

STATE OF WISCONSIN

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
Plaintiff
JUL 10 2006SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF STATE'S MOTION IN
LIMINE (Paragraph 7) – OUT OF COURT
STATEMENT'S OF THERESA
HALBACH

vs.

STEVEN A. AVERY,

CLERK OF CIRCUIT COURT

Defendant,

Case No. 05-CF-381

The State of Wisconsin had requested this Court allow prior statements of Theresa Halbach made to co-workers concerning Steven Avery. Specifically, Halbach described for support staff at Auto Trader Magazine a recent trip to Steven Avery's property (believed to be on October 10, 2005) where Avery greeted Halbach wearing just a towel, while Avery was at his residence. Halbach described the event for Auto Trader employees as Avery being "creepy" and that the event disturbed Halbach.

The State believes the evidence is admissible for several purposes, including showing Avery's intent and plan (a sexual assault motivation, to occur at the Avery property); relevant as to Theresa Halbach's state of mind (that she was fearful of Steven Avery, and would not "voluntarily" have contact with Steven Avery near his property after October 10, 2005); and relevant on the charges of kidnapping and false imprisonment (establishing the element that the victim would have been accosted or held against her will, based upon the relationship of the parties after the October 10, 2005 episode).

The State argued in its previous memorandum that Halbach's statements would be admissible as a statement of recent perception (section 908.045(2); Wis. Stats.), and suggested that the defendant did not enjoy Confrontation Clause protections based upon the theory of "forfeiture by wrongdoing" as the defendant procured the "unavailability" of the declarant as a witness.

After the State filed its Motion, the United States Supreme Court decided Davis v. Washington, 126 S. Ct. 2266 (June 19, 2006), which clarifies what is "testimonial hearsay" for

Confrontation Clause analysis, and reaffirmed the “forfeiture by wrongdoing” exception. This Court has asked the State to supplement its argument to include information from the recently pronounced United States Supreme Court case.

I. TESTIMONIAL HEARSAY.

Crawford v. Washington, 541 US 36 (2004) held that the Confrontation Clause of the 6th Amendment bars “admission of testimonial statements of a witness who did not appear at trial unless he (she) was unavailable to testify, and the defendant had had a prior opportunity for cross examination. Id., at 53-54. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause. Id.

In Davis v. Washington, the Supreme Court recently ruled that a 911 emergency operator’s conversation with a domestic abuse victim was not “testimonial”, as the primary purpose of the conversation was to enable police assistance to meet an ongoing emergency, rather than police initiated interrogation designed for introduction at a subsequent criminal prosecution.

With that standard being applied, statements by Theresa Halbach to a co-worker are in no sense “testimonial”, and therefore, not barred by the Crawford Confrontation Clause analysis.

A straightforward analysis of whether the out of court statements are admissible (as non-hearsay, or through an exception to the hearsay rule) is all that is required of this Court.

The State reasserts its argument that the statements by Halbach clearly fit within the “statement of recent perception” exception to the hearsay rule. Prior statements of homicide victims have been admitted under this exception in recent Wisconsin cases. See: State v. Kutz, 267 Wis. 2d 531 (Ct.App. 2003); State v. Weed, 263 Wis. 2d 434 (2003).

The State alternatively argues that Halbach’s statement would fit within the “residual exception” to the hearsay rule, as it contains circumstantial guarantees of trustworthiness (as

similarly adopted by the Supreme Court in State v. Anderson, 280 Wis. 2d 104 (2005)). In Anderson, a homicide victim's prior statements were admitted under the residual hearsay exception (sec. 908.045(6), Wis. Stats.), while the trial court further found the Confrontation Clause did not apply due to the "forfeiture by wrongdoing" analysis previously referenced.

Finally, the State argues that Halbach's statements to her co-workers are not hearsay at all, as they are not offered to prove the matter asserted (see: Sec. 908.01(3)). Statements offered to show state of mind or to explain future behavior are not hearsay.

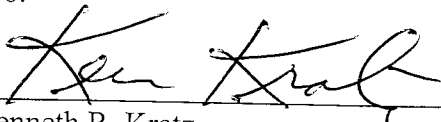
II. DAVIS REAFFIRMS "FORFEITURE BY WRONGDOING".

In the June 19, 2006 Supreme Court decision, the Supreme Court reaffirmed that the rule of forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds (citing Reynolds, 98 US at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. Davis, at 2280.

The Court took no position on the standards necessary to demonstrate such forfeiture, but noted that generally courts have held the government to a "preponderance of the evidence" standard. Id., at 2280.

Clearly then, should this Court find that Steven Avery engaged in behavior that prohibited the availability of Theresa Halbach as a witness (by a preponderance of the evidence), the Court should find that Avery has forfeited any right to assert his 6th Amendment Confrontation Clause rights in arguing for the exclusion of Halbach's out of court statements.

Respectfully submitted this 5th day of July, 2006.



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