06AP2254

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal 2006AP2254-CR
(Milwaukee County Case No. 2004CF006408)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARMEN L. DOSS,

Defendant-Appellant.

Appeal from the Judgment and the Final Order Entered in the Circuit Court for Milwaukee County, The Honorable Elsa C. Lamelas, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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1. Whether the admission of bank records without a live foundational witness subject to cross-examination violated Wis. Stat. §891.24 and Doss' right to confrontation.

The trial court overruled Doss' objections, admitted the bank records, and denied Doss' post-conviction motion raising this claim.

2. Whether the trial court erroneously exercised its discretion in denying a mistrial after the state sought to elicit evidence in violation of a pretrial ruling.

The trial court denied the mistrial request and Doss' post-conviction motion raising this claim.

3. Whether the trial court committed reversible error by admitting evidence of a lawsuit filed by the Wisconsin Department of Revenue in the absence of evidence that Doss was served with the lawsuit or otherwise knew of it at any time relevant to this action.

The trial court overruled Doss' objection, admitted the evidence, and denied Doss' post-conviction motion raising this claim.

4. Whether the prosecutor's invocation of Doss' failure to testify or explain her actions violated Wis. Stat. (Rule) 905.13(1) and her constitutional rights to silence and a fair trial.

The circuit court denied Doss' post-conviction motion raising this claim.

5. Whether the evidence was sufficient for conviction.

The circuit court denied both Doss' motion to dismiss for insufficiency at trial and her post-conviction motion raising this claim.

6. Whether the state's ambiguous and constantly shifting theory of the case, the lack of clarifying instructions, the state's presentation of inadmissible, irrelevant, and highly prejudicial evidence, and its improper reliance upon Doss' exercise of her right not to testify at trial combine to justify reversal in the interests of justice under Wis. Stat. §752.35.

The circuit court did not address whether this Court should exercise its discretion to order a new trial in the interests of justice

under Wis. Stat. §752.35. It did deny Doss' request that it exercise it's own discretion to reverse in the interests of justice under Wis. Stat. §801.15(1).

7. Whether the post-conviction court committed reversible error by denying Doss' ineffective assistance of counsel claim without an evidentiary hearing.

The post-conviction court denied Doss' post-conviction motion without a hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellants' arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Because Ms. Doss' entitlement to relief is clear under established Wisconsin and Federal authority, publication may not be appropriate under Wis. Stat. (Rule) 809.23.

STATE OF WISCONSIN
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Appeal No. 2006AP2254-CR
(Milwaukee County Case No. 2004CF6408)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARMEN L. DOSS,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

By criminal complaint dated November 23, 2004, the state charged Carmen Doss with one count of theft of more than $10,000 by a trustee or bailee in violation of Wis. Stat. §943.20(1)(b) & (3)(c). The theft was alleged to have taken place on or about March 1, 2004. (R2).

Doss and Diane Loftus were co-personal representatives of Doss' father's estate. The legal theory presented in the complaint was that Doss caused the estate bank account to be closed on February 20, 2004 following a disagreement between Doss and Loftus about whether the estate should immediately pay disputed taxes, and that Carmen Doss deposited the proceeds from that account (totaling $70,555.47) into an Atlanta, Georgia bank account in the name of her father's estate on March 1, 2004. The complaint further alleged that Doss subsequently wrote a check to herself in the amount of $65,000 and labeled "inheri-

tance," and that she did not return the funds when ordered to do so by the probate court on October 7, 2004. (R2).

Following a preliminary examination based on the same theory (R67), the state filed an information alleging the same charge, but changing the date of the alleged theft from March 1 to February 20, 2004 (R9).

Doss moved to dismiss on the grounds that the evidence was insufficient to show that Doss caused the closing of the Wisconsin estate account and transfer of the funds to her in Georgia and that, if any offense took place, it was the withdrawal of the funds from the Georgia estate account, for which Wisconsin has no territorial jurisdiction (R12). The circuit court agreed that there likely was no territorial jurisdiction over the March 1 withdrawal but viewed the evidence as sufficient either as a case of retention after the probate court's order to return the funds or an unlawful transfer on February 20, 2004 (R69:17-21, 25-30).

At the subsequent motion hearing on September 29, 2005, the state moved to amend the information to change the focus from an alleged conversion on February 20, 2004 to an unlawful retention of the funds on or about October 31, 2004, based on Doss' failure to comply with the probate court's order to return them. (R71:55). The circuit court granted that request over defense objection (*id.*:58-61).

The case proceeded to trial on October 10, 2005 and, on October 13, 2005, the jury found Doss guilty (R72-R77). On January 20, 2006, the Court, Hon. Elsa Lamelas, presiding, sentenced Doss to six years imprisonment, with one year initial confinement and five years extended supervision. The court also imposed restitution. 9R80:48-49).

Doss timely filed her post-conviction motion on June 7, 2006 raising the same issues addressed here (R54). Following briefing (R58; R59; R60), the circuit court issued a two-page Decision and Order effectively adopting its previous decisions on these issues (R63; App. 1-2).

STATEMENT OF FACTS

In August, 2003, Georgia resident Carmen Doss retained Milwaukee attorney Diane Loftus to assist her with the probate of her father's intestate Wisconsin estate (R76:16, 62). Both Doss and Loftus were named as co-Personal Representatives of the estate and together obtained a $52,000 surety bond from the Ohio Casualty Insurance Company (R76:17; R75:17-22; R34:Exh.2-4). The two opened an informal probate and estate assets totaling about $72,000 were deposited in the M&I Bank (R76:16; R34:Exhs.5 & 30).

Although apparently a resident of Wisconsin, Doss' father had not paid Wisconsin income tax for a number of years, and the Wisconsin Department of Revenue ("DOR") believed that it was owed the bulk of the estate assets (R74:48-50; R34:Exh.26). Although Doss disagreed and sought to contest the DOR assessment, Loftus chose to pay the disputed taxes anyway (R74:60, 84; R76:19-21). Loftus never advised Doss that the DOR is not subject to probate filing deadlines, nor did she seek to make the probate formal so a judge could resolve the conflict (R76:29, 32-33, 82-83). Rather, on February 6, 2004, Loftus forwarded income tax returns and checks totaling $39,865 to the DOR (R74:60-61; R76:25-26, 72; R34:Exh.18).

Knowing of Doss' disagreement with the assessments, the DOR agent did not immediately process the returns. After he advised Doss of the returns and heard her continued objections, however, he submitted the checks for cashing. They were returned on the grounds that the account was closed on February 20, 2004. (R74:69-71).

Although noone with personal knowledge testified concerning the circumstances under which the account was closed, Loftus claimed that she was told that the bank had complied with a request by Doss to close the account and send the proceeds to her in Georgia (R76:35, 39). The bank first provided Loftus an opportunity to cash a check from the account for her own attorney fees, however R76:35-36; R34:Exh.42). At Loftus' request, the probate court on March 25, 2004 allowed her to

withdraw as co-personal representative, and approved $5,115 in attorney fees. The court did not address her request to direct Doss to return the funds. (R76:44-46; R34:Exh.7).

The state's evidence of the disposition of the account proceeds was based entirely on interpretation of bank records, unsupported by a live custodian (R75:53-69; *see* R34:Exhs. 30-33). According to those records, M&I Bank issued a cashier's check for $70,555.47 to the Estate of Donald Doss on February 20, 2004 (R75:57, 59, 70-71; R34:Exh.30). That check was then deposited into a Georgia estate account at the SunTrust Bank of Atlanta (R75:60, 71-73; R34:Exh.31). A $5,000 check to Kimberly Cunningham for "federal taxes and traveling expenses" and a $65,000 check to Doss for "inheritance" subsequently were paid from that account (R75:74-75). The check to Doss then was deposited into another SunTrust Bank account in the name of Doss and her mother on March 15, 2004 where it was co-mingled with other funds (R75:63-65, 79-80). The entire amount then was transferred to a SunTrust money market account in the same names (R75:65-66; R34:Exh.33). Several smaller checks or withdrawals were made from that account over the following six months, with the $52, 778.34 balance being withdrawn in cash on September 15, 2004 (R75:66-68, 80-81, 85). The withdrawal slip purports to have been signed by Carmen Doss (*id.*:68-69; R34:Exh.33B).

On September 27, 2004, Ohio Casualty filed a motion in the probate case for an order that Doss surrender the funds to the court (R74:12-13; R34:Exh.9). Doss appeared by telephone and without counsel at the hearing on that motion on October 7, 2004 and explained that she no longer had the funds (R74:28-33; R34:Exh.11). The Court nonetheless entered a written order directing her to pay $70,555.47 to the Clerk (R74:19-20; R34:Exh.12). Doss did not comply with that order (R74:20-21).

In the meantime, the DOR filed a separate action in August, 2004, seeking payment of the taxes it claimed were owed by the estate (R75:5-7; R34:Exh.13-14). Although the trial court excluded on

confrontation grounds evidence that the DOR lawsuit was served upon Doss (R72:28-38; R75:11-12), it admitted evidence of the action and overruled Doss' subsequent mistrial motion (R75:4-12, 39-42; App. 35-47).

ARGUMENT

I.

ADMISSION OF CERTIFIED BANK RECORDS WAS ERROR AND VIOLATED DOSS' CONFRONTATION RIGHTS

The state's case at trial turned on certified bank records from M & I Bank in Wisconsin and SunTrust Bank in Atlanta, GA. (*See* R34:Exhs 30-33). In fact, the prosecutor admitted those records were "essential" to his case (R72:16). He nonetheless failed to call a records custodian to authenticate these documents, resting instead on the claim that the documents were self-authenticating under Wis. Stat. §891.24. Doss objected to the records on hearsay and confrontation grounds. (R72:9-19; App. 4-14). The trial court, however overruled that objection (*id.*:17-26; App. 12-21).

Admission of the "certified" bank records was error and violated Doss' constitutional rights to confront the witnesses against her. U.S. Const. amend. VI; Wis. Const. art. I, §7.

A. Applicable Legal Standards

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court modified the applicable standard for assessing whether admission of out-of-court statements violates a defendant's confrontation rights. According to *Crawford*, "where 'testimonial' hearsay evidence is at issue, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 69. Non-testimonial hearsay remains controlled by *Ohio v. Roberts*, 448 U.S. 56 (1980). *See State v. Manuel*, 2005 WI 75, ¶¶57-60, 281 Wis.2d 554, 697 N.W.2d 811.

The initial question therefore is whether a particular out-of-court statement is "testimonial." *Manuel*, ¶36. While *Crawford* did not provide a comprehensive definition for what hearsay is "testimonial," it did explain that "'testimony' . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51 (citation omitted). The Court further noted three "formulations of this core class of 'testimonial' statements: "

> – "'*ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;'"
>
> – "'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;'" and
>
> – "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"

Id. at 51-52 (citations omitted).

The Court stated that, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68. At the same time, "nontestimonial" statements include "[a]n off-hand, overheard remark," "a casual remark to an acquaintance," business records, or statements in furtherance of a conspiracy. *Id.* at 51, 56. *See generally Manuel* ¶¶37-38 & n.9.

B. Admission of the Bank Records Was Error and Violated Doss' Rights to Confrontation

The trial court's error in admitting the bank records arose from confusion over the real issue presented. Had the state called the records

custodian to authenticate the records, then the issue would have been limited to a simple question of whether admission of records, otherwise admissible under the hearsay exception for business records, Wis. Stat. §908.03(6), would nonetheless violate the defendant's confrontation rights. That question is answered by *Crawford's* express recognition that such business records are not testimonial. 541 U.S. at 56; *see Manuel*, ¶38 n.9.

The trial court's analysis, however, failed to account for the fact that, by relying upon a hearsay certification or affidavit for verification of the bank records under §891.24 rather than the live testimony of the custodian to meet the foundation and authentication requirements for business records under §908.03(6), the state transformed the issue here from a simple question regarding business records to a complex matter of double hearsay. The alleged verification also is an out-of-court statement offered for its truth and thus constitutes hearsay. Wis. Stat. §908.01(3). The underlying business records are admissible, therefore, only if *both* levels of hearsay meet both statutory and constitutional requirements.

While the bank records would violate neither the rule against hearsay nor the confrontation clause if properly authenticated and if a proper foundation were laid, the state's attempt to do so meets neither statutory nor constitutional requirements.

1. Because the state failed to comply with the requirements of Wis. Stat. §891.24, neither foundation nor authentication requirements were met

The state and the trial court relied upon §891.24 as satisfying authentication and foundational requirements of bank records via a sworn verification attesting to certain factual matters. However, §891.24 requires that the original records "shall be open to the inspection of all parties to the action or proceeding." Doss objected to admission of the records on the ground, which the state failed to

contest, that the original records were not in fact open to his inspection given the facts that (1) defense counsel was only notified on the Friday preceding the Monday start of trial that the state would rely on this provision and (2) at least with regard to the SunTrust records, those records were out of state and thus unavailable for review for all practical purposes. (R72:12-13).

It was the state's responsibility to properly authenticate the bank records and otherwise establish their admissibility. While compliance with §891.24 could meet the statutory requirements for admission, , the state forfeited the benefits of that statute by failing to comply with a mandatory proviso to its application – that the party opponent have a fair opportunity to verify that the proffered records in fact are what they claim to be. Because the state failed to present any alternative basis for satisfying the foundational and authentication requirements for admission of the bank records, such as by the live testimony of a records custodian, the records were not properly admissible.

2. Admission of the bank records violated Doss' right to confrontation

Even if the state had fully complied with §891.24, however, admission of the bank records denied Doss her right to confrontation because, as she noted in her objection at trial, the verifications themselves were "classic" examples of "testimonial hearsay" (R72:14-15). Each was a "solemn declaration" made "for the purpose of establishing or proving some fact," i.e., that the attached records are authentic and qualify as "business records." *Crawford*, 541 U.S. at 51 (defining "testimony"). Each attests to certain facts under oath and thus constitutes an "affidavit." *See id.* at 51-52 (statements in affidavits are testimonial). And finally, each verification was made expressly for trial. *See id.* ("pretrial statements that declarants would reasonably expect to be used prosecutorially" or "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are

testimonial).

Given the testimonial nature of the verifications, confrontation requirements under *Crawford* are met only if the declarant was unavailable and Doss had a prior opportunity to cross-examine that witness. Neither requirement is met here. There is no dispute that Doss never had an opportunity to cross-examine the witnesses who signed the verifications. Nor is there any real dispute that the witnesses could have been made available. Although it was the state's obligations to establish unavailability, *State v. King*, 2005 WI App 224, ¶6, 706 N.W.2d 181, it conceded that it could have a live witness from M&I Bank but simply chose not to call one (R72:16). Regarding the SunTrust records, the state merely asserted that it "was not prepared to bring a custodian in," giving no basis for a finding of unavailability. (*Id.*)[1]

* * *

Because the state failed to meet either the statutory or constitutional requirements for admission of the verifications, neither those documents nor the underlying business records were properly admissible. Because, as the state conceded at trial, those records were "essential" to its case (R72:16), it cannot meet its burden of proving that the error in admitting those records was harmless. *E.g.*, *State v. Hale*, 2005 WI 7, ¶¶59-60, 277 Wis.2d 593, 691 N.W.2d 637 (burden on beneficiary of error to prove harmlessness beyond a reasonable doubt). Absent the bank records, there was no evidence that Doss did anything with the money, let alone that she stole it.

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[1] The state previously indicated that it had tried to obtain a live custodial witness for the SunTrust records but that SunTrust "want[ed] to do things by the book" (R72:19) suggesting that the state had failed to comply with the applicable rules in obtaining that evidence.

II.

DENIAL OF A MISTRIAL BASED ON THE PROSECUTOR'S VIOLATION OF THE COURT'S ORDER EXCLUDING EVIDENCE OF SERVICE OF THE DEPARTMENT OF REVENUE COMPLAINT WAS A MISUSE OF DISCRETION

A significant part of the state's case consisted of its attempt to demonstrate both motive and intent through evidence that, shortly before Doss withdrew approximately $52,000 in cash from a Georgia bank account on September 15, 2004, she was served with notice of a legal action brought by the Department of Revenue seeking a large amount of money in back taxes on her father's estate (*see* R72:30, 38; App. 25, 33). Prevailing on that point required proof that Doss in fact was served, and thus had notice of, the DOR lawsuit prior to the withdrawal. *See* Section III, *infra*.

As the state explained the first day of trial, however, the records custodian for the out-of-state process server who allegedly served that lawsuit on Doss was not cooperative. Although the state had sought to extradite that witness, the prosecutor was informed (in a bit of irony) that the service on that witness was not good and they could not compel his attendance for Doss' trial. (R72:28-32; App. 23-27). The state therefore sought to introduce the alleged Affidavit of Service in lieu of live testimony that Doss in fact had been served with the DOR's lawsuit (R72:29, 32-33; App. 24, 27-28).

Doss objected on the grounds that offering the affidavit of service would constitute multiple levels of hearsay, that the state had no basis for authenticating the supposed affidavit, and that the allegations of the affidavit were clearly testimonial, so that its admission would violate Doss' confrontation rights under *Crawford*. (R72:33-36; App. 28-31). The trial court agreed that the purported Affidavit of Service was testimonial under *Crawford* and *Manuel* and therefore excluded it (R72:36-38; App. 31-33).

Despite that court's order excluding evidence that the DOR

lawsuit ever was served on Doss, or at least that the lawsuit was served on her at any time relevant to this prosecution, the state called DOR attorney John R. Evans to testify regarding that lawsuit. Evans testified regarding his employment, that the Donald Doss estate case had been referred to him after the checks submitted with the tax returns were returned unpaid, and that he filed a lawsuit against Doss, Loftus, and their bonding company seeking payment of those taxes. (R75:4-7; App. 35-38). The state also sought to evade the confrontation issues underlying the Court's exclusion of the Affidavit of Service of that lawsuit by having Evans testify regarding usual procedures for service, the procedures employed in this case and, ultimately, the fact that he received notice of service. (R75:7-12; App. 38-43). While the court overruled Doss' objections to the preliminary questions, it finally sustained her objection to the question whether the DOR received confirmation of service back from the process server (R75:12; App. 43).[2]

Doss subsequently moved for a mistrial based on the prosecutor's conduct in violation of the pretrial order (R75:39-40; App. 44-45). The court, however, denied the mistrial. Although unclear, it appears that the court did so based on second thoughts regarding whether out-of-court statements regarding service on Doss really violated *Crawford* as it originally held. (R75:40-41; App. 45-46).

The decision whether to grant a mistrial lies within the sound discretion of the trial court. *State v. Ross*, 2003 WI App 27, ¶ 47, 260 Wis.2d 291, 317, 659 N.W.2d 122, 134. "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." *Id.* "A trial court

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[2] Here, as throughout this trial (*see, e.g.*, R76:100), the court conducted a number of unreported sidebar conferences with the attorneys. This Court has long deemed this practice to be inappropriate, even when the court subsequently summarizes the substance of the sidebar conferences. *E.g.*, *State v. McDowell*, 2003 WI App 168, ¶16 n.8, 266 Wis.2d 599, 669 N.W.2d 204 (Ct. App. 2003) ("we again remind counsel and the court that such summaries often fall short for appellate purposes").

properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." *State v. Bunch*, 191 Wis.2d 501, 529 N.W.2d 923, 925 (Ct. App.1995).

The trial court's rationale for denying the mistrial motion fails this standard. If, as it appears, that denial was based in whole or in part on the court's reconsideration of its pretrial order excluding the hearsay evidence of the alleged service of the DOR lawsuit upon Doss, then the denial was based on an error of law. As the trial court initially held, the evidence sought by the state plainly contravened the requirements of *Crawford*. An affidavit or other out-of-court assertion that a lawsuit was properly served falls squarely within *Crawford's* definition of "testimony" i.e., "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51 (citation omitted). The very nature of such a statement, relating as it does to the legal prerequisites to a lawsuit, likewise render it inescapable that the declarant would or should naturally expect the assertion to be available for use at a trial. *See Hagen v. City of Milwaukee Employee's Ret. Sys. Annuity & Pension Bd.*, 2003 WI 56, ¶ 12, 262 Wis.2d 113, 663 N.W.2d 268.("The plaintiff has the burden to prove compliance with statutory service requirements, that is, to establish that the defendant was properly served and is therefore subject to the court's jurisdiction").

A court erroneously uses its discretion when its decision is based on an error of law. *E.g.*, *State v. Harp*, 2005 WI App 250, ¶12, 288 Wis.2d 441, 707 N.W.2d 304.

Even if the court's second thoughts concerning its *Crawford* ruling did not contribute to denial of the mistrial, that denial still does not qualify as sound exercise of the court's discretion:

> THE COURT: Well, I, I, I decided that it fell within the spirit of the ruling that I had made; and so ultimately I sustained the objection.
>
> These are rulings that I have made that I think have given the benefit of the doubt to the defense, and not to the prosecution; and certainly a request for a

mistrial on that ground is misplaced.

> Mistrial is an extraordinary remedy, and there is nothing in this record that would warrant a mistrial so that request is denied.

(R75:41-42; App. 46-47).

"The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards." *Nehls v. Nehls*, 151 Wis.2d 516, 518, 444 N.W.2d 460, 460-461 (Ct. App.1989). A conclusory assertion such as that relied on for denial of the mistrial motion fails to meet the requirements of a valid exercise of discretion because it does not reflect a reasoned decision-making process.

Nor do the facts reasonably support the denial of a mistrial. The state's inquiries regarding the possible service of the DOR lawsuit on Doss were highly prejudicial. Absent evidence that Doss knew of the DOR lawsuit before withdrawing the funds on September 15, 2004, all evidence regarding that lawsuit was rendered irrelevant. The existence of a lawsuit can have no reasonable effect on the motives or intent of someone who does not know of it. Only by impermissible speculation could the inference of motive desired by the state have been drawn from evidence of the DOR lawsuit. Yet, the state's questioning of Evans regarding service of the lawsuit was both designed to induce such speculation and had that likely effect. Indeed, the state emphasized just such a speculative inference in closing argument (R76:170-71, 198).

Because the prosecutor's intentional or unintentional attempt to evade both the Court's pretrial ruling and the *Crawford*-based confrontation clause rationale for it in fact seriously prejudiced the defense case, the Court misused its discretion in failing to grant a mistrial.

III.

GIVEN THE ABSENCE OF EVIDENCE THAT DOSS KNEW OF THE DEPARTMENT OF REVENUE'S LAWSUIT AGAINST HER, EVIDENCE OF THAT LAWSUIT WAS IRRELEVANT AND UNFAIRLY PREJUDICIAL

Trial counsel objected on various grounds, including hearsay, confrontation, and relevance, to the state's evidence regarding the DOR lawsuit (R74:22; R75:4-12; App. 35-43). In particular, counsel objected that the lawsuit was irrelevant because there was no evidence it ever was served on Doss (R76:3-5; App. 49-51). The state, however, argued that the jury could conclude from the fact that Evans contracted with a process server to serve the lawsuit and that Doss appeared by telephone at the October 7, 2004 hearing that the lawsuit in fact was served (R76:5-6; App. 51-52).

The trial court apparently agreed:

> THE COURT: Thirteen and 14 are received. I don't think it's required that there be absolute proof of receipt on the part of the defendant.
>
> There is very much like someone who says they mailed a letter, and then there is some action that follows at some point after that. It's a natural inference to be drawn that the letter was received, and so I don't find the objections to 13 and 14 valid, and they are received.

(R76:6; App. 52).

Contrary to that court's conclusion, there was no non-speculative basis on which a jury could conclude that the DOR lawsuit had been served upon Doss before the September 15, 2004 withdrawal and, as a result, evidence of that lawsuit was both irrelevant and unfairly prejudicial.

It is true, of course, that "the mailing of a letter creates a presumption that the letter was delivered and received." *State ex rel. Flores v. State*, 183 Wis.2d 587, 612, 516 N.W.2d 362 (1994) (citations omitted). It does not follow, however, that proof of service rationally

may be presumed from a request for service of process by a private process server of unknown reliability.

As the Supreme Court noted long ago, the presumption of receipt from mailing is an "'inference of fact, founded on the probability that the officers of the government will do their duty and the usual course of business.'" *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884), quoting *Huntley v. Whittier*, 105 Mass. 392 (1870).

The same presumption thus does not apply to the actions of *private* agencies. *See, e.g., Danielson v. Brody Seating Co.*, 71 Wis.2d 424, 428, 238 N.W.2d 531. (1976) (no presumption of service where affidavit of service does not meet legal requirements). Even proof of the dictation of a letter coupled with proof of the custom of a private office regarding the mailing of letters does not give rise to a presumption that the letter was received absent "proof from which it may be inferred that in the particular instance the custom was complied with." *Frank v. Metropolitan Life Ins. Co.*, 227 Wis. 613, 277 N.W. 643, 645 (1938) (citation omitted).

Service of the DOR lawsuit cannot rationally be inferred, as the state argued and the trial court apparently concluded, from the fact that Doss appeared by phone at the October 7, 2004 hearing (R76:5-6; App. 51-52). The existence, nature and scope of that lawsuit were irrelevant to that hearing, as the probate court repeated advised Doss (R34:Exh.11:9-11). That hearing was based, not on the DOR lawsuit, Milwaukee County Case No. 2004CV7498, but on a motion by Ohio Casualty Insurance Company in the probate matter, Case No. 2003PR1732 (R34:Exh.9). That motion, moreover, was not even filed until September 27, 2004 (*id.*), and thus rationally could not have provided a motive for the alleged withdrawal of funds 12 days earlier.

Because there was no admissible evidence that the process server in this matter in fact served Doss with the DOR lawsuit at all, let alone prior to the withdrawal of the funds from which the state sought to impute motive, evidence of that lawsuit bore no relevance to this matter and should have been excluded or stricken. Instead, testimony

of DOR Attorney Evans and the documentary evidence of the DOR lawsuit allowed the state to argue unfairly prejudicial and speculative inferences that Doss must have known of the lawsuit and therefore acted with the motive and intent to convert the funds when she withdrew them and subsequently failed to turn them over to the probate court after the October 7, 2004 hearing. (R76:170-71, 198).

The state cannot meet its burden of proving that admission of Evans' testimony and other evidence regarding the DOR lawsuit was harmless. *Hale*, 2005 WI 7, ¶¶59-60.

Doss' statements to Judge Donald that she no longer had the funds on October 7, 2004 (74:28-29, 32-33; R34:Exh.11:3, 5, 7-8, 11-12), were not inherently incredible and thus could have been credited by a reasonable jury sufficiently to raise a reasonable doubt as to her guilt. The purpose and likely effect of the evidence of the DOR lawsuit was to nullify Doss' denial by suggesting motive on her part to conceal and convert the funds remaining in the bank account on September 15, 2004 (R76:170-71, 198).

Also, without direct evidence that Doss in fact still had the funds in October, 2004, the state's case relied on the inference, based again on the theory that she withdrew the funds on September 15 in response to notice of the DOR lawsuit, that she still would have possessed the funds a month later. Absent this inference of motive, the state would have been left with an unexplained withdrawal for unknown purposes. Given that the funds had remained in the bank for more than six months, a reasonable jury could view such a withdrawal as supporting Doss' claim and rendering speculative any assertion that she still possessed the funds somewhere.

IV.

THE PROSECUTOR'S RELIANCE UPON DOSS' FAILURE TO TESTIFY VIOLATED WIS. STAT. (RULE) 905.13(1) AND DEPRIVED HER OF HER CONSTITUTIONAL RIGHTS TO SILENCE AND TO A FAIR TRIAL

Doss did not testify at her trial. Under such circumstances, "the Fifth Amendment . . . in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). Any such comment on a defendant's silence constitutes an impermissible penalty for exercising one's constitutional privilege. *Id.* at 614. *See State v. Hubanks*, 173 Wis.2d 1, 496 N.W.2d 96, 102 (Ct. App. 1992). ""[R]eference to the defendant's silence does 'no more than turn on the red light of potential prejudice involving the defendant's fifth amendment rights.'" *Reichhoff v. State*, 76 Wis.2d 375, 251 N.W.2d 470, 473 (1977) (citation omitted). *See also* Wis. Stat. (Rule) 905.13(1) (references to, or inferences from, exercise of privilege impermissible).

Despite these well-established rules, the prosecutor commented extensively in summation on the defendant's exercise of her right not to testify:

> I'm also, I also focus on the fact that there has been no accounting that has been uncovered in our investigation, no explanation as to where the money had gone. I would feel much differently about this case if my investigation had shown that sometime during the summer of 2003, excuse me, 2004 there was an extraordinary medical expense that had to be paid, there was some unusual thing that occurred that would have explained why money would have been taken, and maybe there was subject to some estate restrictions, that that money then was put to a use that had some good and understandable purpose.

> I would have been interested. Indeed, I was interested. Indeed, that's why I asked the investigator to trace these funds, and we found no such evidence. There is no evidence on this record that this money, the way in which this money was spent, and our investigation reveals only the extraordinary end point when Ms. Doss walked into a bank and walked out with $52,788.34 in cash.
>
> Who among us has ever done that? What is the explanation for that? That speaks volumes to me.

(R76:171-72).

> . . . I myself have never heard an explanation for why we moved from the first estate account to one personal account, to a third account and second personal account in the space of just days. To me that says that there's some intent to conceal here.

(*Id.*:198).

> And a person who truly didn't have the money, but was interested in making sure that they abided by the requirements of the law would have made, would have done two things, would have, A, provided some sort of formal accounting to the court, *which was never provided, not, and [sic] from any witness that we have heard from the witness stand*, Ms. Loftus didn't testify to a formal accounting, Judge Donald didn't testify to a formal accounting; and then, secondly, no payments over time.

(*Id.*:201 (emphasis added)).

"The test for determining whether remarks are directed to a defendant's failure to testify is 'whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *State v. Lindvig*, 205 Wis.2d 100, 555 N.W.2d 197, 200 (Ct. App. 1996) (citation omitted). The prosecutor's repeated references to Doss' exercise of her right not to testify, and to the absence of an explanation or accounting that only Doss could give

plainly meet that standard. *See Lakeside v. Oregon*, 435 U.S. 333, 345-46 & n.6 (1978) (Stevens, J., dissenting) (noting the tainting effect of a prosecutor's repeated reference to a defendant's right to remain silent, each "in slightly different form, just to make sure the jury knew that silence, like killing Caesar, is consistent with honor." (citing W. Shakespeare, *Julius Caesar*, Act III, Sc.II)); *In re Rodriguez*, 174 Cal. Rptr. 67, 74 (Cal. App. 1981).

The misconduct was not harmless. *United States v. Hasting*, 461 U.S. 499, 510-11 (1983):

> The question a reviewing court must ask is this: Absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?

(Citation omitted).

Despite the Court's instruction that the jury not hold the defendant's silence against her (R76:207), juries most often do just that, even in the absence of comment by the prosecutor encouraging them to do so. "Even if jurors try faithfully to obey their instructions, the connection between silence and guilt is often too direct and too natural to be resisted." *Lakeside*, 435 U.S. at 345 (Stevens, J., dissenting); *see, e.g., United States v. Davis*, 437 F.2d 928, 933 (7th Cir. 1971) (a defendant's silence at his own trial is "almost certain to prejudice the defense no matter what else happens in the courtroom"); S. Dawson, *Due Process v. Defense Counsel's Unilateral Waiver of the Defendant's Right To Testify*, 3 Hastings Const. L. Q. 517, 533 n.111 (1976).

While a boilerplate instruction thus may be deemed sufficient to balance the jurors' inherent suspicion about the defendant's failure to testify, persistent prosecutorial comment on the defendant's exercise of the right to silence undermines that delicate balance. Courts generally assume that the jury will follow a properly given cautionary instruction, *see State v. Lukensmeyer*, 140 Wis.2d 92, 409 N.W.2d 395, 403 (Ct. App. 1987), but that assumption does not hold where, as here, the

evidence is so highly prejudicial to the core issue at trial. *State v. Pitsch*, 124 Wis.2d 628, 369 N.W.2d 711, 720 n.8 (1985); *see Francis v. Franklin*, 471 U.S. 307, 323 n.9 (1985). *See also Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) ("if you throw a skunk into the jury box, you can't instruct the jury not to smell it").

The error was not harmless, especially when combined with the effect of the erroneously-admitted evidence of the DOR lawsuit. *See* Section III, *supra*. A central issue at trial concerned whether Doss in fact still possessed the funds in October, 2004 or whether, as she informed Judge Donald on October 7 of that year, she no longer had them (R34:Exh.11:3, 5, 7-8, 11-12; R74:28-29, 32-33). The purpose and likely effect of the prosecutor's invocation of Doss' right not to testify was to undermine the credibility of her statements to Judge Donald in the eyes of the jury and to persuade the jury to shift the burden of proof on the issue of possession from the state to Doss. Instead of the state having to bear its burden of proving beyond a reasonable doubt that Doss still possessed the money in October, 2004, the state sought to transfer the burden onto Doss to explain where the money went.

Because a reasonable jury could have credited Doss' statements to Judge Donald absent the improper argument, thus requiring a not guilty verdict, and because the prosecutor's improper argument was both intended to nullify that possibility and had that likely effect, the state cannot meet its burden of proving that misconduct to have been harmless.

Doss' trial counsel, however, neither objected to this misconduct at trial nor requested a mistrial on these grounds as required by *State v. Holt*, 128 Wis.2d 110, 382 N.W.2d 679, 692 (Ct. App. 1985). Accordingly, unless this Court overlooks the resulting waiver, *see State v. McMahon*, 186 Wis.2d 68, 519 N.W.2d 621, 631 (Ct. App. 1994), the error must be reviewed as either ineffective assistance of counsel, *see* Section VII, *infra*, or interests of justice, *see* Section VI, *infra*.

V.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION

The burden is on the state to prove every fact necessary for conviction of the crime charged beyond a reasonable doubt. *E.g.*, *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). "The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Rushing*, 197 Wis.2d 631, 541 N.W.2d 155, 159 (Ct. App. 1995) (citing *Jackson*, 443 U.S. at 319); *see State v. Hayes*, 2004 WI 80, ¶56, 273 Wis.2d 1, 681 N.W.2d 203.

While the jury may rely upon reasonable inferences from the facts as well as upon direct evidence, a reasonable inference is a rational and logical deduction from established facts rather than a mere guess or conjecture. *See, e.g.*, 1 Sand, et al., *Modern Federal Practice Jury Instructions* ¶6.01 (2004) and cases cited therein. *See also Leary v. United States*, 395 U.S. 6, 36 (1969) (inference is "irrational" unless presumed fact more likely than not given proven fact); *State v. Haugen*, 52 Wis.2d 791, 191 N.W.2d 12, 15 (1971) (inference of guilt from criminal complaint unreasonable if conclusion of innocence equally reasonable).

Under the information as amended for purposes of trial, Doss was charged with theft in violation of Wis. Stat. §943.20(1)(b) on the grounds that, without the owner's consent and with intent to convert it to her own use, she retained possession of money on or about October 31, 2004 that she had in her possession by virtue of her office as a personal representative of her father's estate (R71:55, 58-61). As outlined in the jury instructions, conviction therefore required proof beyond a reasonable doubt that (1) Doss had possession of money due to her position as a personal representative of her father's estate, (2) she

intentionally retained possession of the money contrary to her authority and without the owner's consent, (3) she knew that retention of the money was contrary to her authority and without the owner's consent, and (4) that she intended to convert the money to her own use (R76:208-09; App. 61-62).

Because the evidence, when viewed most favorably to the state, failed to establish that Doss still retained the funds on or about October 31, 2004, the state failed to prove a necessary element of the offense. At best, the evidence showed that Doss possessed the funds when she withdrew them from the Georgia bank account on September 15, 2004. Nothing but speculation, however, suggested that she still possessed those funds more than a month later. Indeed, the only evidence on this point is her statement to the probate court on Octooer 7, 2004 that she no longer had the funds and thus could not return them (R74:28-29, 32-33; R34:Exh.11:3, 5, 7-8, 11-12).

The evidence likewise is insufficient to convict on the charge of retaining estate funds in her office as personal representative on or about October 31, 2004 with intent to convert because, as the state argued at trial (R76:160), the evidence established that, if there was any conversion, it already had taken place either on February 20, 2004 when the funds were mailed to Doss in Georgia or on March 1, 2004 when she withdrew the bulk of the funds from the Georgia estate account. While that was the offense originally alleged against Doss, the state chose to amend the charge, with the trial court's authorization, to the charge of retention (R71:55, 58-61), and the jury was instructed only on the retention theory (R76:207-09; App. 60-62).

The Court, of course, "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella v. United States*, 445 U.S. 222, 236 (1980). The Court thus can uphold a conviction only if the evidence at trial was sufficient to convict on the theory actually presented to the jury. *State v. Wulff*, 207 Wis.2d 143, 557 N.W.2d 813, 817 (1997).

Because any conversion already would have been completed

nine months before the alleged retention here, the jury could not reasonably find that any possession Doss may have of those funds on or about October 31, 2004, was either in her role as personal representative of her father's estate or with intent to convert.

Because no rational trier of fact could have found all elements of the offense charged, the conviction must be vacated and the charge dismissed. *E.g., Wulff, supra.*

VI.

REVERSAL IS APPROPRIATE IN THE INTERESTS OF JUSTICE

Even if the Court does not otherwise grant Doss a new trial, the state's ambiguous and constantly shifting theory of the case and the lack of clarifying instructions, as well as the state's presentation of inadmissible, irrelevant, and highly prejudicial evidence and improper reliance upon Doss' exercise of her right not to testify at trial combine to justify reversal in the interests of justice under Wis. Stat. §752.35 because these factors resulted in the real controversy not being fully tried. *See Vollmer v. Luety*, 156 Wis.2d 1, 456 N.W.2d 797 (1990). The Court's discretionary authority to reverse in the interests of justice furthers its obligation to do justice in an individual case. *Id.*, 456 N.W.2d at 803.

The identified combination of factors conspired to confuse the jury regarding the central legitimate issue in the case - whether Doss unlawfully retained estate assets on or about October 31, 2004 after being directed by probate court to pay those funds into the court.

A. Admission of Inadmissible and Prejudicial Evidence and Improper Argument

Reversal is justified under §752.35 when, among other things, the jury "had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not

fully tried." *State v. Hicks*, 202 Wis.2d 150, 549 N.W.2d 435, 440 (1996).

For the reasons already stated, the jury was exposed to inadmissible and unfairly prejudicial evidence in the form of the bank records and evidence of the DOR lawsuit, as well as the prosecutor's invocation of Doss' right not to testify. Such improper evidence no doubt had its intended effect of influencing the jury's judgment by suggesting a reason to find motive to conceal estate funds and discredit Doss' explanation that she did not still possess the funds as of the date of Judge Donald's October 7, 2004 Order.

B. Failure to Define the "Owner" Whose Consent Was in Issue and the State's "Moving Target" Theory of Prosecution

A major dispute prior to trial concerned identification of the "owner" of the funds allegedly retained or converted in this matter. While all agreed that the DOR was not an owner (R71:47), the question remained whether the amorphous "estate" was the owner and, if so, whose consent was at issue when addressing the requirement of Wis. Stat. §943.20(1)(b) that the retention be "without the owner's consent." This matter was discussed at length prior to trial (R71:7-27, 31-33), and in discussions of jury instructions (R76:122-37).

At various times, the state argued that the "owner" for purposes of granting consent was either the probate court or Loftus as co-personal representative (R28:14-15; R71:23-24, 27; R72:49; R76:92, 122-26, 132-34),[3] although it ultimately withdrew its request regarding Loftus (R76:129). Doss, on the other hand, argued that the applicable "owners" was either Doss as personal representative or the heirs (*E.g.*, R71:11-12, 16-21; *see* R76:136).

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[3] At one point, both the state and the trial court even suggested that the creditors may be "owners." (*See* R28:14-15; R71:11-12, 17, 19-20). However, the subsequent agreement that the DOR was not an owner seemingly resolved that matter. (*See* R71:47).

The trial court took the position that the "estate" was the owner (*e.g.*, R71:39-40). While recognizing that courts may disagree regarding that conclusion, however (R76:135; App. 56), that court ultimately chose not to further define whose lack of consent the state was required to establish for conviction (R76:134-36; App. 55-57). Indeed, even though the parties agreed that the DOR was *not* an owner, the court refused even to tell the jury that (R76:148-49; App. 58-59).

The trial court's failure to define whose lack of consent mattered left the jury without guidance on a critical issue in the case. As the prosecutor astutely put it, the court's approach required the parties to "kind of trust that the jury will figure out who the owner is" (R76:135; App. 56). Indeed, the court itself expressed doubt whether the jury "can figure out who the owner is," especially given the difficulty of the question as a legal matter (*id.*:135-36; App. 56-57).

Identification of the "owner" was critical. As an amorphous entity, "the estate" could not act or withhold consent on its own. To meet its burden of proving that the retention was "without the owner's consent" and that Doss knew the retention to be without the owner's consent, therefore, the state was required to identify the human owner. By failing to resolve that matter for the jury, the trial court's instructions failed to require proof of every element of the charged offense.

As fundamental principles of probate law establish, Doss was the "owner." *Peters v. Kell*, 12 Wis.2d 32, 41, 106 N.W.2d 407, 413 (1960); *In re Krause's Will*, 240 Wis. 72, 75-76, 2 N.W.2d 733, 735 (1942); *Schoenwetter v. Schoenwetter*, 164 Wis. 131, 134, 159 N.W. 737 (1916); *see* Wis. Stat. §857.01 ("Upon his or her letters being issued by the court, the personal representative succeeds to the interest of the decedent in all property of the decedent"). That being the case, then there was no violation, at least until the probate court directed her to deposit funds with the clerk. *See Peters*, 106 N.W.2d at 413 (any action for conversion of estate property may be maintained only by the administratrix (now, personal representative)).

It is true that the personal representative's interests are not absolute, limited as they are by the interests of the heirs. *Schoenwetter*, 164 Wis. at 134. *See also* Wis. Stat. §939.22(28). However, to the extent that the heirs were owners based on their future interests in the estate, then the evidence was insufficient because (1) the state failed to present evidence of their non-consent and, (2) since all the heirs lived in Georgia, the consequences of any alleged conversion would have been limited to that state, depriving Wisconsin of territorial jurisdiction.

It is also clear that creditors (such as the DOR) have no ownership interest in the estate:

> "The administrator is the legal owner for the time being of the personal property of which the decedent died possessed, and his title and authority extend so completely to all such property as to exclude for the time being creditors, legatees, and all others beneficially interested in the estate."

In re Krause's Will, 240 Wis. at 75-76 (citations omitted). *See also Austin v. State*, 86 Wis.2d 213, 271 N.W.2d 668, 670 (1978) (Creditor has no ownership interest in particular funds of debtor); *Edwards v. State*, 49 Wis.2d 105, 181 N.W.2d 383, 387-88 (1970) (same).

The trial court's failure to instruct on these principles, and instead to "kind of trust that the jury will figure out who the owner is," resulted in the real controversy not being fully tried. Especially when combined with the state's constantly shifting theory of prosecution, the lack of relevant guidance left the jury adrift regarding critical issues it was to decide.

The offense, if any, in this case was limited to Doss' alleged refusal to deposit funds with the clerk after ordered to do so by the probate court. The relevant dispute for the jury thus involved whether Doss in fact had possession of the funds at that time and whether she intended to convert them to her own use at that time. That was the offense charged in the amended information and that was the offense that the trial court and the defense understood was in issue. (*See*

R71:55-61; R76:148).

While constantly evolving to overcome proof problems, as well as problems meeting requirements of territorial jurisdiction, the state's ultimate theory at trial was much broader than that in the Amended Information. This is demonstrated both by its request to yet again amend the information "to conform to the evidence" by extending the time period to cover the entire time frame from February 20, 2004 to October 31, 2004 (R76:116-20), and by the scope of the offense asserted in its closing argument (*id.*:167-68).

However, until the probate court directed Doss to deposit certain funds with the clerk, she was the relevant "owner." *E.g.*, *Schoenwetter*, *supra*. With no guidance from the court, however, the jury was left to assume that Loftus' lack of consent was sufficient, even though she withdrew as co-personal representative long before the alleged retention for which Doss was on trial and even though the probate court failed to grant Loftus' request for an order that Doss return the funds. (*See* R76:44-46; R34:Exh.7). That lack of guidance likewise left the jury erroneously to assume that creditors such as the DOR may have an ownership interest sufficient to trigger criminal liability here.

While the jury *may* have figured out who the relevant owner was on its own, there is nothing that establishes that it did. Rather, it may have merely followed the state's faulty reasoning that Loftus' lack of consent was enough, so that Doss' retention of the funds prior to September 15, 2004 proved her guilt even if she no longer possessed the funds at the time of the October 7, 2004 hearing. (*See* R76:125-26, 167-68). Indeed, the vast majority of the state's closing argument concerned the time period leading up to September 15, 2004, with only minor asides regarding the period at issue here, late October, 2004. (*Id.*:152-72).

The evidence that Doss no longer possessed the funds on October 7, 2004 was not inherently incredible and could have been credited by a reasonable jury. Indeed, even if there were admissible evidence that Doss was served with the DOR lawsuit, that would

provide motive to distribute the funds, not retain them. Reasonable doubt on that point would have required a not guilty verdict. However, the trial court's failure adequately to guide the jury on ownership, when combined with the standard instruction that it is sufficient if the "offense was committed on a date near the date alleged" (R76:207; App. 60), allowed some or all of the jury improperly to credit the state's argument and convict for her retention prior to October 7, 2004.

The state's broad-brush approach and the absence of adequate guidance from the trail court also presented a unanimity problem. The court denied Doss' request for a unanimity instruction (R76:148; App. 58). However, the range of possible bases for criminal liability presented by the state and the absence of guidance by the court raise the possibility that some jurors found beyond a reasonable doubt that Doss unlawfully retained the funds *after* the probate court's order while other jurors found reasonable doubt that she still possessed the funds at that time but nonetheless concluded that she unlawfully retained them prior to September 15, 2004 without the consent of Loftus or the DOR or even the probate court, none of which lawfully would support a conviction.

Because the instructions did not limit the jury to the real issues in controversy and instead allowed it to convict on other, improper grounds, Doss was denied a jury verdict on every element of the charged offense and a unanimous verdict. The real controversy, in other words, was not fully and fairly tried. This Court, therefore, should exercise its discretion to order a new trial under §752.35. *See Vollmer*, 456 N.W.2d at 805-06 and cases cited therein.[4]

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[4] Under the "real controversy not tried" category of "interests of justice" cases, "it is unnecessary . . . to first conclude that the outcome would be different on retrial" prior to ordering a new trial. *Vollmer*, 456 N.W.2d at 805. As amply demonstrated throughout this motion, however, the facts of this case establish just such a probability of acquittal upon retrial.

VII.

BECAUSE DOSS' MOTION ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVENESS OF COUNSEL, THE POST-CONVICTION COURT ERRED IN DENYING HER A HEARING

Contrary to the post-conviction court's summary conclusion below (R63:2; App. 2), Doss was denied the effective assistance of counsel at trial guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Whether based on trial counsel's failure to object to the prosecutor's comments on Doss' silence or on some other supposed defect, as yet unidentified by the state, in his attempts to preserve the issues raised on this appeal, such failures were unreasonable under prevailing professional norms and Doss' defense was prejudiced by them.

A. Standard for Ineffectiveness

The test for ineffective assistance of counsel is two-pronged. A defendant first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" *State v. Johnson*, 133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986), *quoting Strickland v. Washington*, 466 U.S. 668, 688 (1984). In analyzing this issue, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690; *see Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

It is not necessary, of course, to demonstrate total incompetence of counsel, and the defendant makes no such claim here. Rather, a single serious error may justify reversal. *Kimmelman*, 477 U.S. at 383; *see United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error . . . if that error is sufficiently

egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Deficiency is shown when counsel's failures resulted from oversight rather than a reasoned defense strategy. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001); *State v. Moffett*, 147 Wis.2d 343, 353, 433 N.W.2d 572, 576 (1989); *but see State v. Koller*, 2001 WI App. 253, ¶¶8, 53, 248 Wis.2d 259, 635 N.W.2d 838.

Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "[A] counsel's performance prejudices the defense when the 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Johnson*, 153 Wis.2d at 222, *quoting Strickland*, 466 U.S. at 687. "The defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *Moffett*, 147 Wis.2d at 354, *quoting Strickland*, 466 U.S. at 693. Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." *Moffett*, 147 Wis.2d at 357 (citation omitted).

"Reasonable probability," under this standard, is defined as "'probability sufficient to undermine confidence in the outcome.'" *Id.*, *quoting Strickland*, 466 U.S. at 694. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. *Williams v. Taylor*, 529 U.S. 362 (2000). In addressing this issue, the Court normally must consider the totality of the circumstances. *Strickland*, 466 U.S. at 695.

In assessing resulting prejudice, the Court must assess the cumulative effect of *all* errors, and may not merely review the effect of each in isolation. *E.g.*, *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001); *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000); *State v. Thiel*, 2003 WI 111, ¶¶ 59-60, 264 Wis.2d 571, 665 N.W.2d 305 (addressing cumulative effect of

deficient performance of counsel).

Once the facts are established, each prong of the analysis is reviewed *de novo*. *State v. Cummings*, 199 Wis.2d 721, 546 N.W.2d 406, 416-17 (1996).

B. Failure to Object to Prosecutor's Comments on Doss' Failure to Testify

Trial counsel neither objected to the prosecutor's comments on Doss' failure to testify nor sought a mistrial on these grounds. Accordingly, he failed to preserve that violation for review as of right. *State v. Holt*, 128 Wis.2d 110, 382 N.W.2d 679, 692 (Ct. App. 1985).

As explained in her post-conviction motion (R54:19-20), Doss can imagine no possible rational basis for trial counsel's failure to preserve this issue. When provided an opportunity prior to the filing of Doss' motion to explain any reasoned basis for failing to object, trial counsel declined to do so. Doss noted, however, that trial counsel was not shy about objecting to other instances of prosecutorial overreaching in closing argument (*See* R76:200-01). It therefore appears that he merely overlooked the *Griffin* violations. Deficient performance is shown where counsel's failures are the results of oversight rather than a reasoned defense strategy. *E.g.*, *Wiggins*, 539 U.S. at 534; *Moffett*, 147 Wis.2d at 353.

For the reasons already stated, moreover, the prosecutor's violation of Doss' Fifth Amendment rights, when combined with the other trial errors, prejudiced her right to a fair trial. But for those errors, there is more than a reasonable probability of a different result on retrial. *See* Section IV, *supra*.

C. Failure to Preserve Other Identified Issues

To the extent Doss is deemed to have waived any objection to the other errors identified in this motion, she was denied the effective assistance of counsel for this reason as well. Although no such waiver is readily apparent from the record, it is unknown what, if any, waiver

arguments the state may seek to make on this appeal. The state below claimed that Doss' trial counsel waived her interests of justice challenge to the absence of an "ownership" instruction (R58:18), overlooking the fact that such challenges are not subject to waiver. *E.g.*, *State v. Harp*, 150 Wis.2d 861, 443 N.W.2d 38, 44 (Ct. App. 1989).[5] The state also claimed that Doss' trial counsel failed to make a timely request for a mistrial based on the state's prejudicial attempt to elicit evidence excluded by pretrial order (R58:8, 20), similarly ignoring the fact that counsel immediately objected (R75:12; App. 43), and moved for a mistrial at his first opportunity outside the presence of the jury, a mere six transcript pages after the misconduct giving rise to it (R75:18; *see id.*:39-42; App. 44-47). There can be no rational suggestion here that waiting a few minutes to raise the issue until the next sidebar in any way "prejudice[d] the state in the operation of its criminal law system [or] cause[d] inordinate delay and unnecessary expenditure of public funds." *E.g.*, *Mulkovich v. State*, 73 Wis.2d 464, 243 N.W.2d 198, 201 (1976) (no waiver of mistrial where issue immediately brought to courts attention and appropriate motion made as soon as jury left courtroom).

While the state's waiver arguments below thus were frivolous, Doss cannot anticipate what similar claims creative counsel for the state may suggest on this appeal. Trial counsel objected at length regarding the *Crawford* issues, evidence of the DOR lawsuit, and identification of the appropriate "owner" of the funds. Should this Court nonetheless determine that counsel waived any such issue by failing to follow established procedure, therefore, it once again appears that trial counsel merely overlooked any insufficiency in his objections. Again, deficient performance is shown where counsel's failures are the results of oversight rather than a reasoned defense strategy, *e.g.*, *Wiggins*, 539 U.S. at 534, and, for the reasons already demonstrated, there is more than a reasonable probability of a different result on retrial but for the

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[5] *Harp* was overruled in part on other grounds in *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380, 388 (1993).

combined effect of those errors.

D. Because Doss' Motion Established Her Entitlement to Relief, the Post-Conviction Court Erred in Denying Her Ineffectiveness Claim Without a Hearing

While Doss' motion thus demonstrated her entitlement to relief, an evidentiary hearing is necessary on an ineffectiveness claim to permit trial counsel to state his or her reasons for the challenged acts or omissions. *See, e.g., State v. Mosley*, 102 Wis.2d 636, 307 N.W.2d 200, 212 (1981). The question is whether counsel's acts or omissions were the result of reasonable strategy. The post-conviction court, however, denied Doss' motion without a hearing (R63:2; App. 2).

A defendant is entitled to an evidentiary hearing if the motion "alleges facts which, if true, would entitle the defendant to relief . . .." *Nelson v. State*, 54 Wis.2d 489, 195 N.W.2d 629, 633 (1972) (motion to withdraw guilty plea); *see State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50, 53 (1996). Sufficiency of the motion is reviewed *de novo*. *Id.*

The court below concluded that Doss is not entitled to relief based on the facts alleged; Doss has demonstrated to the contrary. Accordingly, she is entitled to remand for a hearing on this claim, and the court below erred in denying her one. *See State v. Washington*, 176 Wis.2d 205, 500 N.W.2d 331, 336 (Ct. App. 1993) ("Were Washington to have alleged sufficient facts to support his claim that he was denied the effective assistance of counsel, we would have to remand for an evidentiary hearing on the issue").

CONCLUSION

For these reasons, Carmen Doss respectfully asks that the Court reverse the judgment of conviction and direct, in order of priority, (1) that the charge against her be dismissed, (2) that a new trial be granted, or (3) that a hearing be held on Doss' ineffectiveness claim.

Dated at Milwaukee, Wisconsin, December 4, 2006.

Respectfully submitted,

CARMEN DOSS, Defendant-Appellant

HENAK LAW OFFICE, S.C.

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Doss CA Brf.wpd

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,447 words.

Robert R. Henak

Brief Cert.wpd

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal 2006AP2254-CR
(Milwaukee County Case No. 2004CF006408)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARMEN L. DOSS,

Defendant-Appellant.

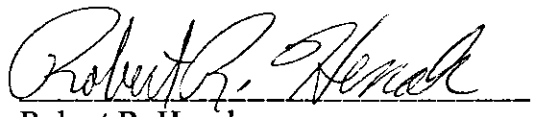
APPENDIX OF
DEFENDANT-APPELLANT

CERTIFICATE TO APPENDIX

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 reproduced to preserve confidentiality and with appropriate references to the record.



Robert R. Henak

CA App..wpd

STATE OF WISCONSIN | CIRCUIT COURT Branch 23 | MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

CARMEN DOSS,

Defendant.

Case No. 04CF006408

DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

On June 7, 2006, the defendant by his attorney filed a motion for postconviction relief seeking dismissal of the case or a new trial. The defendant was convicted of theft in a business setting and sentenced to six years in prison. The court set a briefing schedule, to which the parties have responded. The defendant contends that the court erred in admitting certified bank records instead of hearing the testimony of a records custodian; that the court erred by denying the defense request for a mistrial; that evidence of the Department of Revenue's lawsuit was unfairly prejudicial; that the prosecutor improperly commented on the defendant's silence during his closing argument after she did not testify; that there was insufficient evidence to sustain her conviction; that the interests of justice require a new trial; that the errors during the trial substantially impaired her right to a fair trial; and that trial counsel was ineffective for failing to object to errors during the trial.

Many of the defendant's claims were advanced before and during trial and properly denied for reasons set forth on the record previously and detailed by the State in its response to the motion for postconviction relief.

Admission of the defendant's bank records was proper. Defendant's rights under the Confrontation Clause were scrupulously observed. In light of the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), and a certain degree of uncertainty regarding the full ramifications of that decision at the time of trial, the evidentiary decisions favored the defense perhaps more than case law, as now developing, would require.

This was a vigorously defended case. Examined in context, the prosecution's closing argument was not an allusion to the defendant's failure to testify. Nothing in the prosecution's conduct warranted mistrial, and so no mistrial was ordered. The defense in this case was assiduously well-prepared and carefully orchestrated. Defendant's present claims of ineffective assistance of counsel are without merit.

Finally, the evidence adduced at trial was certainly sufficient for conviction. An indication of the strength of the government's case, in a sense a summary of the defendant's willful criminal conduct, is found in the testimony of the Hon. M. Joseph Donald. As earlier, defendant seeks to exploit the nuances of ownership in a probate estate in order to nullify the consequences of her theft of property that was not hers. The jury instructions appropriately explained the elements of the offense.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is **DENIED.**

Dated this AUG 22 2006 day of August, 2006, at Milwaukee, Wisconsin.

BY THE COURT:

/S/ELSA C. LAMELAS

Elsa C. Lamelas
Circuit Court Judge

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH #23

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 04CF006408

CARMEN L. DOSS,

Defendant.

COPY

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

October 10, 2005 - AM

HON. ELSA C. LAMELAS
CIRCUIT JUDGE, PRESIDING

CHARGE: Theft

A P P E A R A N C E S:

BRUCE LANDGRAFF, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

JAMES J. CONNOLLY, Attorney at Law, appeared on behalf of Carmen L. Doss.

CARMEN L. DOSS present in court.

How long do you think you'll want for opening statements, Mr. Landgraf?

MR. LANDGRAF: I believe that my opening statement will last no longer than 30 minutes.

THE COURT: Okay.

Okay. All right. We can go off the record until the jury gets here.

(Pause.)

THE COURT: Let's go back on the record.

MR. LANDGRAF: I can just go through this verbally, judge; there's nothing particularly complicated.

THE COURT: Sure.

MR. LANDGRAF: First I would move to sequester witnesses during the course of the trial.

THE COURT: That's fine. The witnesses will be excluded from the courtroom after voir dire. They may not discuss their testimony until they have completed their direct and cross-examination after they are first called to the stand.

MR. LANDGRAF: Secondly, Your Honor, I have a series of bank records that I would move in limine be considered as admissible evidence. I have the originals here. The copies are already part of the exhibit binder that I've given to counsel and given to the court.

There are -- they are four packets of certified

bank records, and the authority that I offer for their admissibility is Section 891.24 of the Wisconsin Statutes.

MR. CONNOLLY: Your Honor, I would object on a number of grounds.

Number 1, a motion in limine is a motion to exclude evidence. This is the state requesting an advisory opinion before jeopardy sets in in this case regarding the admissibility of evidence. I don't think that, Number 1, it's fair to do that at this stage of the game. When we were here on October 4th, the state indicated that it was ready to go forward, that it had records custodian witnesses available.

I was only advised late Friday afternoon by Mr. Landgraf that he had problems with regard to both bank records custodians and a custodian of business records for a process serving company. I guess at this point we're limited to talking about the bank records. But I don't think that it is fair to the defense to have to, in effect, argue the admissibility or non-admissibility of an item in this context.

With regard --

THE COURT: Have you looked at the statute?

MR. CONNOLLY: Pardon me?

THE COURT: Have you looked at that time statute that he's citing.

MR. CONNOLLY: Yes.

As to the merits, counsel is apparently talking about both M & I Bank records and Sun Trust Bank records. The bank records are clearly hearsay under 908.01 Sub 3 Wisconsin Stats. The only arguably applicable hearsay exception for their admission is 908.03 (6), i.e., quote, Records of Regularly Conducted Activity, unquote.

THE COURT: 891.24 is pretty specific, it's the more specific statute; right?

MR. CONNOLLY: Well, judge, I'll get to that in a second.

THE COURT: Okay.

MR. CONNOLLY: I'm looking at it initially under a normal hearsay analysis; and in order to be admissible under 908.03(6), a records custodian must testify if authentication testimony is required under that section.

891.24 does not overcome the hearsay problem. 891.24 is a statute that under defined circumstances creates a presumption that entries in copies of bank records accurately reflect entries in original records; but the statute is absolutely silent as to the admissibility of the record copies, themselves.

It also requires as part of its defined circumstances even for application of the presumption for there to be a showing that the bank records have been

subpoenaed.

I haven't seen any such showing --

THE COURT: I'm just looking at the last sentence of 891.24:

"Such verified copy shall be prima facie evidence of such entries, and, when presented, no officer of the financial institution may be compelled to produce the books demanded or attend the trial or hearing," unless specifically -- "unless specially ordered to do so by the court or officer before whom it is pending; provided, that such books shall be open to the inspection of all parties to the action or" pending -- "or proceeding."

Sorry.

MR. CONNOLLY: Well, there -- the statute lays out a number of, of definitional requirements. The one that the court just looked at was the last one. And I would, I would point out to the court that it says that the originals must be open to inspection of all parties.

As a practical matter, I don't have any ability to go and inspect original bank records in Georgia, and so for the state to try and use this at the last minute --

THE COURT: Aren't they your client's records?

MR. CONNOLLY: Pardon me?

THE COURT: Aren't they your client's records?

MR. CONNOLLY: They're the bank's records. I

mean --

THE COURT: Are they the client's records of -- are they the bank's record of your client's account?

MR. CONNOLLY: Apparently so, that's going to be the contention. But that's, I mean, that begs the question. That's the whole point of authentication. And this, the last part of this statute talks about originals must be open to inspection of all parties.

As a practical matter, I don't have -- I'm a public defender appointed counsel. I don't have the ability to, on a Friday afternoon when I'm told that the state has a problem now with their records custodian it said a few days earlier it didn't have a problem with, to immediately jump on an airplane and go to Atlanta, Georgia to try and review bank records.

THE COURT: Let me ask you this: How are you prejudiced by the custodian not being here if I, if I let these come in without a custodian?

MR. CONNOLLY: Because I can't cross-examine a verification statement.

THE COURT: A verification statement, what are you talking about?

MR. CONNOLLY: The statute, 891.24, talks about if this is verified, et cetera, et cetera, et cetera, under oath.

I can't cross-examine the, you know, the signed verification statement.

THE COURT: But how would you cross-examine such a custodian?

MR. CONNOLLY: I would ask him questions -- I could ask a records custodian, I could cross-examine them with respect to the foundation for authentication:

Did you really look at the originals and compare these copies to those originals?

How do you know that these were made by a person with knowledge?

What is your job in the bank?

THE COURT: Okay, well --

MR. CONNOLLY: And, judge, finally, I would submit that verification under oath, which is what this 891.24 calls for, is, quote, testimonial hearsay, unquote, under Crawford versus Washington, 541 U.S. 36, a 2004 case.

Under the Crawford case, admission of testimonial hearsay violates the 6th Amendment's confrontation clause unless, Number 1, the witness is unavailable, and, Number 2, the defendant had a prior opportunity to cross-examine the witness.

There has been no showing that the state has made diligent attempts to get a records custodian from

either Sun Trust Bank or M & I Bank, which is right here in Milwaukee, into court.

And, Number 2, even if they had, and for some reason these bank people were truly unavailable, there hasn't been any prior opportunity to cross-examine them.

So this is a classic situation of testimonial hearsay under the second of the three categories that the Crawford case talks about in quasi-judicial, quasi-judicial affidavit, in effect. And so I would submit that even though -- you know, even if this court is not prepared to disallow the admission of these records on the basis of the lack of authentication under 908.03 (6), I submit the court must exclude them in the absence of authen -- authenticating testimony on the basis of the 6th Amendment under Crawford.

THE COURT: What about Crawford?

MR. LANDGRAF: You're asking me, judge?

THE COURT: Yes.

MR. LANDGRAF: Your Honor, my position on Crawford would be that this is not the sort of witness testimony that the confrontation clause as interpreted in Crawford contemplates.

This is a bank record. It's a document that would be authenticated by someone who knows no more about the transactions relating to this case than perhaps anyone

walking in the hallways right now.

THE COURT: Is there any, is there any basis for the argument that Crawford is inapplicable to financial records?

MR. LANDGRAF: Well, I think it -- I think that the Crawford case talks about certain types of evidence that are subject to the confrontation clause and other types of evidence are not subject to the confrontation clause, and --

THE COURT: Do you have a cite for that?

MR. LANDGRAF: Well --

THE COURT: You might as well tell the bailiffs to hold off on bringing this jury up.

Why don't we have the custodian?

MR. LANDGRAF: With respect to the M and I Bank, Your Honor, I could bring a custodian in. With respect to the Orlando company, the Sun Trust, I am not prepared to bring a custodian in.

THE COURT: Do you need them?

MR. LANDGRAF: Do I need the bank records?

THE COURT: Yes.

MR. LANDGRAF: They're essential, yes.

THE COURT: Okay.

MR. LANDGRAF: I've never briefed the issue of bank records under Crawford, judge. I know that these

certifications have historically been accepted.

THE COURT: I know, but Crawford really has thrown a wrench into all kinds of things that we did more regularly. You know, it was just a huge change in the law. And I will have to take a look at Crawford.

Do you have the cite?

MR. CONNOLLY: Judge, I can give you the U.S. cite.

MR. LANDGRAF: I have it on my laptop; but my laptop is not powered up, judge.

THE COURT: Let's go off the record.

(Discussion off the record.)

THE COURT: Back on the record.

I have done a little quick research of my own with respect to the argument that's being advanced now by the defense in this case.

Interestingly, Crawford, the decision of the Supreme Court in Crawford also refers to whether statements are testimonial or not. It appears that there is a State of Wisconsin case that follows Crawford that speaks somewhat on this issue.

The state -- the case that I'm looking at right now is State of Wisconsin versus Manuel, M-a-n-u-e-l. It is cited at 281 Wis. 2nd 554, and it was decided on June 10th of this year.

Admittedly, I have not had a particularly long time to conduct the research, just a matter of a few minutes, since this issue has arisen really as we were about to begin trial.

First of all, with respect to one of the arguments advanced by Mr. Connolly in connection with the hearsay matter, I believe that the more specific statutory authority here is that cited by Mr. Landgraf.

And, second of all, with respect to that portion of the argument that pertains to the defendant being deprived of the ability to cross examine the records custodian, I have a hard time thinking of a single cross-examination that I have ever witnessed of a records custodian at all. And in part this is because in the vast majority of cases there is a stipulation with respect to records, most litigants seeing the production of a records custodian as a needless waste of scant resources.

In this case we have an out-of-state defendant who, if the state is correct, has attempted to preclude a State of Wisconsin court from exercising its authority over a probate estate. The underlying dispute pertains to the efforts of the defendant to avoid State of Wisconsin taxes. The defendant is in Georgia and allegedly transferred the record from Wisconsin to Georgia. And the state now faces an understandable problem in requiring a

records custodian to come from Georgia to Wisconsin to testify.

Is that correct, is that essentially what it came down to, you couldn't get the records custodian up here, Mr. Landgraf; or was it the expense?

MR. LANDGRAF: No. It was the fact that the Sun Trust Bank, which has branches in Georgia but is venued in Orlando, Florida, has very strict rules about service of process; they want to do things by the book.

I did think that we might get a stipulation as to bank records, and I didn't have time enough to bring them up here.

THE COURT: Well, --

MR. LANDGRAF: As the court will learn in a few moments, most of my energies over the past five or six business days have been dedicated towards getting the process server here in Wisconsin, including even starting an out-of-state extradition of a witness; but that's not particularly germane to the bank records.

THE COURT: Well, anyhow, it's an irony that we would have to expend all of these state resources in order to protect the integrity of a state court proceeding here and the defendant now claiming indigency is being represented at Wisconsin taxpayers' expense.

And I gather, Mr. Connolly, you predate me in

this case, but --

MR. CONNOLLY: Yes.

THE COURT: -- I imagine that you are being paid for by the state Public Defender and --

MR. CONNOLLY: Some day.

THE COURT: -- hopefully you will be made whole. But the State of Wisconsin taxpayer here allegedly is taking the brunt of it.

Nevertheless, the defendant, of course, has important constitutional protections.

I did look at Manuel very quickly just to see what kind of authority there might be for this latest issue that has arisen here. The concern articulated in Crawford is that the way that the law had developed with respect to the use of hearsay statements being admitted at trial, at criminal trials, in derogation of the defendant's confrontation clauses -- confrontation clause rights, was precisely that -- I think I'm losing track here.

The concern articulated in Crawford is that because of the way that the law had developed in criminal trials, hearsay statements were coming in as, quote, firmly-rooted exceptions, unquote, despite the defendant's 6th Amendment right to confrontation.

And so the Supreme Court put a stop to that and

relied upon the distinction in part on what is testimonial and what is not.

There are a variety of decisions in Crawford -- a variety of opinions in Crawford. At Page 50 and 51 the decision states:

"Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court-testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.' Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."

One of the concerns articulated in Crawford is that the way that the law had developed with respect to the admission of out-of-court statements resembled precisely the evil, the evils that our founding fathers had attempted to preclude.

The decision goes on to state again at Page 51:

"The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."

"Various formulations of this core class of 'testimonial' statements exist; 'ex-parte in-court

testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."

At -- the decision goes on to state at Pages 55 and 56:

"We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability."

This is not to say, as The Chief Justice notes -- and here, by the way, I am reading I think from Thomas's concurring opinion -- no, I think it's Scalia's opinion --

"This is not to deny, as The Chief Justice notes, 'that [t]here were always exceptions to the general rule of exclusion' of hearsay evidence.... Several had become well established by 1791... But there is scant evidence that exceptions were invoked to admit *testimonial*" -- and 'testimonial' is in italics -- "statements against the accused in a *criminal*" -- and 'criminal' is in italics -- case. "Most of the hearsay

exceptions covered statements that by their nature were not testimonial--for example, business records or statements in furtherance of a conspiracy."

So the opinion in Crawford in and of itself notes that even back in 1791 business records were not considered to be testimonial.

I tend -- I turned then to State of Wisconsin versus Manuel, which is found at 281 Wis. 2nd 554. This is an opinion of Justice Louis Butler of the Wisconsin Supreme Court.

Justice Butler wrote as follows:

"Antwan Manual seeks review of a published court of appeals' decision that affirmed his convictions, which included attempted first-degree homicide and five related offenses. Manuel shot Prentiss Adams in the neck while Adams was sitting in his car talking to Derrick Stamps. Shortly after the incident, Stamps made several statements to his girlfriend that incriminated Manuel. A couple of days later, the girlfriend revealed these statements to a police officer when the officer was arresting Stamps. At Manuel's trial, Stamps invoked his privilege against self-incrimination, and the girlfriend claimed she could not remember what Stamps told her, but the State introduced Stamps' statements through the arresting police officer.

A number of issues revolve around Stamps'

hearsay statements. The court of appeals concluded that: (1) the statements were admissible under the statement of recent perception exception; (2) their admission did not violate Manuel's right of confrontation; and (3) Manuel's trial counsel was not ineffective for failing to impeach Stamps' credibility with the number of Stamps' prior convictions after Stamps' statements were admitted into evidence... Manuel argues that this court should reverse on any of these conclusions.

We affirm the court of appeals' decision. We conclude that the trial court did not erroneously exercise its discretion by admitting Stamps' statements as statements of recent perception. Further, we conclude that Stamps' statements were not, 'testimonial' under the recently announced decision of Crawford versus Washington... We retain the analysis of Ohio versus Roberts... for scrutinizing nontestimonial statements under the Confrontation Clause and Article 1 Section 7 of the Wisconsin Constitution. Applying Roberts, we conclude that the statement of recent perception hearsay exception is not 'firmly rooted.' However, because Stamps' statements contain particularized guarantees of trustworthiness, we hold that admission of Stamps' statements did not violate Manuel's confrontation rights. Finally, we conclude that Manuel's trial counsel was not

ineffective. Therefore, the decision of the Court of Appeals is affirmed."

The decision goes on to note that the first part of the examination calls for whether the statement is admissible under the rules of evidence. And then, of course, they proceeded to analyze the statements that were admitted under Crawford.

In this vein, Justice Butler wrote:

"In Crawford, the Court, concluded that the 'principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused... Thus, not all hearsay implicates the Confrontation Clause's core, only that which is 'testimonial'.... While the Court established the boundaries of the Confrontation Clause's core, it declined to define them with a comprehensive definition of 'testimonial.' It did note that 'testimony' is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' From this 'core class' of testimonial statements, the Court indicated that testimonial statements could be characterized by three various formulations, all of which 'share a common nucleus and then define the Clause's coverage at various levels of extraction around it.'"

At Footnote 9, there is the following statement:

"On the other end of the spectrum are 'nontestimonial' statements. The Court" --

And this is referenced to the United States Supreme Court.

"The Court portrayed this type of statement as [a]n off-hand, overheard remark,' 'a casual remark to an acquaintance,' business records, or statements in furtherance of a conspiracy."

This is footnote 9.

It appears then that the records that the state seeks to introduce are under Crawford, itself, and under the approach taken by the Wisconsin Supreme Court in State versus Manuel nontestimonial statements. There is no confrontation clause problem.

These are records that have extraordinary, extraordinary guarantees of trustworthiness; and I think that they should be admitted.

Okay. Any other last minute grenades you want to throw at me, counsel?

MR. LANDGRAF: Hopefully not rising to the level of grenades, judge.

There is in a letter a request to take judicial notice of the Wisconsin Statutes laws of intestacy and to

publish to the jury that any part of the net estate of a decedent that is not disposed of by a will passes to the decedent's surviving heirs as follows, to the issue the entire estate if there is no surviving spouse.

And that becomes part of this case because there will be evidence that Ms. Doss cashed a check for about 80% of the estate proceeds made payable to herself, and we've never received any indication that any other heir had had a distribution; and that I think is evidence of intent to convert these proceeds to her own use.

THE COURT: What is it specifically that you want me to do, just simply to take notice of that statute?

MR. LANDGRAF: Yes, just simply publish -- take judicial of notice of the statute and publish the terms of the statute to the jury.

THE COURT: All right.

Mr. Connolly.

MR. CONNOLLY: I would object at this stage of the game. In the absence of knowing what the exact context is, I don't know if counsel is asking for a jury instruction in that regard or if he's asking the court to publish it verbally at some point in time in the evidence when it might make sense.

I certainly don't have any problem with the concept of, you know, the statute being an accurate

recitation of how the end result of the probate process is supposed to turn out; but on those grounds only at least at this point I would object to it in advance of the trial actually beginning.

THE COURT: All right. Mr. Landgraf, I'm sure, will let me know when it is that he wants me to take judicial notice and if he wants this as a jury instruction.

All that I ask on this right now, Mr. Landgraf, is that before you do so you let Mr. Connolly know so that he can advance an objection if he can possibly think of one; but I anticipate that there will be no problem here whatsoever.

MR. LANDGRAF: Thank you, judge.

THE COURT: Are there any other issues here?

MR. LANDGRAF: Yes, judge, there are. I referred earlier to the fact that we had endeavored to bring in the process server, records custodian from the State of Washington who resisted our efforts and who was not cooperative. We commenced an out-of-state extradition proceeding --

THE COURT: The State of Washington?

MR. LANDGRAF: Yes.

THE COURT: Okay.

MR. LANDGRAF: We commenced an out-of-state

extradition proceeding. It took a good part of last week. At the end of the week I was told, notwithstanding the fact that I had been contacted by the witness' attorney, that the prosecutors in Washington State did not believe they had good service on the witness and could not compel his attendance here.

With that in mind, I have indicated in my letter to the court that I am going to ask for a ruling that the Affidavit of Service as it relates to the commencement of a civil action by the State of Wisconsin Department of Revenue against Ms. Doss be admitted into the record under Section 891.18.

And that statute provides that:

"Whenever any notice or other writing is by law authorized or required to be served the affidavit of the person serving it, setting forth the facts necessary to show that it was duly served, shall be presumptive proof that such notice or writing was duly served. But this section shall not apply to any service where another way of proving such service is expressly prescribed by law."

THE COURT: I am not following you at all. What is the relationship between the State of Washington and this action?

MR. LANDGRAF: The State of Washington is the process server's home. The process server was retained by

the Department of Revenue to serve Ms. Doss with the Complaint in the civil action.

The state's theory of the case is that Ms. Doss --

THE COURT: This case here?

MR. LANDGRAF: Yes, my case --

THE COURT: Why Washington? I thought she lived in Georgia.

MR. LANDGRAF: She did.

THE COURT: Okay.

MR. LANDGRAF: The business records custodian lives in the State of Washington, and they would not cooperate in identifying and providing contact information for the actual process server in the State of Georgia.

So we commenced the extradition proceeding to bring the business records custodian in. He successfully resisted as I indicated to the court.

The role and purpose in this case is to show that on August 14th Ms. Doss was served with papers by the Department of Revenue. This was a clear sign that they were going to pursue her, and on the next day she went into the Sun Trust Bank and walked out of the bank building with $52,788 in cash.

THE COURT: I still don't understood what Washington has to do with this.

MR. LANDGRAF: Think of it, judge, in the same sense that the records custodian for the Sun Trust Bank was in Orlando, Florida.

THE COURT: Okay. So the bank is located, had its headquarters or some kind of connection to the State of Washington.

MR. LANDGRAF: The process servers have their main offices in the State of Washington.

THE COURT: Okay. All right.

MR. LANDGRAF: And the Department of Revenue contracted with these process servers to serve Ms. Doss --

THE COURT: In Georgia.

MR. LANDGRAF: -- in the State of Georgia.

THE COURT: Because she had avoided process in Georgia.

MR. LANDGRAF: Well, I don't know that it's fair to say she avoided process; but they were commencing the civil action to recover the tax.

THE COURT: Okay. So the Wisconsin Department of Revenue was trying to collect Wisconsin taxes that the Department of Revenue believed that it was owed. They were having difficulty obtaining the cooperation of Ms. Doss without all formalities; and so they contracted with a service of process outfit based in the State of Washington.

MR. LANDGRAF: Correct.

THE COURT: Okay. And who were these people?

MR. LANDGRAF: The process servers?

THE COURT: Yes.

MR. LANDGRAF: They are known under the business name of ABC Legal Services, and they also do business as Process Filing International, PFI.

THE COURT: Okay. And so what is it that you're looking for?

MR. LANDGRAF: Well, we are seeking to invoke the terms of Section 891.18; and that is, that that Affidavit of Service without more is presumptive proof that such notice or writing was duly served.

THE COURT: And how do we know that?

MR. LANDGRAF: By virtue of the Affidavit, itself.

Would the court like to see the Affidavit?

THE COURT: Yes, please.

MR. LANDGRAF: I would also advise the court that it would be my intention to introduce this, and authenticate it, if the court will, through the Department of Revenue attorney, Attorney John Evans. So it's -- to the extent that it is not self-authenticating, he would be the proponent of this exhibit.

THE COURT: So an attorney from the Department

of Revenue would come, would testify that they had, that the Department of Revenue had initiated this action, had sought service of process on Ms. Doss, and that they contracted with the outfit whose name you set forth, and that ultimately they received this document back.

MR. LANDGRAF: That's correct.

THE COURT: The one that you've just tendered to me.

All right.

Mr. Connolly.

MR. CONNOLLY: Essentially the state is, is arguing that it should be allowed to admit what is hearsay within hearsay within hearsay to prove that my client had a motive to convert estate funds.

Essentially they're saying that we're trying to prove that she was served with court papers that would have given her notice that somebody was seeking to get those funds; and so, therefore, she had a motive to go and grab the funds next day. Essentially I think that's what their argument is.

The problem with all of that is, Number 1, essentially what they're really trying to get in is the statement of the affiant, Rachel M. Bass, saying that I served some court papers on Carmen Doss on September 14, 2004.

That's clearly hearsay in that they're trying to prove the truth of the matter asserted in that statement.

The second level of hearsay is the fact that we've got -- you know, we don't have anybody to authenticate the Affidavit, itself. And now they're talking about bringing in a Department of Revenue attorney who I guess adds in a third level of hearsay.

I guess the key here is that once again the arguments are nearly identical to the arguments with respect -- that I just made to the court with respect to the bank statements. The statute is somewhat different; but, in effect, 891.18 is very similar to 891.24.

It talks about -- it essentially begs the question and says:

"Whenever any notice or other writing is by law authorized and required to be served the affidavit of the person serving it, setting forth the facts necessary to show that it was duly served, shall be presumptive proof that such notice or writing was duly served."

I mean how do we know that Rachel Bass actually even made out this Affidavit?

I don't think that this statute trumps 908.03 (6).

As to confrontation, this is, is certainly a different beast than the business records in the sense

that this is clearly testimonial. It's the equivalent of a person getting on the witness stand and saying, you know, I served somebody with such and such on such a date. I mean, that's testimony, there's no question about it.

This is an extrajudicial affidavit. It's something that falls clearly within what Crawford was talking about. There is nothing in Crawford that would characterize this as somehow not implicating the right of confrontation. And unlike the situation where, as the court noted, it is rather routine for people to just accepts business records in our modern day, I can tell you from my own practice in personal injury that it is very common for process servers to not actually serve people personally with process, to make all kinds of mistakes.

I mean, as a practical matter, the kind of people that you find making a living as a process server are not particularly detail oriented and are not particularly concerned about making sure that the affidavits that they sign every day are entirely accurate.

So there is prejudice with regard to confrontation if I am unable to cross-examine this affiant with regard to the service.

The state has emphasized that it's critical to their case; and I think that under Crawford it has to be

disallowed unless the state produces either, you know, either the actual affiant or at least the business records custodian.

And, I mean, certainly the state can ask for a continuance. I'm sure my client would probably object to it, but my understanding is that the courts in the Circuit Court of Milwaukee pretty much look at it as if everybody gets one continuance if they have a reason. And I think that this is a different situation than the business records. The confrontation clause is implicated.

THE COURT: Looking at Stamps, which is the Wisconsin case that I just cited to you, I skipped over the part that had to do with the Wisconsin Supreme Court's analysis of what is testimonial since it appeared that business records clearly were not because of the footnote.

In Crawford -- I'm sorry -- in Manuel, the Wisconsin Supreme Court was tentative in its conclusion as to what is testimonial under Crawford. And the way that the Wisconsin Supreme Court left this at Paragraphs 39, 40, 41, is as follows, the last sentence of Paragraph 39 is:

"For now, at a minimum, we adopt all three of Crawford's formulations."

Paragraph Number 40 states:

"For a statement to be testimonial under the first formulation, it must be 'ex-parte in-court testimony or its functional equivalent'.... Stamps' oral statements to his girlfriend at their apartment clearly do not fit this depiction."

Paragraph Number 41:

"For a statement to be testimonial under the second formulation, it must be an extra-judicial statement []...contained in formalized testimonial materials, such as [an] affidavit[], deposition[], prior testimony, or confession[]."

And then Paragraph 42:

"For a statement to be testimonial under the third formulation, it must be a 'statement[] that [was] made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

It would seem to me that the Affidavit of Service is testimonial under Manuel for two reasons: One, it's an affidavit; and, Number 2, it's certainly conceivable that at the time that it was executed a reasonably objective person or witness might believe that the statement would be used at a trial, not necessarily this trial, but certainly at a trial. That's the reason that the Affidavit is executed.

So I think here he's got a point, Mr. Landgraf.

Did she talk about this at all, the -- I imagine that the reason you want this Affidavit, it's the timing that's of particular interest to you; right?

MR. LANDGRAF: It is. And I certainly acknowledge that this is a different sort of ruling than the court just entered. I am not going to ask for a continuance, and I accept the court's ruling.

THE COURT: Yes, I think for now it's got to stay out. I think if she testifies, I think then you can properly confront her with this. I think you've got a good-faith basis upon which to do it.

MR. LANDGRAF: Thank you.

Judge, the rest of these -- well, at least two of the three I think are going to be quick. I simply on Page 2, Number 2, at the very top of the page, I'm asking that there be no reference to a witness's criminal record except as authorized by 906.09; and I would ask that both counsel be instructed to tell their witnesses that no references should be made to a record or the absence of a record.

MR. CONNOLLY: Agreed.

THE COURT: Yeah, you can't ask her whether she has a criminal record for the purpose of having her say she's got no criminal record. And she can't volunteer

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH #23

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 04CF006408

CARMEN L. DOSS,

Defendant.

COPY

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

October 11, 2005 - PM

HON. ELSA C. LAMELAS
CIRCUIT JUDGE, PRESIDING

CHARGE: Theft

A P P E A R A N C E S:

BRUCE J. LANDGRAF, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

JAMES J. CONNOLLY, Attorney at Law, appeared on behalf of Carmen L. Doss.

CARMEN L. DOSS present in court.

Carol A. Brathol, RDR, Certified Realtime Reporter

MR. EVANS: I do.

THE COURT: Please state your name.

MR. EVANS: John R. Evans.

THE COURT: And, Mr. Evans, would you spell it for us, please.

MR. EVANS: J-o-h-n R. E-v-a-n-s.

THE COURT: Thank you, sir.

DIRECT EXAMINATION

BY MR. LANDGRAF:

Q Mr. Evans, would you tell the jury how you are employed, sir.

A I'm an attorney with the Wisconsin Department of Revenue.

Q And how long have you served as an attorney for the Department of Revenue?

A Twenty-eight years.

Q Were you an attorney for the Department of Revenue in the summer of 2004?

A Yes.

Q In that time period did you come to be familiar with a matter involving the Estate of Donald Doss and the estate's personal representative, Carmen Doss?

A Yes.

Q Did there come a time when you as an attorney on behalf of the Department of Revenue filed certain papers with the clerk of court in Milwaukee County?

A Yes.

MR. LANDGRAF: Permission to approach, Your Honor?

THE COURT: Yes.

BY MR. LANDGRAF:

Q Mr. Evans, I'm placing before you a series of three exhibits that I will be asking you about in the following minutes. What was the reason -- before we get into those documents -- generally and briefly what was the reason for filing civil papers in connection with this matter involving Donald Doss?

MR. CONNOLLY: I'm going to object to the extent it calls for hearsay.

THE COURT: What was the question, Mr. Landgraf, do you remember?

MR. LANDGRAF: I asked what was the reason for filing the papers in connection with the Estate of Donald Doss.

THE COURT: Overruled.

MR. EVANS: A file was referred to me from our Inheritance and Estate Tax Division wherein there was income tax returns that were due, they were filed by the personal representatives of the estate, and checks were provided with those returns.

Upon presentment, the checks were dishonored by

the bank and returned to the Department of Revenue.

The file was then referred to me for the purposes of obtaining collection of those checks.

BY MR. LANDGRAF:

Q Picking up Exhibit 8, Mr. Evans, would you tell the jury what that particular document is.

A Exhibit 8 is entitled Motion for Summary Judgment on Application for Assessment and Payment of Income Tax and for Constructive Trust. It's addressed to the two co-personal representatives, Ms. Doss and Ms. Loftus, an insurance company which issued a bond to the co-personal representatives, and the registered agent of the bond company, the insurance company, in Wisconsin. This document was --

Q Let me just stop you there, Mr. Evans, and ask you what was the date of filing Exhibit Number 8?

A August 18, 2004.

Q And if you could take up Exhibit Number 14, please, would you describe that for the jury.

A This is the Application for Assessment that was filed with the Notice of Motion for Summary Judgment.

Q And what was the date that that document was filed, sir?

A Well, it's signed by me August 18, 2004, and it's filed with the court on August 23, 2004.

Q And if you could take up Exhibit 13, sir, would you

describe for the jury what Exhibit 13 is.

A Exhibit 13 is a Complaint which is, was filed in conjunction with the, with the matter that I've just discussed. This Complaint was filed in the civil court, not the Probate Court, in order to pursue judgment against the bond company.

Q Mr. Evans, you've referred to those pleadings, and you referred to co-personal representatives. As of the date of August 23, 2004, are you aware of your own knowledge whether or not Diane Loftus continued to be a co-personal representative at that point in time?

A I believe at that point in time she had been removed or, or excused by the court.

Q Mr. Evans, do the documents that you've identified as State's Exhibit Number 13 and State's Exhibit Number 14 include a written demand of Ms. Carmen Doss for payment of the taxes you considered due to the State of Wisconsin?

A Yes.

MR. CONNOLLY: I'm going to object. I'm going to object, Your Honor, and move to strike the answer on the grounds that unless and until some, you know, some evidence of notice of the contents of the documents comes into evidence, the documents, themselves, are technically irrelevant.

THE COURT: Mr. Landgraf.

MR. LANDGRAF: I, I can proceed at this point, judge, subject to the objection; and then I will renew --

THE COURT: Renew the motion.

MR. LANDGRAF: -- renew the motion I guess would be the way to say.

THE COURT: All right, you may continue.

BY MR. LANDGRAF:

Q Mr. Evans, especially in light of the comments by Mr. Connolly, would you -- are you familiar with a process whereby people who are named in civil papers come to be aware of the fact that these civil papers have been filed?

A Yes, I am.

Q And is, is that a process in the legal system that is called the service of process?

A Yes.

MR. CONNOLLY: I'm going to object to the leading nature.

THE COURT: Well, I'll let the answer stand.

Mr. Landgraf.

BY MR. LANDGRAF:

Q What is the practice with respect to any civil litigant and the service of papers in a civil proceeding?

A After the Summons and Complaint are drafted, they're taken to the courthouse and presented to the clerk of court to be authenticated. Then the attorney will take those

documents and proceed to serve them on the various defendants, litigants, either by serving them himself, contracting with a private serving agency, or contracting with the sheriff's office to serve those documents.

Q And when you say "serve," what does the word "serve" mean in this context?

A Generally it means personal service in which the serving agency, let's say the sheriff, will go to the home of the defendant, and knock on the door, and someone will answer, and the sheriff will present the papers to that person assuming they're of the correct age to receive the papers. Preferably it's on the litigant, themselves, on the defendant, themselves, that they will ask for.

Q And in connection with these papers that you've identified as 13 and 14 in this case, did you, yourself, personally serve these papers; or did you contract with someone else to serve the papers?

A No. I contracted with a national process serving agency.

Q And when does your file reflect that you sent these papers out for service of process, on what date, sir?

MR. CONNOLLY: Judge, I'm going to object to this whole line of questioning in light of the court's pretrial rulings; and I would ask for a sidebar to elaborate.

THE COURT: Sure.

(Discussion off the record.)

THE COURT: You may continue.

MR. LANDGRAF: Could you read back the last question; I assume there was an objection.

THE COURT: The last question was: And when does your file reflect that you sent these papers out for service of process, on what date, sir?

MR. CONNOLLY: I'm going to object on the grounds it calls for hearsay.

THE COURT: Well, why don't you lay a foundation, Mr. Landgraf.

MR. LANDGRAF: Sure.

BY MR. LANDGRAF:

Q Have I asked you to examine your file to determine the date that the papers were sent out for service in this case?

A Yes.

Q And does your file contain an indication as to when that service -- excuse me -- does your file contain an indication as to when those papers were sent out for service?

A Yes.

Q In the course of your business as a civil litigator, is it your custom and practice to maintain records of the nature that we're talking about here; in other words, when you

send something out for service do you keep a record of it?

A Yes.

Q And that is something that you keep in the normal course of your business as a civil litigator?

A Yes.

Q And that record is made at or near the time of the fact that the service papers were sent out to be served; correct?

A At the time.

Q What is -- what does your file reflect as to the date when the papers were sent out for service, sir?

A The, the papers were sent to the National Service Agency on 8-24-04.

Q August 24, 2004?

A Yes.

Q Would you tell the jury what the nature of the service contract that you purchased from the National Service Agency was?

MR. CONNOLLY: I'm going to object as irrelevant.

THE COURT: Overruled.

MR. LANDGRAF: You may answer, Mr. Evans.

THE COURT: You may answer.

MR. EVANS: We, we take a look at the contract, what the contract terms are; and in this case we paid $75

for 10 to 30 day service of the Summons, Complaint, and Application.

BY MR. LANDGRAF:

Q Did you receive confirmation of service back from the National Process Serving Agency?

A Yes.

MR. CONNOLLY: Object, Your Honor. This is directly violative of the court's pretrial ruling.

THE COURT: Sustained.

That answer is stricken.

MR. LANDGRAF: I have no further questions.

THE COURT: Mr. Connolly.

MR. CONNOLLY: Thank you, judge.

CROSS EXAMINATION

BY MR. CONNOLLY:

Q Attorney Evans, good afternoon, how are you?

A Fine, thank you.

Q You and I talked on the phone only with regard to scheduling whether you would be available on subpoena for the defense to call you; correct?

A That is correct.

Q We had no discussions about any substance matters in this case.

A That is correct.

Q I just wanted to cover a couple points. First, unless I

the court reporter has been going since 1:30, and she needs a break, and so we're going to take that mid-afternoon break at this time. I'm sorry about that.

THE BAILIFF: All rise for the jury.

(The jury leaves the courtroom.)

THE BAILIFF: You may be seated.

MR. ANDERSON: Am I excused, judge?

THE COURT: Yes, I think you are excused.

MR. LANDGRAF: How long did you say?

THE COURT: About fifteen minutes, but we do need to put on the record something that Mr. Connolly told me at the last sidebar.

MR. CONNOLLY: Judge, at the sidebar I asked the court to declare a mistrial on the grounds that the district attorney asked a question of Mr. John Evans which I think the answer actually came out, if I'm -- I'm not sure if the answer came out -- but in any event, the court sustained the objection. And it was along the lines of when did he receive notice that the, that the, the civil process had been served.

The court sustained it because it violated certainly the spirit, if not the letter, of the court's pretrial ruling that the Affidavit of Service of those same papers that the state had sought to admit, you know, the court had ruled that the confrontation clause

disallowed it. And on those grounds I ask the court for a mistrial.

THE COURT: Well, I gave you the benefit of the doubt on that Affidavit because I was looking at the language of Manuel. I'm not at all certain in my own mind that Crawford versus Washington, the Supreme Court case, envisioned an Affidavit of Service being admitted in these circumstances as violative of the confrontation clause.

I checked again this afternoon. I can't find any law in any jurisdiction on this particular point, but certainly I think I gave you the benefit of the doubt there. It's -- the Affidavit of Service is simply a sworn statement by someone that your client was served with -- or someone was served, I'm not sure what the face of the Affidavit says -- was served with a particular document.

The more that I think about this the more that I wonder if the kind of ruling that I made will withstand scrutiny in the long run. It would make service of process in any jurisdiction other than one's own jurisdiction extremely, and most likely unfairly cumbersome; and it's most likely I would guess that that's not what the justices of the nation were thinking of.

Now I did, I do think that the question that Mr. Landgraf asked was not directly violative of the letter of my ruling because he didn't ask specifically

about the Affidavit or attempt to introduce the Affidavit; but he did try to extract testimony as to when the attorney had received a confirmation that the Complaint had been served. And I did sustain -- that may not have been precisely your question.

MR. LANDGRAF: I asked if he received a confirmation of service. I didn't ask for a time frame.

THE COURT: Okay.

MR. LANDGRAF: And I interpreted the court's ruling, both spirit and letter, to mean that a statement that Carmen Doss had been served with these papers at her address in Georgia on September 14th, a remarkably critical date in this case, was what I was barred from putting into the record.

I did not consider that testimony regarding the receipt of a proof of service document without further elaboration was in violation of the court's order.

THE COURT: Well, I, I, I decided that it fell within the spirit of the ruling that I had made; and so ultimately I sustained the objection.

These are rulings that I have made that I think have given the benefit of the doubt to the defense, and not to the prosecution; and certainly a request for a mistrial on that ground is misplaced.

Mistrial is an extraordinary remedy, and there

is nothing in this record that would warrant a mistrial, so that request is denied.

MR. CONNOLLY: I just wanted to make a brief record, judge, that during the sidebar I also objected to the state trying to elicit what was in effect expert testimony from Mr. Anderson of Ohio Casualty.

The court overruled the objection, did indicate that it would give me latitude on cross-examination; but I just wanted to make a record of that.

THE COURT: Right. At the time that the objection was made, at the time that this sidebar was conducted was during Mr. Anderson's testimony, not during Mr. Evans' testimony. The request for the mistrial came at the same time that the objection regarding Mr. Anderson's testimony came up. I think you must have had some time to think about it, Mr. Connolly, and decided that you wanted to ask for the mistrial; and so you took advantage of the sidebar during Mr. Anderson's testimony to make that request.

You did object to questions that were being asked of Mr. Anderson about -- these were the preliminary questions that Mr. Landgraf asked regarding the bond and how a bond operates; and you said, Hey, wait a minute, you're not letting me call Mr. McElligott as an expert witness, and you're letting him testify as an expert

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH #23

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 04CF006408

CARMEN L. DOSS,

Defendant.

COPY

TRANSCRIPT OF JURY TRIAL

October 12, 2005

HON. ELSA C. LAMELAS
CIRCUIT JUDGE, PRESIDING

CHARGE: Theft

A P P E A R A N C E S:

BRUCE J. LANDGRAF, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

JAMES J. CONNOLLY, Attorney at Law, appeared on behalf of Carmen L. Doss.

CARMEN L. DOSS present in court.

Carol A. Brathol, RDR, Certified Realtime Reporter

MR. CONNOLLY: Good morning, Your Honor.

James Connolly with my client, Carmen Doss, who appears in person.

THE COURT: Good morning. We have just spoken off the record regarding certain exhibits that the state wishes to have received in evidence. One is 41A.

And would you describe that for the record, Mr. Landgraf?

MR. LANDGRAF: Yes, 41A is an 8 and a half by 11 version of 41, which I am also offering if it hasn't been received.

MR. CONNOLLY: No objection to either one.

THE COURT: Okay. And so you are going to move in both 41 and 41A?

Mr. Connolly is not objecting so those will be received.

You should -- if -- you may if you want to move them in again in front of the jury. They're not really keeping notes so there is no way that they would be able to keep track. But, in any event, 41 and 41A are received.

Then we also discussed 13 and 14; and as I understood it, Mr. Connolly, you have an objection to the receipt of both 13 and 14; is that correct?

MR. CONNOLLY: Yes, Your Honor.

THE COURT: And would you like to state your objection for the record.

MR. CONNOLLY: Yes, Your Honor, I object to Number 13 on the grounds that the Department of Revenue civil complaint that is its subject was identified I believe in Mr. Evans' testimony; but there was never any testimony that was admitted showing that that document was ever served or otherwise reached my client.

I had objected during the course of the state's Direct Examination of Mr. Evans on that point on the grounds that the line of questioning that was being pursued, i.e., the line of questioning designed to create the impression in front of the jury that a process service company had actually served it without any direct evidence of that actually being in the case because it had been ruled inadmissible, the Affidavit of Service had been ruled inadmissible prior to the beginning of the trial on confrontation grounds, I objected to that line of questioning.

I believe the very last question on that line was something to the effect of, Didn't these documents go out from your office, Mr. Evans, to the National Service Company? And, Did you ever receive notice back from the service company that they had been received, or something along those lines.

My recollection is that the witness while I was objecting did blurt out the answer, Yes.

The court sustained the objection and struck the answer.

And then later on, shortly after Mr. Evans left the witness stand, during the first part of Mr. Anderson's testimony I asked for a sidebar to make two points. One was to move for a mistrial on the basis of the testimony that came out from Mr. Evans and, Number 2, on another point on Mr. Anderson I don't need to make a record on.

The same objection would be with respect to Exhibit Number 14. As I told the court off the record, I don't have a perfect memory, and I don't have a transcript in front of me, but I think that Exhibit 14 was talked about by Mr. Evans in tandem with Exhibit 13. And I don't -- I think it's part and parcel of the same thing, that he was talking about those two exhibits and whether or not they came back from the National Service Company in the same line of questioning. I'm not going to swear to it, but that's my general recollection. So on that basis I would object to 14 as well.

THE COURT: Mr. Landgraf, is there anything you want to say about this?

MR. LANDGRAF: Well, judge, just very briefly, the evidence is that Mr. Evans sent these out for service

on August 23rd. He contracted with a service agency for the service of these documents within a period of 10 to 30 days, and the money was withdrawn in the midst of that time period.

I think that given the fact that Ms. Doss did ultimately appear at the hearing on August 7th, there's a fair inference that she was receiving court papers in the normal course; and I think I should be entitled to argue the facts. And I would move that the exhibits been received.

THE COURT: Thirteen and 14 are received. I don't think it's required that there be absolute proof of receipt on the part of the defendant.

This is very much like someone who says they mailed a letter, and then there is some action that follows at some point after that. It's a natural inference to be drawn that the letter was received, and so I don't find the objections to 13 and 14 valid, and they are received.

Are there any other exhibits that you wanted to address, Mr. Landgraf?

MR. LANDGRAF: No, I am not going to move 27 and 29.

Other than that, I believe that all exhibits offered have been received with the possible exception of

a person in possession --

THE COURT: Where is that?

MR. LANDGRAF: It would be direct -- it's right in the embezzlement section which I believe is (2) (b).

THE COURT: No.

MR. LANDGRAF: (1) (b).

THE COURT: (1) (b).

MR. CONNOLLY: I've got it highlighted here if you want me to pass it up.

THE COURT: No, that's okay.

What bothers me about that is 225, itself.

MR. LANDGRAF: Judge, it is but a smallish piece of the case; and if the court is troubled by the instruction, I will withdraw it.

THE COURT: I am. I am looking at 225, and I get very concerned about presumptions to the jury.

I see what you're seeing in the statute. I had not seen it before. If you are abandoning the request to give it --

MR. LANDGRAF: Given the court's concern and given that I think it would be good to get to the jury, I will abandon the request.

THE COURT: Okay. Now where does that leave us with what's at the top of Page 12, a personal representative acts without the consent of the owner if

she acts in violation of the order of a probate court judge regarding the handling or disposition of estate assets?

MR. CONNOLLY: I object to that, judge, because that -- it's antithetical to the refusal to deliver only creating a presumption of intent. This criminalizes --

THE COURT: Well, you didn't object to that.

Mr. Landgraf, what's your authority for that language?

MR. LANDGRAF: Which language, judge, I'm sorry that --

THE COURT: The one I just read to you, a personal representative acts without the consent of the owner if she acts in violation of the order of a probate court judge regarding the handling or disposition of estate assets.

MR. LANDGRAF: Well, the authority is contained in my original submission of requested jury instructions. I believe I cited to the probate code, and I had a rather lengthy quote that a fiduciary has an obligation to not -- strike that -- to act for the benefit of the heirs, the creditors, and the estate as a whole.

I then went on to say that I thought that a nonconsent instruction that at least at that juncture in the case was based on the heirs, the beneficiaries, the

creditors, and the court was one way of proving nonconsent.

We then went through the revision of the retention to the retention theory, and it was in that context that I told the court that I thought that that would simplify the jury instructions, and this is the result of the simplification.

So we have always had this issue of how do we instruct the jury on ownership in the context of an estate; and that's been sometning of a, an open question throughout.

This represents the digest of the original requested jury instruction that I think the court may be looking at.

THE COURT: Another way to go about this, Mr. Landgraf, and, Mr. Connolly, as I was thinking about who is the owner here, okay, which is what I think you are trying to get at --

MR. LANDGRAF: Precisely.

THE COURT: And it's difficult in a probate setting. We could say the estate is the owner, as I have said. We say that the heirs are the owners of the net estate, as Mr. Connolly has suggested at times; and he's advanced certain arguments in that vein.

One of the things that occurred to me as I was

thinking about this and looking at the second element of the offense is that whoever the owner is need not necessarily be resolved in the context of these instructions, if one persuades the jury that whoever the owner is, it's not the defendant, and that the wiser course here is to focus on the fact that it is not the defendant. I mean, that's ultimately what the jury has to be persuaded of, is that this is not her money to take and keep.

Clearly Judge Donald didn't think it was her money to take and keep; and I imagine that's why you called Judge Donald to get that information before the jury, one of the reasons you called Judge Donald.

If one proceeds in that fashion, isn't it better just to keep jury instruction, the jury instruction for, with respect to the second element without any of this?

MR. LANDGRAF: So you are proposing to go with the standard jury instruction?

THE COURT: Yes.

MR. LANDGRAF: And, and kind of trust that the jury will figure out who the owner is?

THE COURT: Well, no, I don't know that the jury can figure out who the owner is; and, frankly, I think that different courts could come to different conclusions from a legal point of view.

I've actually thought that from a probate perspective the owner might be defined in one particular way. It's conceivable that a criminal court would view it a little differently. I think that --

MR. LANDGRAF: You're proposing that we give the standard instruction.

THE COURT: Yeah. I think it's, it's -- well, it's certainly safer if you get a conviction. It's not so safe if you get an acquittal. I understand how you're thinking here.

MR. LANDGRAF: Well, especially against the background that Mr. Connolly has long argued that the owner's consent or lack of consent was never a part of this case because Ms. Doss was the owner.

I'll agree to that.

THE COURT: So I will take out the paragraph -- I'm sorry -- the sentence at the top of Page 12.

All right. Turning once again to Page 12, Mr. Connolly, any objections?

MR. CONNOLLY: Judge, the next sentence below what you just were referring to. I think the word "use" needs to be changed to the word "retention."

THE COURT: Yes, that the retention of the money.

MR. LANDGRAF: And I've lost track there.

property theory.

You may look at this and see if you can find a better argument, Mr. Connolly.

(Pause.)

MR. CONNOLLY: Just reading the head notes, I guess I would agree that it does not appear that State versus Seymore is really, provides any guidance to our situation. I guess my point is just that there's been, you know, there's been evidence introduced by the state of more than one transaction, and there ought to be unanimous agreement on one or more particular transactions that are supposedly the basis for a finding of guilt.

THE COURT: Well, ultimately I think that the state is proceeding on only one theory here, which is the retention of funds ordered to be returned to the court, those funds having been the funds that she withdrew here in Wisconsin, so I don't see the need to give that instruction.

Do you have any others, Mr. Connolly.

MR. CONNOLLY: Just the custom instruction I submitted back in September, that the D.O.R. is not an owner of estate assets.

THE COURT: Mr. Connolly, I don't view that as necessary -- I'm sorry -- Mr. Landgraf.

MR. LANDGRAF: I do not either.

THE COURT: Okay. Anything else?

MR. CONNOLLY: No.

THE COURT: All right. Take ten minutes now, and would the bailiff tell the jury that we're going to bring them in for argument in ten minutes.

The -- you'll argue first, and then I'll instruct.

MR. CONNOLLY: For the record, I'm requesting the court instruct before argument.

(Break taken.)

THE COURT: Okay. I think we're ready for the jury.

THE BAILIFF: All rise for the jury.

(The jury enters the courtroom.)

THE BAILIFF: You may be seated.

THE COURT: All right. Well, I know you must be happy to be out of that room; and I want to assure you that I did not forget about you. And now you probably know why I talk to juries when it's all over because they have a lot of questions about things. They want to know this or that, and there are all kinds of curious little things that, curious little questions that jurors have and they want to ask me about.

But none of those things really have anything to do with the job that you have ahead of you right now,

yourselves the reliability of things people say to you. You should do the same thing here.

A defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

The Information in this case charges that on or about October 31st of 2004 at 901 North 9th Street, in the City and County of Milwaukee, the defendant, Carmen L. Doss, by virtue of her office as personal representative of the Estate of Donald Doss, having possession or custody of money of the Estate of Donald Doss having a value exceeding $10,000 did intentionally retain possession of such money without the owner's consent contrary to her authority and with intent to convert to the defendant's own use or to the use of any other person except the owner in violation of the laws of the State of Wisconsin.

If you find that the offense charged was committed by the defendant, it is not necessary for the state to prove that the offense was committed on the precise date alleged in the Information. If the evidence shows beyond a reasonable doubt that the offense was committed on a date near the date alleged, that is sufficient.

Now, as you know, to this charge the defendant

has entered a plea of not guilty, which means the state must prove every element of the offense charged beyond a reasonable doubt.

Theft, as defined in Section 943.20 Sub (1) Sub (b) of the Criminal Code of Wisconsin is committed by one who by virtue of his or her service as personal representative has possession of money belonging to an estate and intentionally retains possession of the money without the owner's consent contrary to his or her authority and with intent to convert it to her own use.

Before you may find the defendant guilty of this offense, the state must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present:

Number 1 -- these are the elements that the state must prove. Number 1, the defendant, Carmen Doss, had possession of money belonging to the estate because of her service as a personal representative of the Estate of Donald Doss.

Number 2, the defendant, Carmen Doss, intentionally retained possession of the money without the owner's consent and contrary to the defendant's authority.

The term "intentionally" means that the defendant must have had the mental purpose to retain the money without the owner's consent and contrary to the

defendant's authority.

Number 3, the defendant, Carmen Doss, knew that retention of the money was without the owner's consent and contrary to the defendant's authority.

Number 4, the defendant intended to convert the money to her own use.

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon knowledge and intent.

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty.

If, and only if, you find the defendant guilty, answer the following question:

Question No. 1: Was the value of the money that the defendant retained more than $10,000?

Answer: Yes or no.

If, and only if, you find the defendant guilty and answered the first question no, answer Question 2.

Question 2 is: Was the value of the money that the defendant retained more than $5,000?

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 4th day of December, 2006, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Carmen L. Doss to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Robert R. Henak

Robert R. Henak

Cert. Mailing.wpd