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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REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT

ARGUMENT

I.

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

The Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), held that, "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. The state's response does not dispute that the certificates necessary for admission of the bank records were testimonial for purposes of *Crawford*, nor could it rationally do so. *See* Doss' Brief at 5-6, 8-9. Nor does the state suggest that it satisfied the alternative requirements of either confrontation or unavailability and a prior opportunity for

cross-examination. Rather, it attempts to argue that the statutory and constitutional requirements of confrontation and authentication of business records are merely a nuisance that the state should not have to satisfy. State's Brief at 3-4. Although it may be more work for the state to actually follow the law, a hardship on the prosecution "does not justify disregard of the rights of the defendant in order to overcome the state's difficulty." *Pleau v. State*, 255 Wis. 362, 38 N.W.2d 496, 498 (1949).

Neither the hearsay exception for business records nor the fact that such records are not themselves "testimonial" under *Crawford* is relevant here. The state asks this Court to ignore the multiple hearsay nature of its evidence. The records themselves are one level, while the foundational certificate is a second. Both levels must meet the statutory and constitutional requirements for admissibility. *E.g.*, Wis. Stat. §908.05. Contrary to the state's basic assumption, therefore, both authentication and the foundational requirements for such records remain critical to their admissibility. *See* Wis. Stat. §§ 908.03(6); 909.01. While Wis. Stat. §891.24 may overcome the hearsay nature of the foundational evidence here, it does not and cannot overcome Doss' confrontation rights regarding that evidence.

The state did not comply with the requirements of §891.24 in any event. The fact that purported copies of the bank records were made available to the defense does not rationally satisfy the statutory requirement for admission that the *original* books be open for inspection. Nor is it rational to suggest that the original books are open for inspection when the party choosing to rely upon §891.24 does not notify the opposing party until the Friday before a Monday trial that it will not call a life witness to establish the necessary foundation for admission of the bank records. Like the required disclosure of witness lists and intended physical evidence (which would include these certificates), Wis. Stat. §971.23(d) & (g), the requirement that the original books be open for inspection necessarily requires a fair opportunity to make such an inspection, an opportunity denied to Doss.

See State v. Fink, 195 Wis.2d 330, 536 N.W.2d 401 (Ct. App.1995) (failure to notify defense of intent to offer "other acts" evidence until one week before trial denied defendant fair opportunity to investigate)

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

Regardless whether a prosecutor reasonably could believe that eliciting evidence that the DOR attorney had received the affidavit of service was barred by the pretrial order excluding evidence of the affidavit, State's Brief at 6-7, no rational prosecutor seeking to comply with the requirements of that Order and the law would have any doubt that the confirmation of service was testimonial and thus barred under *Crawford*. An affidavit or "confirmation" of service plainly is testimonial and Doss had no prior opportunity to cross-examine the alleged process server.

The prosecutor's misconduct, moreover, was far from "innocuous." State's Brief at 8. Although the trial court ultimately sustained Doss' objection, evidence of the irrelevant DOR lawsuit remained before the jury, and the prosecutor asserted in closing exactly the speculative inference of motive that the improper evidence was intended to raise (R76:170-71, 198).

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

Evidence of the DOR lawsuit was not properly relevant to any

alleged motive for withdrawing the $52,000 on September 15, 2004, given the absence of any evidence Doss even knew of that lawsuit then. The state's speculation that Doss might have had notice does not render the evidence relevant. Doss' Brief at 14-16.

Nor does the state's new theory that the DOR lawsuit evidence was somehow necessary to explain the October 7, 2004 hearing. State's Brief at 9-10. Ohio Casualty's motion that was the subject of the hearing was in the *probate* matter, not the DOR lawsuit (R34:Exh.9). The existence and nature of the DOR lawsuit was irrelevant to the hearing. As the probate court repeatedly advised Doss, the underlying dispute over the money was irrelevant to that hearing (R34:Exh.11:9-11). Evidence of the DOR lawsuit thus had no legitimate tendency to make *any* fact of significance more or less likely and thus was not relevant. Wis. Stat. §§904.01, 904.02. Rather, its *only* effect was to prejudice Doss' defense by allowing the state to argue speculative inferences in closing argument (R76:170-71, 198).

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

The state's application of *United States v. Robinson*, 485 U.S. 25 (1988), and its argument that the trial prosecutor's repeated reliance on Doss' invocation of her right to silence as reason to convict was somehow appropriate is quite puzzling. State's Brief at 10-16.

Since Doss is the only person who could provide any explanation for where the money went, the state's emphasis on the lack of such an explanation in the trial record necessarily is a direct reference to Doss' failure to testify. The prosecutor, moreover, directly tied her failure to testify and provide such an explanation to the issue of intent that was central to the question of guilt or innocence. (R76:171-72, 198, 201).

And finally, the prosecutor's reliance upon Doss' failure to testify and provide an explanation as grounds for conviction cannot rationally be written off as "fair response" to anything in the defense closing. The state vastly overstates the limited "fair response" exception to *Griffin v. California*, 380 U.S. 609 (1965), recognized in *Robinson* and *State v. Jaimes*, 2006 WI App 93, 292 Wis.2d 656, 715 N.W.2d 669. Those cases do not permit the wholesale introduction of the type of prosecutorial comment on the defendant's silence exhibited here whenever it might be viewed as responding to something in the defense argument. Rather, that exception is limited to circumstances where the defense has first raised the defendant's failure to testify.

In *Robinson*, it was defense counsel's closing argument that the Government had not allowed the defendant to explain his side of the story that allowed the prosecutor's response that he "could have taken the stand and explained it to you." 485 U.S. at 31-32. In *Jaimes*, it was defense counsel's argument that the state's failure to call as witnesses two supposed co-participants in the alleged crime should be held against it that permitted the state to respond that they had the same rights not to testify as did the defendant. 2006 WI App. 93, ¶24. *See also Lockett v. Ohio,* 438 U.S. 586, 595 (1978) (no violation where defense counsel first focused jury's attention on defendant's failure to testify).

At no point did Doss' attorney seek to benefit from her failure to testify, instead simply making inferences from the evidence presented at trial (R76:175-96). Under these circumstances, the state's repeated reliance upon her failure to testify and explain her actions as evidence of guilt squarely violated her Fifth Amendment rights. *E.g. State v. Ellsworth*, 855 A.2d 474, 478-79 (N.H. 2004) (defense counsel's attack on state's failure to investigate did not permit state response relying on defendant's failure to testify); *State v. McClure*, 537 S.E.2d 273, 275 (S.C. 2000) (no fair response where prosecutor could have responded without reference to defendant's failure to testify).

V.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION

Contrary to the central assumption of the state's argument, State's Brief at 16-17, evidentiary sufficiency cannot be established by speculation. Rather, the inferences necessary for conviction must be *reasonable.* The state's speculation that Doss might still have had the money on October 31, 2004, thus cannot substitute for proof of that element of the offense.

Nor can the state salvage its conviction here by evidence that Doss may have committed some other offense some eight months earlier. *E.g.*, *Chiarella v. United States*, 445 U.S. 222, 236 (1980). Failing to take advantage of an order to return funds long-since stolen does not constitute the crime of retention of funds lawfully in one's possession with intent to convert. Doss' Brief at 22-23.

VI.

REVERSAL IS APPROPRIATE IN THE INTERESTS OF JUSTICE

Especially when combined with the admission of inadmissible and prejudicial evidence, the absence of an instruction defining the "owner" whose consent was in issue, the lack of a unanimity instruction, and the state's "moving target" theory of prosecution resulted in the real controversy not being fully tried here. Regardless whether the "owner" instruction was correct as far as it went, it failed to provide precise and accurate information critical to application of those general rules to the facts of this case, allowing the state to expand the theory of offense far beyond that charged, thereby confusing the jury and prejudicing Doss' defense. Doss' Brief at 23-28.

As charged here, the only relevant "owner" after October 7,

2004, was the probate court. Before that date, Doss was the "owner" as a matter of law. Doss' Brief at 25-26. This does not mean that a personal representative is free to steal estate funds. It merely focuses the legitimate issues given the specific charge leveled against Doss and on which she was tried.

Despite much clutter and many tangents, the real controversy at trial was whether Doss still possessed the funds when the probate court ordered her to deposit them with the court clerk, as the state assumed, or whether she told the truth when she told Judge Donald that she no longer had them, and thus was not guilty of the offense charged. The trial court's failure to instruct on the applicable owners, however, choosing instead to "kind of trust that the jury will figure out who the owner is," allowed the state to distort the issues and confuse the jury with any number of possible theft theories beyond the theory of retention after the order to return actually at issue. *Id.* at 24-28. (*See, e.g.*, R76:160, 167-68 (conversion took place when money was transferred from Georgia estate account to private account without Attorney Loftus' permission); 162-63 (retention after April 1, 2004 is what is at issue (i.e., after Loftus withdrew as co-personal representative)); 169 (nothing showing heirs received a share); 197 (bond company might be the victim)).

The state's suggestion that it was a defense witness, Attorney Loftus, who provided the bases for the alternative theories it argued to the jury, State's Brief at 22-23, ignores the fact that it was *the state* that elicited the alleged lack of consent on cross-examination of Loftus. The state also ignores the fact that it was *the state* that elicited the evidence of the DOR lawsuit and *the state* that used this evidence and the lack of an "ownership" instruction to suggest that lack of consent by parties other than the probate court and at times other than October, 2004, would support conviction.

It was the state's questioning and argument, and only the state's, that moved the "target" here, and it was only able to do so because of the lack of an instruction identifying the applicable "owners."

The state's reference to waiver is misplaced. State's Brief at 21. "A trial court may exercise its power of discretionary reversal in the interest of justice under sec. 805.15(1), if instructional error occurred, whether or not the error was objected to," *State v. Harp*, 150 Wis.2d 861, 443 N.W.2d 38, 44 (Ct. App. 1989),[1] and this Court has the same discretionary power of reversal in the interests of justice under Wis. Stat. §752.35. *State v. Peters*, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300.[2]

VII.

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

The circuit court denied Doss' ineffectiveness claim, not because of any pleading defect in her post-conviction motion, but because it rejected on the merits her claim that the prosecutor had unconstitutionally commented in closing on the exercise of her right to silence. If there was no underlying error, as the court believed, then counsel was not ineffective for not objecting to it. (R63:2; App. 2). Because the circuit court was wrong on the merits, however, its rationale for denying Doss' ineffectiveness claim falls as well.

The state nonetheless perceives a fatal pleading defect in Doss' motion, alleging that the facts asserted were "conclusory." State's Brief at 26-27. The assertion is absurd.

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

[2] The state's assertion that Doss "agreed . . . to the judge's decision to give an instruction that would not contain a specification of the owner," State's Brief at 21, is not accurate. The trial court made clear that it rejected Doss' position that she was the owner and the question then was whether to give a general instruction or one more favorable to the state (R76:122-37). Once does not "agree" in any meaningful sense when forced to choose between Scylla and Charybdis.

Doss' motion asserted facts and reasonable inferences, not mere conclusions:

> Trial counsel neither objected to the prosecutor's comments on Doss' failure to testify nor sought a mistrial on these grounds. . . .
>
> 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 this motion to explain any reasoned basis for failing to object, trial counsel declined to do so. Doss notes, however, that trial counsel was not shy about objecting to other instances of prosecutorial overreaching in closing argument. *See* Tr. 10/12/05 at 200-01. It therefore appears that he merely overlooked the *Griffin* violations.

(R54:19-20).

There is nothing conclusory about the allegation that trial counsel failed to object to the *Griffin* error. The record demonstrates as much. Nor is it conclusory to assert that trial counsel was provided an opportunity before the motion was filed to explain his failure to object and that he declined to do so. Nor is it conclusory to note that the record reflects trial counsel's willingness to object to other prosecutorial overreaching in argument, thus nullifying any suggestion that he has a strategy of not objecting during closing. Nor is it conclusory to state the fact that the record reflects no apparent rational strategy furthered by the failure to object. Indeed, the only derivative factual assertion in this section of the motion is that, given these circumstances, it appears that trial counsel merely overlooked the *Griffin* error. That assertion, however, is not a mere conclusion, but a reasonable, indeed unavoidable, inference from the circumstances.

The failure to object to clearly objectionable and prejudicial argument or evidence, without any suggestion in the record why counsel failed to object, is *prima facie* evidence of deficient perfor-

mance. In other words, it is perfectly reasonable to infer from such circumstances that counsel's failure to object was due to inattention or oversight r ather than the reasoned defense strategy to which the defendant is constitutionally entitled.

To label such an inference a mere "conclusion" makes no sense and would negatively impact all areas of criminal procedure. The sufficiency of criminal complaints, preliminary hearings, suppression hearings, and even trials turns not only on direct evidence, but also circumstantial evidence and reasonable inferences therefrom. If a particular inference would be permissible in deciding whether a person should go to prison, there is no rational basis for imposing a higher standard when the question is whether she should have a hearing on her ineffectiveness claim.

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, March 15, 2007.

Respectfully submitted,

CARMEN DOSS, Defendant-Appellant

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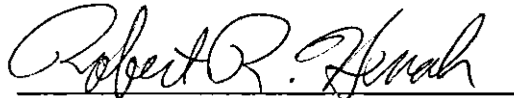

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Reply Brf.wpd

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 reply brief produced with a proportional serif font. The length of this brief is 2,757 words.

Robert R. Henak

Reply cert.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 15th day of March, 2007, I caused 10 copies of the Reply Brief 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

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