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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TROY WILCOXON,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF ASOTIN COUNTY

THE HONORABLE WILLIAM D. ACEY

SUPPLEMENTAL BRIEF OF RESPONDENT

BENJAMIN NICHOLS
Asotin County Prosecuting Attorney

JENNIFER P. JOSEPH
Special Deputy Prosecuting Attorney
Attorneys for Respondent

Asotin County Prosecuting Attorney
P.O. Box 220
Asotin, Washington 99402
(509) 243-2061 FAX (509) 243-2090

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A. ISSUES PRESENTED

1. Whether the United States Supreme Court's decisions categorically limiting application of the Confrontation Clause to testimonial evidence limits the scope of Bruton, a prophylactic rule designed to prevent a specific type of Confrontation Clause violation, to testimonial statements of non-testifying codefendants?
2. Whether a codefendant's statement to a trusted friend in confidence is nontestimonial for Confrontation Clause purposes?
3. Whether the trial court erred by giving no limiting instruction with respect to the codefendant's statement where none was requested?
4. Whether, in light of overwhelming evidence of Wilcoxon's guilt, any error was harmless beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Troy Wilcoxon with Burglary in the Second Degree, Theft in the First Degree, and Conspiracy to Commit Burglary in the Second Degree. CP 1-3. The State alleged that Wilcoxon, an employee of the Lancer Lanes Casino, had burglarized the casino after hours, stealing over \$25,000 from the cashier's cage. RP 6-10. The matter was joined for trial with the case against James Nollette, whom the

State alleged had conspired with Wilcoxon to burglarize the casino.

RP 18. The State sought an exceptional sentence predicated on the crimes being a major economic offense that involved a breach of a position of trust. CP 12.

Wilcoxon moved to sever his case from Nollette's under CrR 4.4(c)(2) on grounds that statements Nollette made to a third person inculpated Wilcoxon, and Nollette's intention not to testify made him unavailable for cross-examination. CP 23-27. The motion did not mention the Sixth Amendment, the Confrontation Clause, or Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The trial court declined to sever the cases, concluding that Nollette's statement would not violate the Confrontation Clause because it did not directly identify Wilcoxon. CP 35-36.

Nollette's statements to the third party were admitted at trial without objection. RP 300-11. Wilcoxon did not request a limiting instruction, and no limiting instruction was given, despite the State's suggestion that one would be appropriate. RP 28.

Following trial, the jury found Wilcoxon guilty as charged and returned special verdicts finding the alleged aggravating circumstances. CP 84-87. The trial court imposed a total, exceptional sentence of 24 months' confinement. CP 91.

2. SUBSTANTIVE FACTS

In May 2013, there were two attempts to burglarize the Lancer Lanes/Bridge Street Connection casino in Clarkston. RP 86, 112-15. In both attempts, the suspect broke into the casino around 2:00 a.m. wearing a large garbage bag and immediately went to the basement to cut the power to the surveillance system. RP 113-15. The May 14 attempt was thwarted by the unexpected presence of Eric Glasson, a developmentally disabled person associated with the casino. RP 111-15, 357-58.

Following the May 14 break-in, casino security installed a new battery back-up for the surveillance system. RP 595. Glasson was not present during the second attempt on May 23, which resulted in the theft of more than \$29,000. RP 86, 95-96, 117-18, 350.

Wilcoxon was an employee of the casino at the time of the crime. RP 130. On the night of May 22, 2013, he invited casino employees and Glasson to go for drinks at a Lewiston bar after closing. RP 132, 360. Wilcoxon ensured Glasson's attendance by giving him a ride, paying his cover charge, and buying him a drink. RP 132, 360-61. Wilcoxon remained at the bar until James Nollette and two other casino employees arrived. RP 121-22, 126. Wilcoxon then left the bar with Nollette, who returned to the bar one minute later and stayed with Glasson and the others until closing. RP 126. Cell records showed that Wilcoxon and Nollette

exchanged a number of phone calls between 1:04 a.m. and 3:52 a.m.

RP 173-79.

Wilcoxon and Nollette converged at the home of their friend Eric Bomar after 2:00 a.m. RP 500, 502. They were "agitated" and "excited." RP 503. Wilcoxon told Bomar, "We pulled it off." RP 505, 508, 538. Wilcoxon, who had in the past discussed with Bomar and Nollette just how easy it would be to break into the casino and steal money, described the burglary to Bomar. RP 506-07. He said that he got into the building through the back door, that he went downstairs and killed the security cameras, then used keys to open the cashier's cage, where he got the money. RP 507. In fact, because of the new battery back-up, the surveillance cameras captured video of a person in a plastic garbage bag, hunched over, going to the basement, returning, and using keys to open the cage and the one drawer in which money is stored. RP 95, 101-11.

When interviewed by police, Wilcoxon claimed that he left the bar between 1:30 and 2:00 a.m. RP 133. Bar surveillance video shows that he actually left at 12:50 a.m. RP 173. Wilcoxon claimed he went from the bar to his sister's house in Lewiston, and then to Bomar's house. RP 134-35. Cell phone records indicated that calls from Wilcoxon's phone during that time were serviced by a cell tower right by the casino, not in Lewiston. RP 173-79. Wilcoxon's sister also testified that he did not

arrive at her house until 2:15 or 2:20 a.m. RP 648. Wilcoxon repeatedly denied having gone back to Clarkston, at one point saying, "If you can find I came back to Clarkston, congratulations." RP 146-47. After being told that detectives could find relevant information on his cell phone, Wilcoxon apparently spent some time deleting the call history for the period during which the burglary occurred. RP 146-47, 474-75.

Several days after the burglary, Nollette asked to speak to his friend James Solem. RP 300. Solem was one of three people Nollette respected; he told Solem that he could not go to the other two possible confidantes because one would be disappointed in him and the other – the Lewiston police chief – might arrest him. RP 300-01. Nollette described to Solem how he and "his friend" had discussed in detail why it would be easy to "rob" the Lancer casino. RP 301. Nollette then told Solem that his friend, who owed someone \$15,000, had actually committed that burglary while Nollette and Eric (Glasson) were at the Lewiston bar. RP 304. Nollette said that his friend called Nollette during the burglary. RP 304-05. Solem urged Nollette to go to the police to explain his involvement and what he knew about the burglary. RP 306-07. Nollette said he would have to kiss his children goodbye first, got a phone book to find a lawyer, and said "he wasn't going to throw his friend under the bus." RP 306-07.

When Nollette did not go to the police as he had promised, Solem contacted his friend, the chief of the Lewiston police, who told Solem he had to notify the Clarkston police. RP 311. Solem did so, and shared most of what Nollette had told him. RP 311. At trial, Solem testified about his conversation with Nollette about the burglary. RP 300-12.

In the days following the burglary, Bomar admitted he had received \$1,000 from Wilcoxon. RP 510. Officers subsequently discovered that Bomar had made three cash deposits totalling over \$14,000 on June 3, June 11, and June 18, 2013. RP 511. These deposits were out of character for Bomar. RP 559-61.

Officers also discovered that Wilcoxon and Nollette had travelled to Las Vegas shortly after the burglary. RP 214. They played in poker tournaments with large buy-ins. RP 138. At the time, Nollette had no job and no apparent legitimate source of income. RP 138.

C. SUMMARY OF ARGUMENT

This case presents this Court with a question that the vast majority of other state and federal appellate courts in the nation have already answered: whether the United States Supreme Court's recent Sixth Amendment jurisprudence limits application of the Confrontation Clause to evidence that is testimonial in nature. These courts have consistently answered in the affirmative. Because it is premised on the Confrontation

Clause, nearly every court to address the question has held that the Bruton rule also has no application to nontestimonial statements. Here, Nollette's statement to Solem was not "testimonial" under any of the various formulations of that term. Accordingly, this Court should conclude that admission of that demonstrably reliable statement under the rules of evidence did not violate Wilcoxon's Sixth Amendment right to confront witnesses against him.

Neither can Wilcoxon prevail on his claim that the trial court's failure to sua sponte instruct the jury to limit its consideration of the nontestimonial statement requires reversal. It is well established in this state that a party's failure to request a limiting instruction constitutes a waiver of that party's right to such an instruction and fails to preserve the claimed error for appeal. Because Wilcoxon declined to request a limiting instruction, despite the State's invitation to do so, his claim must fail.

Finally, whether or not this Court agrees with the majority view concerning the Confrontation Clause's application to nontestimonial statements, reversal is inappropriate in Wilcoxon's case. The Court of Appeals correctly held that any error in admitting the statement at issue was harmless beyond a reasonable doubt, and Wilcoxon has not challenged that conclusion in this Court.

D. THE CONFRONTATION CLAUSE HAS NO APPLICATION TO NONTESTIMONIAL STATEMENTS

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” U.S. CONST. AMEND. VI. In Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Supreme Court held a criminal defendant is denied his Sixth Amendment right of confrontation when a nontestifying codefendant’s pretrial confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. State v. St. Pierre, 111 Wn.2d 105, 111-12, 759 P.2d 383 (1988).

Since Bruton was decided, the Supreme Court’s Confrontation Clause jurisprudence has substantially evolved. In Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), the Court held that admission of hearsay statements would not violate the confrontation right of the accused so long as the witness is unavailable and his or her statements bear adequate indicia of reliability. 448 U.S. at 66. Two decades later, however, the Court eschewed the Roberts reliability test, observing that Roberts was both too broad, potentially excluding evidence that is “far removed from the core concerns of the Clause,” and too narrow, allowing “admission of statements that *do* consist of *ex parte*

testimony upon a mere finding of reliability.” Crawford v. Washington, 541 U.S. 36, 60, 124 S. Ct. 1254, 158 L. Ed. 2d 177 (2004) (emphasis in original). The Court therefore held that “[w]here *testimonial* evidence is at issue ... the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” Id. at 68 (emphasis added). The Crawford Court did not explicitly address whether *nontestimonial* statements implicated the Confrontation Clause, stating only that where such statements are 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.” Id.

Later decisions from the Supreme Court have clarified that the Confrontation Clause indeed applies only to testimonial hearsay. In Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court reiterated that “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. at 821. The Court was even more emphatic about that point in Whorton v. Bockting, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007). There, the Court characterized Crawford as the “elimination of

Confrontation Clause protection against the admission of unreliable nontestimonial hearsay.” Id., at 420. It succinctly summarized the impact of that decision:

Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, *the Confrontation Clause has no application to such statements* and therefore permits their admission even if they lack indicia of reliability.

Whorton, 549 U.S. at 420 (emphasis added). The Court adhered to this view in its most recent Confrontation Clause decision, Ohio v. Clark, ___ U.S. ___, 135 S. Ct. 2173, 2180, ___ L. Ed. 2d ___ (June 18, 2015).

In the wake of Crawford and its progeny, every federal circuit court to address the issue has recognized that the Confrontation Clause is no longer applicable to nontestimonial statements.¹ Almost every court to address the question has also concluded that, because Bruton is premised on the Confrontation Clause, it too is limited to testimonial statements. As the First Circuit explained:

¹ See U.S. v. Figueroa-Cartagena, 612 F.3d 69, 85 (1st Cir. 2010), cert. denied, 131 S. Ct. 2930 (2011); U.S. v. Williams, 506 F.3d 151, 156-57 (2d Cir. 2007), cert. denied, 552 U.S. 1224 (2008); U.S. v. Berrios, 676 F.3d 118, 128 (3d Cir. 2012), cert. denied, 133 S. Ct. 982 (2013); U.S. v. Dargan, 738 F.3d 643, 650-51 (4th Cir. 2013); U.S. v. Vasquez, 766 F.3d 373, 378-79 (5th Cir. 2014), cert. denied, 135 S. Ct. 1453 (2015); U.S. v. Johnson, 581 F.3d 320, 326 (6th Cir. 2009), cert. denied, 560 U.S. 966 (2010); Jones v. Basinger, 635 F.3d 1030, 1041 (7th Cir. 2011); U.S. v. Dale, 614 F.3d 942, 958-59 (8th Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011); U.S. v. Larson, 495 F.3d 1094, 1099 n.4 (9th Cir. 2007), cert. denied, 552 U.S. 1260 (2008); U.S. v. Clark, 717 F.3d 790, 814-17 (10th Cir. 2013), cert. denied, 134 S. Ct. 903 (2014); U.S. v. Rodriguez, 591 Fed. Appx. 897, 900-01 (11th Cir. 2015) (cert. application pending); U.S. v. Wilson, 605 F.3d 985, 1016-17 (DC Cir. 2010), cert. denied, 131 S. Ct. 841 (2010).

The Bruton/Richardson framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place. If none of the co-defendants has a constitutional right to confront the declarant, none can complain that his right has been denied. It is thus necessary to view Bruton through the lens of Crawford and Davis. The threshold question in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause “has no application.”

Figueroa-Cartagena, 612 F.3d at 85 (quoting Whorton, 549 U.S. at 420).

Accord, Berrios, 676 F.3d at 128 (“[B]ecause Bruton is no more than a by-product of the Confrontation Clause, the Court’s holdings in Davis and Crawford likewise limit Bruton to testimonial statements”); Dargan, 738 F.3d at 651 (“Bruton is simply irrelevant in the context of nontestimonial statements. Bruton espoused a prophylactic rule designed to prevent a specific type of Confrontation Clause violation. Statements that do not implicate the Confrontation Clause, *a fortiori*, do not implicate Bruton”); Vasquez, 766 F.3d at 378-79 (same); Johnson, 581 F.3d at 316 (same); Dale, 614 F.3d at 956 (same); Clark, 717 F.3d at 815-16 (same); Rodriguez, 591 Fed. Appx. at 902 (same); Wilson, 605 F.3d at 1017 (same).² Only the Seventh Circuit has applied Bruton to an arguably

² See also 1 Christopher Mueller & Laird Kirkpatrick, Federal Evidence §1:40 (4th ed.) (“Today Bruton would not apply to such a statement if it is viewed as nontestimonial, and offering it in a joint trial with an instruction telling a jury to consider the statement as being only evidence against the declarant would not violate the confrontation clause”). But see 30B Charles Wright & Arthur Miller, Federal Practice & Procedure §7034.1 n.5 (2014 ed.) (noting that it “certainly may be argued that since the confrontation clause as interpreted by Crawford/Davis and progeny does not govern the admissibility of nontestimonial statements, the confrontation clause no longer precludes a Bruton type statement from being received in evidence provided such statement is nontestimonial”)

nontestimonial statement of a nontestifying codefendant. Jones v. Basinger, 635 F.3d 1030 (7th Cir. 2011). In that case, however, the State conceded that the double-hearsay was testimonial. Id. at 1041.

State courts are consistent with their federal counterparts. In State v. Norah, a Louisiana court explained:

When Bruton was originally handed down, the types of statements to which the holding applied were much broader. The Supreme Court, in Crawford, however, limited the spectrum of statements that the Confrontation Clause guards to only “testimonial statements.” Numerous courts have applied this holding to the preclusive effect of Bruton. We agree with their reasoning. Thus, in order for a defendant to have a viable claim under Bruton, his non-testifying co-defendant’s out-of-court statement sought to be introduced by the prosecution must be testimonial.

131 So. 3d 172, 189 (La. Ct. App. 2013), writ denied, 140 So.3d 1188 (La. 2014) (citations omitted). Almost all states that have addressed the question are in agreement.³

but opining that “there is simply no way that the United States Supreme Court would permit such statements, if nontestimonial, to be free from constitutional oversight, whether that be the confrontation clause, the due process clause, or both”).

³ See People v. Arceo, 195 Cal. App. 4th 556, 571 (2011), cert. denied, 132 S. Ct. 851 (2011); Thomas v. U.S., 978 A.2d 1211, 1224-25 (D.C. 2009) (“if a defendant’s extrajudicial statement inculcating a co-defendant is *not* testimonial, Bruton does not apply”) (emphasis in original); Brown v. State, 69 So.3d 316, 319 (Fla. Dist. Ct. App. 2011) (rejecting argument based on pre-Crawford state court interpretation of Bruton because it “did not address the dispositive issue here regarding whether the statements were testimonial in nature subjecting them to the Confrontation Clause”); Billings v. State, 293 Ga. 99, 103-04 (2013) (“the rule set forth in Bruton ... does not apply to non-testimonial out-of-court statements made by such a codefendant”); State v. Payne, 104 A.3d 142, 163 (Md. 2014) (same); State v. Usee, 800 N.W.2d 192, 197-98 (Minn. Ct. App. 2011) (same); Burnside v. State, 131 Nev. Adv. Op. 40 (2015) (“if the challenged out-of-court statement by a nontestifying codefendant is not testimonial, then Bruton has no application because the Confrontation Clause has no application”); State v. Gurule, 303 P.3d 838, 848-49 (N.M. 2013) (same); People v. Lugo, 87 A.D.3d 1403, 1404 (N.Y.

This Court has not yet considered the impact that Crawford's testimonial/nontestimonial dichotomy has had on Bruton.⁴ Only one division of the Court of Appeals has published an opinion on this point.⁵ In State v. DeLeon, Division Three cited Figueroa-Cartagena to hold that, "Since Bruton is based on the protections of the confrontation clause, '[i]t is ... necessary to view Bruton through the lens of Crawford,' with the result that Bruton's restriction on the admission of the inculpatory statements by a jointly tried codefendant is limited to testimonial hearsay." 185 Wn. App. 171, 208, 341 P.3d 315 (2014). Division Three adhered to that reasoning in the instant case, holding that Nollette's statement to Solem was nontestimonial and thus, poses no Bruton problem. 185 Wn. App. 534, 541-42, 341 P.3d 1019 (2015).

2011) (rejecting Bruton claim because codefendant's statements not testimonial); State v. Ennis, 158 P.3d 510, 519 (Or. 2007) (not addressing issue directly, but first determining statements at issue were testimonial before addressing whether they presented a Bruton problem). But see Com. v. Whitaker, 878 A.2d 914, 922 (Pa. 2005) (holding that Crawford does not compel a different result from state decision based on Bruton and its progeny because Crawford and Bruton "define the contours of the Confrontation Clause ... for different purposes"); Rodgers v. Com., 285 S.W.3d 740, 746-47 (Ky. 2009) (same).

⁴ In State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006), this Court concluded that Crawford does not apply to nontestimonial statements and held that the child hearsay statute does not violate the Confrontation Clause.

⁵ In In re Personal Restraint of Hegney, Division Two addressed a personal restraint petition in which the offender sought to renew his previously-rejected Bruton claim in light of Crawford. 138 Wn. App. 511, 546, 158 P.3d 1193 (2007). Without addressing whether Crawford limited Bruton's scope to testimonial statements, the court noted that "Crawford heightened the standard under which a witness's statements can be admitted" but "did not overrule Bruton" and its progeny. 138 Wn. App. at 546. Accordingly, the court adhered to its decision in Hegney's direct appeal that the statement, which did not refer to Hegney in any way, did not implicate Bruton. Id. at 547.

Given the consensus that nontestimonial hearsay does not implicate the Confrontation Clause, and therefore does not trigger Bruton, the question arises about how to determine admissibility of such statements. In Crawford, the Supreme Court indicated that states have some leeway in developing their own rules of evidence for nontestimonial statements. 541 U.S. at 68. The Court suggested that state courts might return to the Roberts reliability test or might simply “exempt[] such statements from Confrontation Clause scrutiny altogether.” Id.

Some federal courts initially interpreted Crawford to overrule Roberts only with respect to testimonial statements, and continued to apply the Confrontation Clause to nontestimonial hearsay through the Roberts indicia of reliability test.⁶ See, e.g., U.S. v. Hendricks, 395 F.3d 173, 179 (3d Cir. 2005) (“[U]nless a particular hearsay statement qualifies as ‘testimonial,’ Crawford is inapplicable and Roberts still controls”); U.S. v. Saget, 377 F.3d 223, 227 (2d Cir. 2004) (“Crawford leaves the Roberts approach untouched with respect to nontestimonial statements”). In light of the Supreme Court’s explicit clarification in Davis and Whorton that nontestimonial statements do not implicate the Confrontation Clause at all, however, many courts ultimately concluded that “Roberts is no longer an

⁶ See also, Michael Duffy, Nontestimonial Declarations Against Penal Interest: Eschewing the Corroboration Requirement for Inculpatory Statements After Crawford, 41 J. Marshall L. Rev. 969 (2008) (arguing that courts should apply Roberts reliability test to nontestimonial statements).

appropriate vehicle for challenging admission of nontestimonial hearsay.”
Berrios, 676 F.3d at 126 (rejecting previous holding in Hendricks).
Accord, Williams, 506 F.3d at 156 (same; rejecting previous holding in
Saget); Johnson, 581 F.3d at 325-26 (same); Larson, 495 F.3d at 1099 n.4
(same); U.S. v. Smalls, 605 F.3d 765, 775-76 (2010) (same; citing cases).

Even if the Roberts reliability test no longer applies to
nontestimonial out-of-court statements by a codefendant, Washington still
has adequate rules to protect a defendant from admission of such
statements against him. First, the severance rule provides that a
defendant’s motion to sever because a codefendant’s statement referring to
him is inadmissible against him “shall be granted” unless the statement is
sanitized to eliminate any prejudice to him from admission of the
statement.⁷ CrR 4.4(c). Second, a codefendant’s out-of-court statements
are still “subject to the traditional limitations upon hearsay evidence.”
Davis, 547 U.S. at 821. In this case, Nollette’s statement to Solem was a
statement against interest and subject to scrutiny under ER 804(b)(3):

A statement which was at the time of its making ... so far
tended to subject the declarant to civil or criminal liability ... that a
reasonable person in the declarant’s position would not have made
the statement unless the person believed it to be true. In a criminal
case, a statement tending to expose the declarant to criminal

⁷ In this case, the trial court refused to sever the trials because the statement, in which
Nollette refers to “my friend” without naming anyone, did not identify Wilcoxon with
sufficient specificity to be prejudicial. RP at 29-30.

liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

ER 804(b)(3). Washington courts apply a nine-point set of guidelines to determine whether the reliability requirements of the rule have been satisfied. State v. Whelchel, 115 Wn.2d 708, 716, 801 P.2d 948 (1990). These factors include (1) whether the declarant had an apparent motive to lie; (2) whether the declarant's character suggests trustworthiness; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously or in response to questioning; (5) whether the timing of the statements and the relationship between the declarant and witness suggests trustworthiness; (6) whether the statements contain express assertions of past fact; (7) whether cross examination could show the declarant's lack of knowledge; (8) whether the possibility of the declarant's recollection being faulty is remote; and (9) whether the circumstances surrounding the statements give reason to suppose that the declarant misrepresented the defendant's involvement. 115 Wn.2d at 722-25. Additionally, ER 802(b)(3)'s "corroboration requirement is aimed at satisfying confrontation clause concerns" and "arguably mirrors the trustworthiness requirements for such hearsay under the confrontation clause." 115 Wn.2d at 716. Further, courts may also exclude nontestimonial, facially incriminatory confessions of a nontestifying

codefendant in a joint trial whenever its probative value is substantially outweighed by the danger of unfair prejudice under ER 403.

Washington's rules pertaining to admission of a nontestimonial statement against interest by a non-testifying codefendant are sufficient to ensure that only reliable nontestimonial hearsay can be admitted. This Court should join the vast majority of state and federal courts that have concluded that Bruton, as a creature of the Confrontation Clause, applies only to testimonial statements because only testimonial statements implicate the Confrontation Clause. Thus, if Nollette's statement to Solem is nontestimonial, it presents no Sixth Amendment problem.

E. NOLLETTE'S STATEMENT WAS NOT TESTIMONIAL

While the Supreme Court did not provide a comprehensive definition of "testimonial" in Crawford, it offered three formulations as guidance: (1) "*ex parte* in-court testimony or its functional equivalent," such as affidavits, custodial examinations, pretrial statements that the speaker would "reasonably expect" to be used by prosecutors, and prior testimony that the defendant could not cross examine; (2) extrajudicial statements found in "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) any statement that would "lead an objective witness to reasonably believe" that the statement "would be available for use at a later trial." Crawford, 541 U.S. at 51-52.

In contrast, the Court identified several types of statements as nontestimonial, including off-hand, overheard remarks; casual remarks made to an acquaintance; business records or statements in further of a conspiracy; dying declarations; and statements made unwittingly to a government informant. Id. at 51, 56, 57.

In Shafer, this Court observed that Crawford was particularly concerned with the “involvement by a government official” in obtaining the statement. 156 Wn.2d at 389. The Court indicated that “[t]he proper test to be applied in determining whether the declarant intended to bear testimony against the accused is whether a reasonable person in the declarant’s position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime.” Id. at 390 n.8.

The Supreme Court attempted to resolve uncertainty about the testimonial/nontestimonial dichotomy by adopting the “primary purpose” test. Davis, 547 U.S. at 822. Under that test, statements “are testimonial when the circumstances objectively indicate that there is no ... ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Id. The Court recently reiterated that “under our precedents, a statement cannot fall within the Confrontation Clause unless

its primary purpose was testimonial.” Clark, 135 S. Ct. at 2180-81 (June 18, 2015) (further noting that statements to persons other than police are “much less likely to be testimonial than statements to law enforcement officers”).

Whatever formulation is applied, it is clear that Nollette’s statement to Solem was not testimonial. No government official was involved. Solem was Nollette’s trusted confidante, one of only three people Nollette trusted in town. RP 300. Nollette chose to confide in Solem, rather than his friend, the chief of the Lewiston Police Department, because he worried that the chief would arrest him. RP 300-01. Nollette sought privacy when speaking to Solem, and when another acquaintance interrupted them, Nollette chose to suspend the conversation until he and Solem could again speak privately. RP 300, 302. In telling his story, Nollette never identified the person who had committed the burglary, referring to him only as “his friend.” RP 304, 331. Nollette also told Solem that “he wasn’t going to throw his friend under the bus.” RP 307. Further, despite Solem’s emphatic and repeated urging, Nollette was afraid and unwilling to go to the police with this information. RP 306-07, 311.

Given Nollette’s efforts to confide in his trusted friend in private, his choice of Solem rather than a law enforcement officer as his

confidante, and his care to avoid implicating the person who committed the burglary, a reasonable person in his position would certainly not anticipate that his statements would ever be used in investigating and prosecuting the crime. Accordingly, the statements to Solem were not testimonial and did not trigger Crawford or Bruton.

F. THE COURT HAS NO DUTY TO PROVIDE A LIMITING INSTRUCTION UNLESS ONE IS REQUESTED

Wilcoxon contends that the trial court erred by failing to instruct the jury that it must not consider Nollette's statement to Solem as evidence of Wilcoxon's guilt. Such an instruction was appropriate; indeed, the State pointed out that any prejudice that could arise from admitting the statement in a joint trial could "be cured by, if it was so requested, a curative instruction to the jury that Mr. Solem's testimony regarding ... any other perpetrator not [be] used or considered ... in determining Mr. Wilcoxon's guilt or innocence[.]" RP 28. But Wilcoxon never requested such an instruction or objected to its absence. Accordingly, Wilcoxon has waived any claim of error.⁸

When evidence is admissible against one party or for one purpose, but not admissible for another, "the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." ER 105

⁸ For the same reason, the Court of Appeals held that Wilcoxon could not raise this issue for the first time on appeal under RAP 2.5(a)(3). Wilcoxon did not challenge that conclusion in his petition for review.

(emphasis added). It is well established that the trial court is under no duty to give a limiting instruction absent such a request. In State v. Noyes, this Court held that “a request for a limiting instruction is a prerequisite to a successful claim of error on appeal.” 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966). Nearly fifty years later, “this [C]ourt has continued to hold that absent a request for a limiting instruction, the trial court is not required to give one sua sponte.” State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604 (2011) (citing cases).

Because Wilcoxon did not request a limiting instruction, he has waived his right to such an instruction and has failed to preserve the issue for appeal. See State v. Newbern, 95 Wn. App. 277, 295-96, 975 P.2d 1041 (1999). This Court should affirm Division Three’s decision to that effect.

G. ANY ERROR WAS HARMLESS

The Court of Appeals concluded, as an alternate basis to affirm, that any Sixth Amendment violation in this case was harmless beyond a reasonable doubt:

Although Mr. Nollette’s statement that his “friend” had committed the burglary was somewhat prejudicial to Mr. Wilcoxon in light of the evidence connecting him to the telephone call, that evidence was primarily useful against Mr. Nollette on the conspiracy count—and the jury failed to reach a verdict on that count. With respect to Mr. Wilcoxon, the “friend” statement paled in light of the other evidence against him, particularly his admissions to Eric

Bomar. If there had been error, it was harmless beyond a reasonable doubt.

185 Wn. App. at 543. Because Wilcoxon did not challenge that holding in his petition for review, this Court should adhere to it. See Davis, 547 U.S. at 829 (where petitioner did not challenge this Court's conclusion that error in admitting testimonial hearsay was harmless beyond a reasonable doubt, Supreme Court "assume[s] it to be correct").

H. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Wilcoxon's conviction.

DATED this 3rd day of August, 2015.

Respectfully submitted,

BENJAMIN NICHOLS
Asotin County Prosecuting Attorney

By: 
JENNIFER P. JOSEPH, WSBA #35042
Special Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Andrea Burkhardt
(Andrea@BurkhartandBurkhart.com), the attorney for the appellant, Troy
Wilcoxon, containing a copy of the Respondent's Supplemental Brief, in State v.
Wilcoxon, Cause No. 91331-5-I, in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

8/3/15
Date

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Cc: Joseph, Jennifer; Andrea@BurkhartandBurkhart.com; bnichols@co.asotin.wa.us; cliedkie@co.asotin.wa.us
Subject: RE: State v. Troy J. Wilcoxon, Supreme Court No. 91331-5

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Please accept for filing the attached documents (Motion to File Overlength Brief and Supplemental Brief of Respondent) in State of Washington v. Troy J. Wilcoxon, No. 91331-5.

Thank you.

Jennifer P. Joseph
Deputy Prosecuting Attorney
WSBA #35042
King County Prosecutor's Office
W554 King County Courthouse
Seattle, WA 98104
206-477-9530
E-mail: jennifer.joseph@kingcounty.gov
E-mail: PAOAppellateUnitMail@kingcounty.gov
WSBA #91002

This e-mail has been sent by Wynne Brame, paralegal (phone: 206-477-9497), at Jennifer Joseph's direction.

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