STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CF-000455
Honorable Judge Fisher

JOEL BISHOP,

Defendant.

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JUL 22 2004
KENOSHA COUNTY
DISTRICT ATTORNEY

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MOTION TO EXCLUDE HEARSAY STATEMENTS UNDER *TOME V. UNITED STATES* AND *CRAWFORD V. WASHINGTON*

The defendant, Joel Bishop, by his attorneys, The Shellow Group, requests that the court exclude all hearsay statements which the state intends to elicit unless the court finds that the statements fall within a recognized hearsay exception and are admissible.

A review of the discovery in this case and the Motion to Admit Other Acts filed by the State, shows a number of hearsay statements which the state may attempt to admit at trial. Pursuant to the holdings in *Crawford v. Washingotn*, 124 S.Ct. 1354, 158 L.Ed.2d 144 (March 4, 2004) and *Tome v. United States*, 513 U.S. 150 (1995), the defense requests that the court rule on each hearsay statement the state intends to introduce.

Recently, the United States Supreme Court in *Crawford* clarified concepts of admissibility of hearsay statements. The Court ruled:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where

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> testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial". Whatever 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. . . . Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. *Crawford, supra* at 1374.

While the only testimonial statements in this case are the statements of Jennifer A and Crystal C at the preliminary hearing, the remainder of the hearsay statements are statements to police officers and others. It is the position of the defense, that the hearsay statements scattered throughout the discovery are not admissible.

The following are some examples of inadmissible hearsay statements from the discovery. The following examples are only a sample, and are not an exhaustive list. By listing the following examples, the defense is not waiving its right to object to any other hearsay the state intends to introduce. The examples are being presented so that the court has an understanding of the types of inadmissible hearsay that may arise in this case.

I. Hearsay Statements of Jennifer A., DOB 6/12/86 – Charged Counts

In Detective Fredericksen's police reports she lists a number of what she terms "disclosure witnesses." These disclosure witnesses are people to whom Jennifer A. made

statements. In January and February, 2003, Jennifer A. made statements to her friend Amanda Betz. Ms. Betz claims that Jennifer spoke to her in general about a teacher of hers touching her. At the time, Betz claimed that Jennifer was upset at first, and then calmed down. The next day, Jennifer spoke to her about discussing the allegations with Mr. Fountain, Officer Wilson and Dr. Pulaski. Then, more than a week later, Jennifer talked to her about the meeting with Bishop, Fountain, Wilson, Pulaski and her parents. The statements made one day later and more than a week later are clearly hearsay and do not fit within a recognized exception.

Jennifer A. also made statements to her mother Jamie Jacobs and her father Ross Anderson. Ms. Jacobs claims that Jennifer told her Bishop had made her feel uncomfortable over the past few days. Both Ms. Jacobs and Mr. Anderson discuss the meeting with Pulaski, Wilson, Bishop, Fountain and their daughter in their statements. The contents of that meeting is hearsay, none of which is admissible. Additionally, Ms. Jacobs in her statement to police, refers to her daughters statements made in April of 2004, where she decides she wants "justice" to be done. It is at this time that Jennifer A writes a letter to her mother claiming that she "will not be able to get over this until I at least try and get justice for this." These statements and the letter are made more than a year and four months after the alleged incident. They do not fall within any recognized hearsay exception and should be excluded by the court.

As stated above, there are a number of statements from Jennifer, her parents, Dr. Pulaski, John Fountain and Officer Wilson regarding the original allegations made in January of 2003 and the subsequent meeting which was held between them. All of these

statements are hearsay and are not admissible.

Jennifer A. also made statements to her current boyfriend, Derek Ewing. In January, 2003, Jennifer allegedly disclosed that Bishop had touched her butt. However, she was not upset and basically Derek shrugged off the incident. It was not until April of 2004 that Jennifer disclosed the alleged incidents. Again, these statements do not fall within a recognized hearsay exception and should be excluded.

In April of 2004, Jennifer approached her drama teacher Dan Shimon and repeated the allegations against Bishop. Mr. Shimon than reported the allegations to his supervisor, Mary Snyder. Ms. Snyder then spoke to Jennifer A. as well. This was almost a year and a half after the original incident. The disclosures to Mr. Shimon and Ms. Snyder are inadmissible hearsay.

The problem that arises in a case like this, is that the alleged victim, Jennifer A has made statements over the past year and a half to a number of different people. Pursuant to *Tome v. United States*, 513 U.S. 150 (1995), prior consistent statements of the victim are not admissible unless they are being offered to rebut a claim of recent fabrication, improper influence or motive charge. The state is not allowed to simply parade a number of witnesses before the jury who repeat over and over the allegations of Jennifer A. The majority of the statements listed above are inadmissible hearsay. While the state may be successful in arguing that a few of the statements are excited utterances, the majority of them do not fall within that exception.

Additionally, as to the written statements of Jennifer A. both to Detective Fredericksen and to her mother, these statements are inadmissible under the holding in

Crawford v. Washington, 124 S. Ct. 1354, 158 L.Ed2d. 177 (March , 2004).

Because of the large amount of hearsay statements of Jennifer A., it is again requested that the state set forth in writing each individual statement it intends to introduce at trial and the witness through whom it intends to introduce the statement as well as the grounds for its admissibility. The defense requests rulings prior to any hearsay testimony being elicited.

II. Crystal C. DOB 8/16/86 – charged count

Similarly, the statements of Crystal C. made to her teachers Ms. Whitaker and Jeff VanRemmen, her mother Michelle Greb, and her friend Nicole Schmidt should be excluded. When Crystal and her friend made the first complaints to her teacher Ms. Whitaker, it was a few weeks after the alleged incidents occurred. The statements of Crystal to these various individuals do not fall within a recognized hearsay exception and should be excluded.

As stated above, there is no basis for the admission of these statements. They are not admissible as prior consistent statements nor as excited utterances. The defense requests that the state set forth the specific hearsay statements it intends to introduce of Crystal C. and the basis for which they are admissible.

III. OTHER ACTS:

As stated in the Defendant's Response regarding other acts evidence, the defense maintains that the proposed evidence be excluded. However, should the court rule that any of the other acts evidence be admitted, there are a number of hearsay issues surrounding that evidence as well.

Christine K. is offered as an other acts witness by the state. As stated in the Response of the defendant, any statements made by Christine K to her friend Lisa E are hearsay and not admissible. The statements were made months after the alleged incidents. There is not basis for their admissibility.

Jennifer K and Jackie K made statements in 1988. The police reports show that at this time, Jennifer K has no memory of the events and can not corroborate her previous statements. Jackie K, according to the police reports has not made any statements since 1988.

Amy B. made statements to her parents as well as her teacher Ed Kupka and her friend Aaron Nelson. These statements are hearsay as well.

Pursuant to *Crawford v. Washingotn*, 124 S.Ct. 1354, 158 L.Ed.2d 144 (March 4, 2004) and *Tome v. United States*, 513 U.S. 150 (1995), the above statements are not admissible. There is no basis for the admissibility of prior consistent statements and no foundation has been laid by the state for their admissibility under one of the hearsay exceptions.

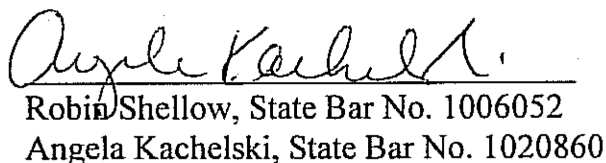
Due to the magnitude of hearsay in this case, the defense requests that the state

provide the defense in writing every hearsay statement they intend to elicit, the witness from whom they will elicit it and the grounds for admissibility.

The defense also requests that this court make pre-trial rulings regarding the hearsay statements in this case so that counsel knows which statements are admissible prior to opening statement.

Dated at Milwaukee, Wisconsin, this 22 day of July, 2004.

Respectfully submitted,
THE SHELLOW GROUP
Joel Bishop, Defendant



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