining that *Melendez-Diaz* and *Bullcoming* did not control. The Court in *Mattox* pointed out several factors which distinguished *Melendez-Diaz* and *Bullcoming*:

- *Melendez-Diaz* and *Bullcoming* involved forensic reports requested by police, while in *Mattox* the medical examiner requested the forensic report;
- The forensic reports in *Melendez-Diaz* and *Bullcoming* were prepared for use against known suspects, while the defendant in *Mattox* was not a suspect when the toxicology report was requested; and
- While the forensic reports in *Melendez-Diaz* and *Bullcoming* involved testing either of drugs possessed by the defendant or the BAC of the defendant's blood, the toxicology report was addressed to the contents of the victim's blood.

Mattox, ¶¶27-29.

These distinguishing characteristics, which rendered *Melendez-Diaz* and *Bullcoming* not controlling

in *Mattox*, demonstrate that these cases *do* control Mr. Thomas' case. Due to the manner in which the prosecution introduced the DNA evidence, the record does not expressly reveal who requested the DNA analysis. However, circumstances suggest the police or prosecutor did so. Neither testifying medical examiner testified to requesting DNA testing. Mr. Thomas fell under almost immediate suspicion, and thus the DNA analysis was in furtherance of prosecution of a known suspect. Finally, the DNA testing was of materials collected from both the victim and the defendant. These factors all support that the DNA evidence was testimonial.

Because the trial court erred in admitting the DNA test results without any opportunity for Mr. Thomas to cross-examine the DNA analyst who produced those results, Mr. Thomas' was denied his right to Confrontation. He prays this court grant him a new trial.

III. The Circuit Court erred in failing to strike an objectively biased juror.

During jury selection, the Court must examine jury panelists under oath to determine if they are related to the parties or counsel, and must excuse any panelist who is not indifferent to the case:

> The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused.

Wis. Stat. §805.08(1). While this statute is limited by its terms to panelists related to a party or attorney, panelists who are related to other persons connected to a case may be deemed to be objectively biased because the relationship raises at least the appearance of bias. *State v. Gesch*, 167 Wis.2d 660, 482 N.W.2d 99 (1992) (panelist is brother of State's police officer witness); *State v. Tody*, 2009 WI 31, 316 Wis.2d 689, 764 N.W.2d 737 (panelist is mother of presiding judge). In *Gesch*, the court noted that while a panelist may not display bias in response to questions, "there are situations in which the relationship

between a prospective juror and a participant in the trial is so close that a finding of implied bias is mandated. Such a situation exists in this case." *Gesch*, 167 Wis.2d at 666-667.

Older cases (such as *Gesch*) discussed juror bias in terms of being "implied," "actual," or "inferred," but these terms are no longer used. *State v. Faucher*, 227 Wis.2d 700, ¶23, 596 N.W.2d 770 (1999). Instead of these terms, juror bias is analyzed using the following terms:

"Statutory bias" is found in those persons who are not indifferent to the case under Wis. Stat. §805.08(1) (quoted above) due to a relation to a party or attorney or a financial interest in the case. *Faucher*, ¶26.

"Subjective bias" refers to bias which is revealed through the words and demeanor of the prospective juror on voir dire; focus is on the panelist's subjective state of mind. *Faucher*, ¶¶27-28.

"Objective bias" focuses on whether a reasonable person in the individual prospective juror's position could be impartial. *Faucher*, ¶¶29-30. In *Gesch*, the necessity to remove the brother of the State's police officer witness from the panel was based on "implied" bias, but this would now be deemed "objective" bias. *Faucher*, ¶¶38-39.

Despite the change in terminology, *Faucher* reaffirmed *Gesch*: "*Gesch* remains an example that some relationships are so fraught with the possibility of bias that we must find objective bias regardless of the surrounding circumstances and the particular juror's assurances of impartiality." *Faucher*, ¶40.

After the parties listed potential witnesses to the jury panel, Panelist Cruz Vargas stated that she believed that witnesses Erika and Victor Cruz were her cousins. Ms. Cruz Vargas testified she did not socialize with them, and that she did not believe her relationship would affect her judgment. Thus, Ms. Cruz Vargas was not subjectively biased. She was also not related to a party or attorney, so she was not statutorily biased. Nonetheless, she was objectively biased.

Ms. Vargas Cruz was related to an important State's witness. Erika Cruz was the only witness to testify to direct perceptions of events at the time of Joyce Oliver-Thomas' death. She lived in the apartment direct below, and heard voices of arguing. She heard a woman say: "Stop, stop, I love you, I love you." The prosecutor referred to this quotation in her testimony repeatedly in his closing and rebuttal arguments. 321: 37, 47, 50, 51, 60, 93, 94. 97.

Erika Cruz also testified to seeing Mr. Thomas leave the apartment building and return with another person.

Panelist Cruz Vargas stated she believes she is a cousin of witness Erika Cruz, and also of Victor Cruz, who did not testify. This was revealed in her response to the Court's examination conducted pursuant to Wis. Stat. §805.08(1). While she was not certain they were her cousins, the chance that Ms. Cruz Vargas is mistaking Erika Cruz for an unrelated person with same name is very small, for she recognized *both* names: Erika *and* Victor. While the record does not reveal who Victor Cruz is, Erika Cruz lived with a brother, uncle and son.

The Court erred in failing to excuse Panelist Cruz Vargas for objective bias. As the Court in *Gesch* concluded:

> Whether Daniel Wineke [the brother of the State's police officer witness] or any other relative by blood or marriage to the third degree of a state witness will be actually biased we may never know, but what is important is the existence of the very high potential that they will be. Whether Daniel Wineke's presence in the jury room actually hindered significant credibility determinations we will never know, but what is important is the fact that it could have.

Gesch, 167 Wis.2d at 669. Therefore, Mr. Thomas prays the court grant him a new trial.

CONCLUSION

Oscar C. Thomas prays that this Court order that the sexual assault charge be dismissed with prejudice, and that this court vacate his other convictions and sentences and remand for a new trial.

Respectfully submitted,

_____
John T. Wasielewski
Attorney for
Oscar C. Thomas

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8794 words.

_____
John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

_____
John T. Wasielewski

APPENDIX CERTIFICATION

I hereby certify that I filed with this brief, an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

_____

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APPENDIX CONTENTS