State of Wisconsin: **Circuit Court:** **Racine County:**

State of Wisconsin,

Plaintiff,

v. Case Nos. 2002CF763, 973,1215

Thomas C. Burton,

Defendant.

Defendant's Memorandum in Opposition to State's Motion in Limine for a Preliminary Ruling on the Use of Prior Testimony

---

Introduction

This case is before the court for a new trial on remand from the court of appeals. Thomas Burton (hereinafter "Burton") was tried on fourteen charges arising from three shootings on three separate days. In one incident, Burton allegedly approached a car in which Phillip Bowens was a passenger and fired several shots into the vehicle, hitting Bowens in the thigh. A few weeks later, Burton allegedly fired a gun at Donnis Jones while the two were standing on a public street in the same neighborhood; a ricocheting bullet hit Jones in the leg. One week later, Burton allegedly fired several shots at unknown persons who may also have been shooting at him; one of the bullets struck a young girl in the thigh.

At the first trial, various witnesses to the shootings testified. Some of these witnesses stated that they did not see Burton or did not see him with a gun, though police officers testified that these witnesses had stated to the contrary immediately after the shootings. Donnis Jones testified that he was shot by a young man who had attempted to rob him and that while he did not know the shooter, he was certain that it was not Burton. Jones had earlier told police that he knew the person who shot him as “T” and also that “T” had fired several shots at the house Jones fled to immediately after being shot. The State adduced some testimony to the effect that Bowens had earlier robbed Burton of money and the pants he was wearing. Neither Bowens nor Burton testified.

The state now seeks a preliminary ruling on the admissibility of the prior testimony of

four witnesses: Ray Crockett, Jessica Bernal, Sandra Greenwood, and Lorenzo Parker. The state argues that these witnesses are now unavailable and their prior trial testimony should be admitted under Sec. 908.045(1), Stats.

Argument

I. The court must not admit the prior trial testimony of the witnesses because even though the "prior testimony" exception to the hearsay rule may be satisfied there are unusual circumstances present here that run contrary to the purpose of the confrontation clause.

As will be set forth in more detail below, the State seeks a preliminary ruling on the admissibility of the prior trial testimony of four key witnesses- all of whom were eyewitnesses to the shooting and who testified at the last trial that they could not identify Burton as the shooter. Although the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, (2004) specifically excluded prior testimony that was subject to cross-examination from its ban on testimonial hearsay at a criminal trial, the court must nonetheless exclude hearsay from a criminal trial if there are "unusual circumstances" that make the admission of the evidence unfair. Here, there are three sets of very unusual circumstances present: (1) The state offers the prior testimony even though the prosecutor certainly believes that critical elements of the testimony are untrue- the state offers the prior testimony only as an evidentiary predicate to the admission of extrinsic evidence of prior inconsistent statements by the witnesses to police officers (i.e. so the police detectives can then testify that shortly after the shooting the witness identified Burton as the shooter); (2) Generally the proponent of hearsay evidence is disadvantaged by the use of this "second best" evidence; however, here Burton is disadvantaged because the testimony of the witnesses that is favorable to the defense will be presented through the reading of a transcript but the testimony favorable to the state will be presented by live witnesses; and, (3) The importance of the hearsay evidence and the sheer volume of it combine to violate concepts of due process.

A. The substance of the prior testimony

Firstly, it is important to summarize the prior testimony of each witness.

1. Ray Crockett

Ray Crockett was in the passenger seat of Philip Bowen's car on June 17, 2002 when

a gunman came out from behind a tree and started firing at Bowen's car as it was stopped at a stop sign. At trial Crockett said the shooter hit behind a tree and when he came out to fire he was wearing a black "hoodie" over his head. Crockett observed that Bowen was shot and attempted to help him by taking him into his (Crockett's) grandmother's house. A police detective was then called and testified that Crockett told him that the shooter had a black hoodie. According to the detective, Crockett gave a description that generally matched Burton and that the shooter was wearing a Yankee hat.

2. Jessica Bernal

Jessica Bernal testified that she was nearby when someone fired shots at a "red car"[1] She was able to see the shooter and described him a a skinny black male with a nylon on his head. Later in her testimony Bernal identified Burton as the shooter (12/3/2003 Tran. p. 203) Bernal told the jury that she had "no doubt" that Burton was the shooter.

3. Sandra Greenwood

At trial Greenwood testified that on July 12, 2002 she was on her porch with her friend Miko. She heard some gunshots and then moments later saw a black male running toward her house carrying a gun. The man fired some shots from Greenwood's backyard. Greenwood told the jury that Burton was not the man who fired the shots.

Nonetheless, Greenwood was asked by the prosecutor whether, on the night of the shooting when she was interviewed by police, she identified Burton as the man with the gun. Greenwood denied that she ever told the police such a thing.

Thereafter, Investigator. Debra Krueger was called by the state. Krueger testified that on the evening of July 12, 2002 she interviewed Greenwood on Greenwood's front porch. During that interviewed Greenwood told Krueger that she (Greenwood) knew Thomas Burton and that was Burton who had run into her yard that night an fired shots at Miko. According to Krueger, Greenwood explained that Burton had been robbed several times recently and that his his fun, money, and drugs had been stolen.

4. Lorenzo Parker

Lorenzo Parker testified concerning the July 6, 2002 shooting of Adonnis Jones. At trial Parker testified that he did not see Jones get shot and he did not know who shot Jones. The prosecutor asked Parker about interviews he gave to police, including the signing of a

1 Other testimony in the trial establishes that the red car was Bowen's car

affidavit, in which Parker said that in the early morning of that day he had seen Burton and Jones exchanging words and, later that day, he saw Burton pull a gun fire at Jones while Jones was running down the street. Parker denied that he told the police these things.

Thereafter, Inv. Brenda Hutchinson testified that she interviewed Parker and that Parker told her that he saw the altercation between Burton and two other men and that he heard Burton say "I'm going to shoot tonight."

B. Hearsay exception for prior testimony

Sec. 908.045(1), Stats., provides that where the declarant is unavailable[2], the following is an exception to the hearsay rule:

> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

In, *State v. Hale*, 2003 WI App 238, P13 (Wis. Ct. App. 2003) the court of appeals explained:

> The threshold question we are to address is whether the evidence fits within a recognized hearsay exception. *Id.* If not, the evidence must be excluded. Id. If so, we must consider the Confrontation Clause. *Id.* There are two requisites to satisfaction of the confrontation right. Id. First, the witness must be unavailable. *Id*. Second, the evidence must bear some indicia of reliability. Id. If the evidence fits within a firmly rooted hearsay exception, reliability can be inferred and the evidence is generally admissible. *Id*. This inference of reliability does not, however, make the evidence admissible per se. *Id*. The trial court must still examine the case to determine whether unusual circumstances warrant exclusion of the evidence. Id. If the evidence does not fall within a firmly rooted hearsay exception, it can be admitted only upon a showing of particularized guarantees of trustworthiness. *Id*.

In *Hale* the court of appeals expressed grave doubts about whether the prior testimony

2 A declarant is unavailable when the declarant, "Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means." Sec. 908.04(1)(e), Stats.

exception was even "firmly rooted" but nonetheless it felt obliged by precedent to find that it was firmly rooted. Nonetheless, no matter how firmly rooted is an exception to the hearsay rule, "When unusual circumstances exist, the test for determining the admissibility of an unavailable declarant's prior statement is whether the purposes behind the confrontation clause have been satisfied. *State v. Bauer*, 109 Wis. 2d 204, 219 (Wis. 1982)

Thus, "[I]n order for a hearsay statement to be admitted against a criminal defendant, the witness must be unavailable and the statement must either (1) fall within a "firmly rooted" hearsay exception *with no unusual circumstances undermining the reliability of the proffered evidence*; or (2) contain particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statement's reliability. *Bauer*, 109 Wis. 2d at 215; *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980)." *Hale,* 2003 WI App 238, P18.

C. There are unusual circumstances present that run contrary to the purpose of the confrontation clause

Here, there are two sets of "unusual circumstances" that require the court to exclude the prior trial testimony of the unavailable witnesses. Firstly, the state does not offer the prior testimony because the prosecutor believes the testimony to be truthful. Rather, the testimony is offered as a statutory procedural foundation intended to permit the police investigators to testify concerning the *ex parte* interview conducted with the witness which inculpates the defendant. Secondly, the sheer volume of hearsay being offered is beyond what is contemplated by the statutory exception. Thus, not only is the purpose of the confrontation clause frustrated, it violates Burton's due process right to a fair trial.

1. The "truth of the matter asserted" is the explanation for the prior inconsistent statement- not the substance of the statement itself.

To determine whether any "unusual circumstances" exist the court must consider whether the "purposes behind the confrontation clause have been satisfied." In *Crawford v. Washington*, 541 U.S. 36, 61-62 (U.S. 2004)., the United States Supreme Court gave an excellent discussion of the purposes of the confrontation clause. The court wrote,

To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a

> procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

Here, the situation itself is unusual. The prior testimony is not being offered by the state because the state believes the prior testimony to be truthful and reliable- rather it is being offered by the state only because the prosecutor believes the testimony to *not be reliable.* That is, the witness testified that she *did not* see who did the shooting and that she could *not identify* the shooter. Plainly, the state does not believe this testimony to be reliable; rather, the statements are being offered purely as a procedural foundation. [3] This purely procedural purpose is intended to permit the state to later introduce extrinsic evidence of the witness' prior inconsistent statement to police investigators.

Plainly, permitting this to occur runs afoul of the purpose of the confrontation clause because it sets up an unfair contest of credibility between the cold transcript testimony in which the witnesses testify that they cannot identify Burton as the shooter and the live trial testimony of the police officer who will claim that the witness *told him* that the witness could

---

3 Sec. 906.13(1), Stats., provides:

(1) **Examining witness concerning prior statement.** In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel upon the completion of that part of the examination.

(2) **Extrinsic evidence of prior inconsistent statement of a witness.**

(a) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable:

1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement.

2. The witness has not been excused from giving further testimony in the action.

.

3. The interests of justice otherwise require.

identify Burton as the shooter.

Under these circumstances, the factual issue that the jury will be asked to decide is whether the witness was telling the truth during the first trial when she testified that she could not identify Burton as the shooter; or whether the witness was telling the truth when she was interviewed by the police officer on the night in question. The witness' explanation of the apparent prior inconsistent statement, then, is the critical evidence because it bears on credibility.

Under ordinary circumstances where prior testimony is offered it is because the proponent of the evidence believes that the substantive testimony of the unavailable witness to be relevant and true. The jury then compares the prior testimony of the unavailable witness as to what he saw against the trial testimony of the available witnesses as to what they saw or heard.

Here, though, the state does not offer the prior testimony of the unavailable witnesses as substantive evidence of what occurred. Rather, the state offers the evidence only as a statutory procedural foundation intended to permit the police officers to relate to the jury the *ex parte* statements made by the witness during a police interview. This is the very definition of "testimonial hearsay" under *Crawford.* The Supreme Court wrote, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial' (hearsay). Whatever else the term covers, it applies at a minimum to . . . . to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford,* 541 U.S. at 68 (U.S. 2004)

2. Generally the proponent of hearsay is disadvantaged by the use of hearsay; here, though, the state is the proponent of the hearsay evidence and the use of this "second best" evidence is to the state's benefit.

Most legal scholars would agree that live testimony is far preferable to the use of hearsay evidence to prove a certain fact. The appellate courts routinely remind litigants that, "[W]e usually apply the trial court's 'better position' rationale to factual questions concerning the demeanor and credibility of witnesses . . " *State v. Bunch*, 191 Wis. 2d 501, 510 (Wis. Ct. App. 1995). Plainly, a cold transcript does not permit the jury to view the witness's demeanor nor to hear his tone of voice- both are factors which the jury is instructed to consider in

determining a witness's credibility.

Thus, it is generally true that the proponent of hearsay evidence is hindered by its use. That is, the party who is forced to use this "second best" type of evidence is the one who suffers if the jury does not find the hearsay statement credible.

Here, though, the state is the proponent of the hearsay evidence and the state is plainly the beneficiary of this "second best" type of testimony. As set forth above, the factual issue at play here is whether the witness's testimony that he or she cannot identify the shooter is more believable than the police officer's testimony that in an interview shortly after the incident the witness *could* identify the shooter. If the state has its way, the witnesses' testimony that he or she could not identify the shooter will be presented to the jury by a reading of the transcript of the witness's testimony from the first trial (i.e. the second best evidence). Then the state will proceed to present the live testimony of the police detective who, while displaying unmistakable earnestness and being sure to look directly at the jury box, will testify that on the night of the incident the witness identified Thomas Burton as the shooter. Which testimony is the jury likely to believe?

Thus, under this unusual circumstance it is the proponent of the hearsay who benefits by its use.

3. The sheer volume and importance of hearsay testimony being offered

Under the federal due process clause, "the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). Although there is an "exception" to the hearsay rule for prior testimony it could hardly have been the intention of the legislature (nor of the Supreme Court in *Crawford)* that nearly all important testimony in a trial of this magnitude be presented to the jury in the form of reading transcripts. Certainly there comes a point where the use of prior testimony must violate due process. It is probably not possible to draw a distinct line where this occurs but few legal scholars would disagree that, if every state witness were unavailable after a remand from the court of appeals, a second "jury trial" that involved nothing more than a reading of the transcript of the first trial would be a farce.

We are nearly to that point in this case.

Not *all* witnesses are unavailable; however, most of the important one are gone. All four witnesses mentioned by the state in their motion were persons who were eyewitnesses to the shootings. In other words, the state does not propose to read the prior testimony of a police officer who located shell casings (a fact probably not in dispute here); rather, the state proposes to present the *entire* testimony of four key witnesses by the use of transcripts from the first trial. What is the jury deciding? Without being able to view the witnesses how can the jury possibly give fair consideration to matters of credibility?

Plainly, the jury cannot.

Conclusion

For these reasons it is respectfully requested that the court exclude the prior testimony of the witnesses.

Dated at Milwaukee, Wisconsin, this _____ day of August, 2008.

Law Offices of Jeffrey W. Jensen
Attorneys for the defendant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

633 W. Wisconsin Ave.
Suite 1515
Milwaukee, WI 53203

414.224.9484