

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-CF-000502

SOWANDE OMOKUNDE,

Defendant.

MOTION IN LIMINE

The Defendant, Sowande Omokunde, by his attorneys, The Shellow Group, requests that the Court exclude all unattributed out-of-court statements which the State intends to offer, unless the Court finds that such statements are admissible because they fall within a recognized hearsay exception and that the admission of such statements would not abrogate or interfere with the rights accorded a criminal defendant by the Wisconsin and the United States Constitutions.

THE UNATTRIBUTED OUT-OF-COURT STATEMENTS DO NOT PASS THE TEST FOR ADOPTIVE ADMISSIONS AND ARE INADMISSIBLE HEARSAY

The unattributed out-of-court statements which the State intends to offer are inadmissible hearsay. Under the specific facts and circumstances of this case, Defendant's failure to deny the unattributed out-of-court statements was not an adoptive admission and thus the statements are inadmissible hearsay.

Adoptive admissions are defined out of the hearsay rule, Wis. Stat. § 908.01(4)(b)2. They are "normally admissible," *State v. Marshall*, 113 Wis. 2d 643, 651, 335 N.W.2d 612, (1983), because, and only when, "the hearsay rule has been satisfied by a form of cross-

examination, or at least an opportunity to question the declarant,” *Cacciotolo v. State*, 69 Wis. 2d 102, 110, 230 N.W.2d 139 (1975).

Hence the reasoning that “[i]f a statement is made in the presence of another person ... which would ordinarily be denied by that person if it were not true and he does not deny it, then he has foregone the opportunity to dispute the statement.... Since the person whose interest was damaged by the statement did not avail himself of the opportunity to refute it, it is presumably trustworthy.” *Id.*

In this case, Defendant did not refute or deny statements made in his presence because, in the environment in which they were made, these statements were not “inculpatory,” *Richards v. State*, 82 Wis. 172, 178, 51 N.W. 652 (1892), or “damaging to his interests,” *see Cacciotolo v. State*, 69 Wis. 2d 102, 110, 230 N.W.2d 139 (1975), or ones that “would ordinarily be denied by [him],” *id.*

On the contrary, in the heat of pre-election excitement and in the context of informal chatter by young political activists who were friends, such statements appeared to Defendant to be in his interest, as they tended to implicitly glorify Defendant in the eyes of his peers. It was in his interest, as perceived at the time, to maintain the myth that he may have been involved in the acts described by such statements.

Because Defendant did not perceive declarants as accusers who needed to be confronted or questioned, or their statements as inculpatory or damaging, his failure to deny or refute did not constitute adoptive admission.

In this particular case, the statements cannot be admitted as adoptive admissions, because the hearsay rule has not been satisfied by any form of cross-examination or any real opportunity to question declarants.

**THE UNATTRIBUTED OUT-OF-COURT STATEMENTS
ARE INADMISSIBLE UNDER CONFRONTATION RULES**

Even statements admissible under hearsay rules are inadmissible under confrontation rules if they do not pass the confrontation admissibility test. *See State v. Marshall*, 113 Wis. 2d 643, 654, 335 N.W.2d 612 (1983). The statements in question do not pass such test, because -- even if they were to be admissible under hearsay rules -- special and unusual circumstances still do exist in this case, warranting their exclusion. *State v. Marshall*, 113 Wis. 2d at 654. Defendant was not afforded the required “meaningful confrontation.” *Id.* *See also Nabbefeld v. State*, 83 Wis. 2d 515, 527, 266 N.W.2d 292 (1978).

As explained above, Defendant did not have the required meaningful opportunity to confront his “accusers,” *see id.*, because he did not perceive them as accusers or their statements as accusations endangering his interest. Indeed, it seemed to be in Defendant’s interest to perpetuate the myth that he may have been involved in certain acts he would in reality never commit as improper.

The “unusual circumstances” that in this case require the exclusion of the statements, *id.* are the inter-personal and temporal contexts of the statements: friends were chattering in the heat of pre-election battles; young activists wished to see each other as fighters and “heroes;” they were giddy in their pre-game fan-like excitement.

In this situation, the statements are inadmissible because, in the particular facts and circumstances of this case, there was no substantial compliance with the purposes behind the confrontation requirement, because the jury could not have a reasonable basis for evaluating the truthfulness of the statement. *See State v. Marshall*, 113 Wis. 2d at 654.

DEFENDANT DID NOT ADOPT THE UNATTRIBUTED OUT-OF-COURT STATEMENTS BY PARTICIPATING IN “THE GIVE AND TAKE” OF A CONVERSATION AND “EMBRACING THE TRUTH”

Before this Court admits the unattributed out-of-court statements allegedly “adopted” or “adoptively admitted” by Defendant, it must make sure there is proper foundation, i.e. that sufficient facts exist enabling the jury to reasonably conclude that Defendant purposefully embraced the truth of the declarants’ statements. *State v. Rogers*, 196 Wis. 2d 817, 830, 539 N.W.2d 897 (Ct. App. 1995).

A statement can be admitted under the adoption-through-participation in give-and-take theory only after the State offers evidence showing that the Defendant had reference to the statement he is allegedly adopting; made a statement that manifested an adoptive connotation (and not just a referential connotation), and exhibited an unambiguous and knowing approval or adoption of the offered statement. *State v. Rogers*, 196 Wis. 2d at 831 (approvingly quoting trial court’s analysis to this effect).

There must be evidence that the Defendant intended to specifically adopt the statements or purposefully embraced the truth of such statement. *State v. Rogers*, 196 Wis. 2d at 834. Defendant’s conduct or statements must show a purposeful acknowledgement of the “adopted” statement, e.g. that he participated in the give and take of a conversation during which a plan was made to do something and then indeed performed the act planned. *State v. Rogers*, 196 Wis. 2d at 832-833. The State has offered no evidence of such conduct or statements by Defendant. It is not enough for the Defendant to make a similar or same statement as those the State seeks to introduce, or to merely acquiesce with statements made by others. *Id.* at 832.

In this case, the State has not offered sufficient facts to enable the jury to reasonably conclude that Defendant, in chattering with his peers, purposefully embraced the truth of the declarants' statement. Thus, the statements cannot be admitted.

**THE UNATTRIBUTED OUT-OF-COURT STATEMENTS ARE INADMISSIBLE
BECAUSE THEY WERE NOT "MADE IN FURTHERANCE" OF THE CONSPIRACY,
AND THUS CANNOT CONSTITUTE "STATEMENTS BY
CO-CONSPIRATOR" FOR HEARSAY PURPOSES**

The unattributed out-of-court statements the State will offer were made during casual chatter among friends, in idle moments free from active pre-election organizing. The statements referred, in the past tense, to acts completed in the past. As such, pursuant to well-established federal law Defendant urges this Court to follow, they were not statements made in furtherance of the alleged conspiracy, and thus are inadmissible.

Although Wisconsin has no case law on point, federal case law is well settled that "[m]ere idle chatter, narrative declarations, and superfluous casual remarks" are not admissible under FED. R. EVID. 801(d)(2)(E). *United States v. Curtis*, 37 F.3d 301, 307 (7th Cir. 1994). *United States v. Johnson*, 927 F.2d 999, 1001 (7th Cir. 1991), indicates that "Rule 801(d)(2)(E) is a *limitation* on the admissibility of co-conspirators statements that is meant to be taken seriously." *See also United States v. Santos*, 20 F.3d 280, 286 (7th Cir. 1994), *United States v. Doerr*, 886 F.2d 944, 951-52 (7th Cir. 1989) and *United States v. Johnson*, 927 F.2d 1000-1003 (7th Cir. 1991).

In *United States v. Eubanks*, 591 F.2d 513, 520 (9th Cir. 1979), the Court stated,

Mere "idle chatter," narrative declarations and superfluous casual remarks are not in furtherance of a conspiracy. That is true even when ...the declarant makes what can be construed as an offhand admission of culpability and, *quoting Eubanks*,

"[A] casual admission of culpability to someone [the declarant] had individually decided to trust" is not in furtherance of the

conspiracy.

See also *United States v. Pallais*, 921 F.2d 684, 688 (7th Cir. 1990) (Posner, J.), where the Court wrote,

But if it is idle chatter, it is not admissible. The concern with reliability that animates other rules of evidence reasserts itself here. Mere chit-chat, casual admissions of culpability, and other noise and static in the information stream are not admissible.... They are said not to be in furtherance of the conspiracy, but the real point is that they are insufficiently reliable to be considered by a jury.

In *United States v. Johnson*, 200 F.3d 529 (7th Cir. 2000), the Court wrote,

Statements which further the conspiracy must be distinguished from mere idle chatter, narrative declarations, and superfluous casual remarks which do not further the conspiracy. *United States v. Curry*, 187 F.3d 762, 766 (7th Cir. 1999).

Under *United States v. Santos*, 20 F.3d 280, 286 (7th Cir. 1994), narrative discussions of past events were not statements made in furtherance of the conspiracy.

Courts assess a statement's ability to advance the conspiracy in the context in which the statement was made. *United States v. Powers*, 75 F.3d 335, 340 (7th Cir. 1996). Thus, statements made after the conspiracy expired are not statements made in furtherance of the conspiracy. In *United States v. Reglio*, 669 F.2d 1169, 1176 (7th Cir. 1981), in considering the admissibility of co-conspirator statements, the Court stated,

Reglio cites *United States v. Gandara*, 586 F.2d 1156 (7th Cir. 1978), in which we held that once an agreement to sell narcotics has been reached, the objectives of the conspiracy are satisfied and statements identifying the source are surplusage. *Id.* at 1159.

Additionally, in *United States v. Ochoa*, 229 F.3d 631, 637 (7th Cir. 2000), the Court stated,

[b]ecause a co-conspirator's statements incriminating the defendant do not fall within a firmly rooted hearsay exception, the Confrontation Clause requires that such evidence contain "particularized guarantees of

trustworthiness" such that cross-examination would be of marginal utility in determining the truthfulness of the statements. *See Lilly v. Virginia*, 527 U.S. 116, 134 & n.5, 136, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999) (plurality opinion); *Robbins*, 197 F.3d at 839. **Such guarantees must be shown by the circumstances of the statements themselves and cannot be proven by other evidence produced at trial.** *See Lilly*, 527 U.S. at 137-38; *United States v. Castelan*, 219 F.3d 690, 695 (7th Cir. 2000). **A very strong presumption of unreliability attaches to statements of co-conspirators where the statements (1) are produced through government involvement; (2) describe past events; and (3) have not been subject to adversarial testing.** *See Lilly*, 527 U.S. at 137; *Castelan*, 219 F.3d at 695 (emphasis added).

LIMITING JURY INSTRUCTIONS

In *United States v. Johnson*, 927 F.2d 1000-1003 (7th Cir. 1991), the Court declined to follow *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980), which held that statements not admissible under FED R. EVID. 801(d)(2)(E) could nevertheless be admitted under FED. R. EVID. 804(b)(3) as statements against interest. The Court noted that, when statements of co-conspirators are not offered for their truth but to show the nature and scope of the conspiracy, limiting instructions should be given. *Id.*

Defendants submits that, should this Court admit the unattributed out-of-court statements the State proposes to offer, limiting instructions should be given to the jury, to the effect suggested in the following examples:

While statements of persons proven to be co-conspirators of a defendant may be considered as evidence against a defendant if such statements were shown to be in furtherance of a conspiracy of which both the defendant and the speaker were members, problems may arise when the speaker is not identified.

In such situations, before the statements of unidentified speakers may be considered as evidence against a defendant, the prosecution must establish by credible evidence that a

conspiracy existed and that a defendant and the unidentified speaker were members of that conspiracy.

Statements by persons not proven to be members of the conspiracy are hearsay and do not constitute evidence against one who is charged with being a member of a conspiracy.

Only statements by one proven to be a member of a conspiracy are admissible against other members of the conspiracy if such statements are in furtherance of that conspiracy. Idle chatter, casual admissions of culpability, gossip and recitations of past conduct are ordinarily not in furtherance of a conspiracy.

Statements in furtherance of a conspiracy are only such statements which further the objectives or purposes of the conspiracy. Statements which do not further such objectives or purposes, or made after such objectives or purposes were accomplished, are not in furtherance of a conspiracy and are only evidence against the speaker.

Dated at Milwaukee, Wisconsin, this 11th day of January, 2006.

Respectfully submitted,

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