STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II

STATE OF WISCONSIN

Plaintiff-Respondent

v. Case No. 93-2703-CR

ANTONIA M. KESO

Defendant-Appellant

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION MOTION ORDERED AND ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT, BRANCH III, CIRCUIT JUDGE HENRY B. BUSLEE PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

It is the position of defendant-appellant that the issues involved in this appeal are of first impression for the State of Wisconsin, therefore, oral argument and publication are necessary.

STATEMENT OF FACTS

Defendant-appellant relies on her original Statement of Facts which documents just a minuscule portion of the abuse and torture Antonia Keso lived through for 19 years of her life.

ARGUMENT

I. THE UNDENIABLE VIOLATION OF DEFENDANT-APPELLANT'S CONFRONTATION RIGHTS WAS NOT HARMLESS.

Even the State acknowledges, that Antonia Keso's Constitutional right to confrontation was violated at her trial when codefendant, Bradley Keso's, confession was admitted into evidence. It is also clear that the State bases its position on State v. Bradley D. Keso, Case No. 93-0401-CR, which was decided by this very Appellate Court. The only reason that the State is admitting error is to mask the damage that was done to Antonia Keso's defense. The State is again attempting to treat Antonia like her ex-husband (who was not abused and who was the initiating perpetrator) instead of giving her her individual right to justice.

Antonia Keso's case is separate and distinct from her codefendant, who had never experienced 19 years of extreme physical and emotional abuse. Therefore, Ms. Keso's case is unique, highly distinguishable and deserves to be entitled to a complete and separate review by this Court.

When a Constitutional error exists, as it does in this case,

the law of Wisconsin is clear. The verdict must be set aside unless the Court is sure that the error did not influence the jury or had such slight effect as to be de minimis. State v. Myren, 133 Wis. 2d 430, 395 N.W. 2d 818, 823-24 (1986) (citing State v. Dyess, 124 Wis. 2d 525, 542, 370 N.W. 2d 222, 231 (1985). Most importantly, the burden here of proving no prejudice is on the State. Id. (citing Billings, 110 Wis. 2d at 667, 329 N.W. 2d 192). Therefore, "[t]he State's burden is to establish that there is no reasonable possibility that the error contributed to the conviction." Id. at 232.

This Court must, if it is to uphold this verdict, determine that the error of admitting Bradley Keso's confession was harmless beyond a reasonable doubt. Hearington v. California, 395 U.S. 250 (1969).

The State utterly fails in this record to prove beyond a reasonable doubt that the admission of Bradley Keso's confession was harmless and not prejudicial.

The prejudice of admitting damning and uncrossexamined testimony on a key issue (who initiated the act) is indicated in a variety of ways.

The first is the very nature of Brad Keso's statement. Brad Keso describes the defendant as a cunning, calculating sorceress who directed the violent act. The defendant denies that and states that Brad Keso was the primary actor. (75:Ex.1) How can the inflammatory hearsay words of the only other witness to the crime on a key mitigating factor be harmless?

The prominence of Brad Keso's hearsay statements in the mind of the jury is supported by their request to review his statements during deliberations. (119:968). A jury does not specifically request to review evidence which is not primary and paramount in their minds during deliberation. If Brad Keso's confession and statement were not important to the jury and did not form a significant element in their determination of the verdict, then why did the jury specifically request it in deliberations?

In addition, the actions of the jury in returning a First Degree murder verdict, as opposed to some lesser included offense, particularly in light of the significant history of torture and abuse, can only be explained by the hearsay testimony of Brad Keso.

Finally, there simply can be no question that the testimony of the two people who were involved in the commission of a crime of violence, particularly where the statement of one of those persons, not the defendant, contradicts the statement of the defendant is significant. Indeed, there is no more crucial opportunity for a defendant to establish and/or reduce criminal culpability than the ability of that defendant to cross-examine the only other witness to that event on a critical issue. The Court denied the defendant in this case that opportunity.

Therefore, the State cannot meet its burden of proving that this error was harmless. The State cannot prove that the effect of Brad Keso's confession was de minimis, especially with the background of 19 years of undeniable abuse of the defendant and of clearly different statements regarding who was the primary actor.

The unconstitutional admission of Bradley Keso's confession was not cumulative to the other evidence offered at trial. It was the only statement that incriminated Antonia as the initiating sorceress of this crime. This unfairly prejudiced her opportunity to prove her limited role in this murder, a role which result from 19 years of unconscionable and unreasonable torture.

It is true that Antonia Keso gave a statement to police which described the events of December 11, 1991. (75:Ex.1) She did tell police that she was upset with her mother about finances. Toni did call her mother a "bitch" and said that she "wished that she was dead," she wanted the abuse and control to stop. (75:Ex.1 at 10-11) This was a reasonable response to an unreasonable situation. Yes, plans were made and clothes were changed.

However, Toni explicitly told police that she had told Bradley Keso that she did not want to go through with the murder. (75:Ex.1) She described how Bradley had grabbed an object from the living room, ready to attack Naomi Ware in the bathroom, when Antonia quickly called him out of the bathroom and told him that she did not want to go through with it. (75: Ex.1) Antonia went on to tell police that she was the one who took the groceries out to the car and at this time, she thought that the plan was completely disengaged. Antonia goes on to tell police how she was surprised to hear her mother scream as her mother fell down the stairs with Brad standing behind her. (75: Ex.1) The substance of Brad Keso's and Antonia Keso's statements regarding intent are not the same; they are diametrically opposed.

There is no dispute that Ms. Keso participated in the murder and that she was a party to the crime. However, the State had the burden of proving intent to commit this crime beyond a reasonable doubt. Brad Keso's confession harmfully prejudiced this intent element because the two confessions were the only evidence that the State had to prove intent and to discredit Toni's statement of disengagement and involvement based on unleashed stored up anger of 19 years. The United States Supreme Court has recognized that:

> If those portions of the co-defendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment.

Lee v. Illinois, 476 U.S. 530, 545, 106 S.Ct. 2056 (1986). Further, although the State argues that the confessions were similar and cumulative on time, place and events (although different on intent, motive, initiation and involvement), the United States Supreme Court has clearly stated that admissions of confessions in violation of the Confrontation Clause are not harmless. Cruz v. New York, 481 U.S. 186, 192 (1987). In Cruz, the Court recognized that the more "interlocking" the confessions are, the greater the likelihood that the erroneous admission of the accomplice's confession will be devastating. Id. Therefore, the State's own arguments in its brief simply destroy any chance it had to prove that the damage in this case was de minimis beyond a reasonable doubt.

The error here, as in Dyess, went to the very basis of Ms.

Keso's provocation defense and is ipso facto prejudicial because the error went to the "crucial and controlling feature of the crime." Therefore, judgment should be reversed unless we can be sure that the error did not contribute to the guilty verdict. State v. Dyess, 124 Wis.2d 525, 542, 370 N.W.2d 222, 231 (1985). This prejudice was not de minimis for no jury, no reasonable person, could possibly put the violence of this murder out of their minds. No jury understands why a child kills their parents. The jury had two things to weigh, the impact of the 19 years of abuse that was ruthlessly inflicted upon Toni and the two videotaped confessions. Brad Keso painted Toni as a manipulating, cold blooded sorceress. The State's introduction of Brad Keso's confession was done with substantive motivation, purposely to harmfully prejudice any chance Ms. Keso had to mitigate the intent element of the crime.

From the time that Antonia Keso gave her statement, she has never denied her involvement in this murder or her pent up anger. There is no dispute that murder is wrong and that there was no complete defense in this case. However, Antonia Keso under both the Constitution of the United States and under the Wisconsin State Constitution is entitled to a full and fair opportunity to show a jury she was not the perpetrator of the action and how her judgment was tainted by 19 years of abuse. This unlawful verdict, based on the denial of the defendant's liberty in this case, should not be upheld. We either have a Confrontation Clause or we do not.

II. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT LIMITED THE TESTIMONY OFFERED BY THE DEFENSE.

When the trial court limited and/or eradicated crucial

witnesses of the defense, Ms. Keso's rights to Due Process were denied.

A. The trial court's interpretation of sec. 967.08(2), Stats., was incorrect.

Surely, the language of sec. 967.08(2), Wis. Stats., does not limit the opportunity for the defense to offer telephone testimony in a jury trial. Telephone testimony of unavailable defense witnesses in a criminal trial has been and should continue to be admitted. For Antonia Keso, the witnesses that were not allowed to testify were crucial to her provocation defense.

Further, this issue was properly preserved for appeal. When the defense was being denied its motion pertaining to the admissibility of these witnesses, they moved to dismiss because of a constitutional denial of a defense (119: 632, 119: 570).

B. It was harmful error for the trial court to severely limit the testimony involving incidents of abuse.

The crucial provocation evidence offered by the defense was not cumulative and the denial of such evidence harmfully prejudiced Antonia Keso's provocation defense. This issue was properly preserved for appeal when the defense moved to dismiss because of a denial of defense. (119: 632, 119: 570) The denial of this provocation evidence was a denial of due process, the right to an opportunity to put forth a full and fair defense.

While a trial court has broad discretion in determining what is relevant versus remote evidence, this discretion is not standardless. The test for remoteness is, "[w]hether there is a logical or rational connection between the fact which is sought to

be proved and a matter of fact which has been an issue in the case." State v. Oberlander, 149 Wis.2d 132, 140, 438 N.W.2d 580 (1989). Therefore, evidence is irrelevant on remoteness grounds if "the elapsed time is so great as to negative all rational or logical connection between the fact sought to be proved and the remote evidence offered in proof thereof." Id.

Here, the fact which was sought to be proved by the defense was abuse and provocation, facts clearly at issue. It is clear that to prove provocation in the case of a battered child, evidence of the battering relationship from birth on is necessary to prove the child's state of mind at the time when a particular parricide takes place. This is the only way to prove why a child would possibly kill a parent over what someone else might find to not be a precipitating event. This is exactly what the defense intended.

The only other person to live under Naomi Ware's roof as a child was Allison Hooker and yet, Allison was not able to testify to the abuse and cruelty that she personally witnessed. This evidence was not remote, as these were the early years of Toni's torture that would affect her for the rest of her life. This evidence was crucial for the jury to understand what daily life was like under the ruthless Naomi Ware. Yet, this evidence was denied.

In State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161, 163, it was decided that the evidence of outside witnesses to the decedent's husband's acts of violence was cumulative because the defendant and her children could testify about the specific acts of violence firsthand. Here, it was Toni's word against her mother,

with only a rare outsider to see her torture and pain. All of the provocation witnesses were necessary to the defense, but Allison Hooker, who lived with Toni and Naomi, was most crucial and not cumulative.[1]

Another crucial witness that was not cumulative was foster mother Dorothy Kumma. It was the trial court that kept asking for current abuse and yet, denied that very evidence. Dorothy Kumma could have testified to Toni receiving phone calls from Naomi that she was emotionally unable to handle at the age of 16. She would have testified to Toni's lack of social skills and personal hygiene at the recent age of 16, consequently of 16 years of abuse. This evidence would have enlightened the jury as to the cumulative effects of the abuse for up to 17 years, however, this evidence was never heard.

C. The denial and limitation of this evidence was not harmless.

Since the State has failed to argue in its brief that the denial and limitation of the defense's provocation evidence was harmless, it would appear that they have not met their burden of proving beyond a reasonable doubt that this error was de minimis.

III. THE CURRENT DEFINITION AND APPLICATION OF "ADEQUATE PROVOCATION" DOES NOT PROTECT THE CONSTITUTIONAL RIGHTS OF AN ABUSED CHILD.

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[1] It is ironic that the State argues against cumulative evidence when it redundantly introduced unfairly prejudicial and violent photographs of the deceased over and over again. When the State redundantly had one detective after another testify about the crime scene and the violence, it is ironic that the prosecution can ignore 19 years of abusive criminal activity and find such activity to be irrelevant and to have no effect upon whom it was inflicted.

Defendant-appellant does not wish to be redundant and thus relies on her position in her initial brief.

IV. THE APPELLANT'S STATUTORY RIGHTS AND CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT FAILED TO ADVANCE HER PAROLE ELIGIBILITY DATE ON THE BASIS THAT "NEW FACTORS" WERE REQUIRED.

Again, defendant-appellant does not wish to be redundant and thus relies on her position in her initial brief. However, one point needs to be clarified. The State is mistaken when it argues on page 22 of its brief that a positive adjustment to the prison setting and remorse are "new factors." What has been argued by defendant-appellant is that these are factors, not new factors, to be considered for advancing parole eligibility only.

CONCLUSION

For these reasons and the reasons stated in her original brief, defendant-appellant respectfully requests the Court to vacate the judgment of guilt, and order a new trial.

Dated at La Crosse, Wisconsin, February 24th, 1994.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with monospaced font. The length of this brief is 10 pages.

James G. Birnbaum