STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MEMORANDUM OPPOSING EVIDENCE OF TERESA HALBACH'S STATEMENTS

I.

INTRODUCTION

The state wishes to offer evidence, essentially, that Teresa Halbach thought Steven Avery creepy and deemed his behavior beneath her. It all may be true; she may have thought and said it. But it also is irrelevant and unfair — to him and to her. That Avery is uncouth compared to Teresa Halbach does not suggest he killed her. And it does no justice to Teresa Halbach or her family to portray her inaccurately as someone who looked down upon Avery.

But the Court need not weigh such considerations. One statement that the state offers does not fit within a hearsay exception. The other may, but is the very

thing that WIS. STAT. § 904.03 must winnow out. The Court therefore need not reach the constitutional question of confrontation and forfeiture by wrongdoing.

Alternately, if the Court concludes that Teresa Halbach's statements fit within a hearsay exception, the state will have to prove forfeiture by wrongdoing, establishing by a preponderance of the evidence (not just probable cause) at an evidentiary hearing that Steven Avery murdered Teresa Halbach. *See Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006).

II.

FACTS

The state wishes to offer a comments that Teresa Halbach made to co-workers at Auto-Trader magazine about Steven Avery. Halbach apparently claimed that Avery greeted her on some past occasion (perhaps October 10, 2005) wearing only a towel, which Halbach thought "creepy." The state intends to offer those statements for their truth. It claims that they show Avery's intent and plan and Halbach's state of mind: "she was fearful of Steven Avery, and would not 'voluntarily' have contact" with him near his property after October 10. State's Supplemental Memorandum at 1 (July 5, 2006). The statements come within the hearsay exception for statements of recent perception, the state contends. WIS. STAT. § 908.045(2).

III.

ARGUMENT

A. The statements at issue, regardless when made, are inadmissible. The exception for statements of recent perception is "similar to the hearsay exceptions for present sense impression and excited utterances, 'but was intended to allow more time between the observation of the event and the statement.'" *State v. Weed*, 263 Wis. 2d 434, 449, 666 N.W.2d 485, 491 (2003); *State v. Manuel*, 281 Wis. 2d 554, 571, 697 N.W.2d 811, 819 (2005). Statements falling within this exception must "narrate[ ], describe[ ], or explain[ ] an event or condition recently perceived by the declarant." WIS. STAT. § 908.045(2).

Only the description of Avery answering the door in a towel meets that criterion (here assuming, for the sake of argument, that the state could prove that Avery's appearance in a towel happened recently before Halbach's statement. *See Weed*, 263 Wis. 2d at 448, 666 N.W.2d at 491). Halbach's subjective opinion that doing so was "creepy" does not. This hearsay exception is not a back channel for admission of otherwise patently improper comment on a defendant's character, particularly where that character trait is not an essential element of a charge or claim. *Compare* WIS. STAT. §§ 904.04(1), 904.05(2).

And Avery's appearance at the door in a towel, whenever and if that occurred, is not relevant to anything. Halbach evidently came to his house that day without a specific appointment, as she always did. If it was an inconvenient time for any of a number of reasons, Avery might have been partially unclothed. Appearing in a towel would show some appropriate modesty, not the opposite. Halbach did not claim that he made any unwanted advance, removed the towel, or did anything at all suggesting that he was planning weeks or months later to rape or murder her. Moreover, she clearly did go back to the Avery property "voluntarily" on October 31, contrary to the state's claim. She had been there before, and obviously knew both the address and the roads approaching the interior of that property. Finally, this case features no claim of consent to sexual conduct or consent to being held in Avery's trailer or garage. Avery's consistent claim and defense is that he did not rape, kidnap, falsely imprison, or murder Halbach at all, not that she consented to some of that conduct.

The comment about Avery in a towel simply is not relevant, then. WIS. STAT. § 904.01. It does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* If it has some slight probative value, that is greatly outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03. Halbach's statements, one implicitly and the other explicitly, just make out Avery

as a creep; an uncouth person, a person of low character generally. That is not fair – to Avery or to Teresa Halbach.

The state relies upon *State v. Kutz*, 267 Wis. 2d 531, 671 N.W.2d 660 (Ct. App. 2003), and *Weed*. Neither case helps much. The statements in *Kutz* were six observations by a murder victim that her estranged husband was following her. *Kutz*, 267 Wis. 2d at 573, 671 N.W.2d at 681. These immediately preceded her disappearance by a few hours to eleven days at most. They directly supported the state's theory that Kutz was obsessed with his wife leaving him and was stalking her. *Id.* at 54-44, 671 N.W.2d at 665-67. Those are much different than Halbach's statements here. It is not clear when the towel incident supposedly happened in relation to Halbach's comments to her co-workers, so the first condition of admissibility under § 908.045(2) is weaker here. Further, the statements here have nothing like the probative value that observations of the defendant's stalking had in *Kutz*.

In *Weed*, the state supreme court approved admission of the decedent husband's statement, "that's the reason I took the bullets out of the .357." The decedent had taken the bullet out of the gun no more than eight days before he made the comment, maybe less, and his wife shot him to death with the same .357 handgun three days after he made the statement. *Weed*, 263 Wis. 2d at 450-51, 666 N.W.2d at 492. The statement was tied directly to the instrument that caused death.

Obviously, the defendant's decision to reload the .357 handgun (she shot her husband six times) went directly and unprejudicially to her intent to kill. Again, this case is much more attenuated in fuzziness of time between Halbach's supposed observation of Avery in a towel and her statements to co-workers, and in the connection between a towel around Avery's mid-section and Halbach's rape and murder.

Even assuming, then, that the state could prove the recency criterion of § 908.045(2) as to the towel observation, that statement would be excluded under § 904.03. The statement about Avery being "creepy" does not narrate or describe an event or condition at all.

B. Although the state makes a cursory argument that Halbach's statements are not "testimonial" within the meaning of *Davis v. Washington* and *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004), the statements probably are. They establish or prove past events potentially relevant to later criminal prosecution. *Davis*, 126 S. Ct. at 2274. While the state may suppose that these are more like a "casual remark to an acquaintance," *Crawford*, 541 U.S. at 51, if they were merely casual remarks their admissibility under § 908.045(2) would be open to serious question.

Accordingly, Avery starts with a confrontation right with respect to these statements. The state's principle argument appears to be that Avery forfeited that right by killing Halbach. That would require an evidentiary hearing at which the

state would bear the burden of proving the murder by at least a preponderance of the evidence. *Davis*, 126 S. Ct at 2280; *see State v. Hale*, 277 Wis. 2d 593, 623, 691 N.W.2d 637, 653 (2005) (Prosser, J., concurring) (noting that most jurisdictions use preponderance of evidence standard for forfeiture by wrongdoing, but some use clear and convincing evidence standard). That standard is considerably higher than the state had to meet at the preliminary hearing.

The Court could convene an evidentiary hearing on the question of forfeiture by wrongdoing, if necessary. But the threshold inadmissibility of the "creepy" statement under § 908.045(2) and the exclusion of the towel statement under § 904.03 should make a hearing unnecessary. The Court need not reach confrontation at all.

IV.

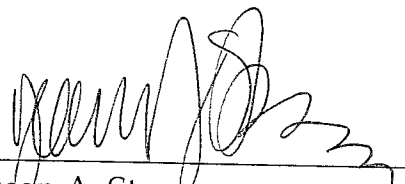
CONCLUSION

Steven Avery asks the Court to exclude evidence of Teresa Halbach's supposed unflattering impressions of Steven Avery. Even if the state could clear the hearsay bar as to both statements, this evidence would be much more unfairly prejudicial than it would be probative of any fact in dispute. It also would require an evidentiary hearing at which the state would have to prove by a preponderance of the evidence that Avery murdered Teresa Halbach, thus forfeiting his right to confrontation by wrongdoing.

Dated at Madison, Wisconsin, July 31, 2006.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.



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