COURT OF APPEALS OF WISCONSIN
DISTRICT ONE

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. Appeal No.: 2014AP002521-CR

SHIRONSKI A. HUNTER,
Defendant-Appellant.

On Appeal From the Circuit Court of Milwaukee County
The Honorable Rebecca F. Dallet Presiding
Circuit Court Case No. 2013-CF-004162

BRIEF OF DEFENDANT-APPELLANT SHIRONSKI A. HUNTER

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STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of record.

STATEMENT OF THE ISSUES

1. Did the trial court properly admit the hearsay testimony of Ms. Rimschneider and Ms. Porter despite the mandate of Sixth Amendment and the confrontation clause?

Circuit Court answered: Yes.

2. Was there sufficient evidence to support the jury's guilty verdict on the possession of a short-barreled shotgun, possession of a firearm and endangering safety with a dangerous weapon (intentionally pointing a firearm) charges?

Circuit Court answered: Yes.

3. Did the trial court properly allow the 911 operator to testify despite the State's failure to disclose this witness before trial, pursuant to Wis. Stat. § 971.23(1)(d)?

Circuit Court answered: Yes.

STATEMENT OF THE FACTS

The police received a 911 call from Ms. Barbara Rimschneider on September 7, 2013 wherein she reported a violent domestic incident involving her boyfriend, Mr. Hunter, and a gun. (R. 35, p. 104:10-12; Ex. 1) (hereinafter the "Incident").

Trial Court's Pretrial Decision to Allow the Hearsay Testimony of Ms. Rimschneider and Ms. Porter:

The 911 Recordings:

The 911 recordings contained statements from both Ms. Rimschneider and Ms. Janelle Porter. (R. 39, Ex. 14). The State offered the recordings as evidence of the crimes because Ms. Rimschneider and Ms. Porter did not testify at trial. The Defense agreed that the initial statements by Ms. Rimschneider on the call were admissible as both an excited utterance and a present sense impression, as well as non-testimonial under ***Crawford v. Washington***, 541 U.S. 36 (2004), because it was a call for help, but it objected to the subsequent calls by Ms. Rimschneider and Ms. Porter because they discussed events that already happened.[1] (R. 33, p. 17:2-18:5). The Defense argued that roughly five minutes and twenty seconds into the recording, Ms. Porter called 911 and calmly discussed the Incident and thereafter Ms. Rimschneider talked about the Incident as a past event. (R. 33, p. 17:2-23). Thus, the Defense argued that those statements were testimonial and not admissible as either an excited utterance or present sense impression. (R. 33, p. 19:4-9).

The trial court ruled that under ***Davis v. Washington***, 547 U.S. 813 (2006), the entirety of the 911 calls would come into evidence because the primary purpose of the call was to enable police assistance and was made during an ongoing emergency and therefore non-testimonial under ***Crawford***. (App. 1-105-109; R. 33, p. 21:17-25, 22:4-11, R. 34, p. 4:4-

[1] The sole issue on appeal regarding the 911 call refers to the statements made roughly five minutes and twenty seconds into the 911 recording wherein Ms. Porter and Ms. Rimschneider address the Incident in terms of a past event. (R. 33, p. 17:4-23). There is no objection to the statements prior to this time.

5). It further held that the call from Ms. Rimschneider was an excited utterance and a present sense impression because she was under the stress of the event. (App. 1-106; R. 33, p. 22:17-25).

Statements Made by Ms. Rimschneider to Police:

Before the trial began, the trial court heard testimony from Police Officer Martin Saavedra to determine whether to allow Officer Saavedra to testify as to statements Ms. Rimschneider made to him upon his arrival at the scene of the Incident. Officer Saavedra testified that he arrived at the scene of the Incident within minutes of the dispatch time but could not give an exact time. (R. 33, p. 26:11-18, 38:11-20). Upon approaching the residence, Officer Saavedra saw Ms. Rimschneider standing in the middle of the street in a group of three and testified that the Incident for which he was dispatched appeared to be over. (R. 33, p. 35:12-25). Ms. Rimschneider appeared upset, according to Officer Saavedra, but was able to logically answer all of his questions. (R. 33, p. 27:4-8, 36:7-22). Officer Saavedra testified that Ms. Rimschneider identified Mr. Hunter as the suspect and stated that he was inside the house with a shotgun. (R. 33, p. 30:1-5, 17). She further told Officer Saavedra that Mr. Hunter battered her and stabbed her in the leg with a screwdriver. (R. 33, p. 30:13-20).

The Defense argued that Ms. Rimschneider's statements to Officer Saavedra should be excluded because they did not qualify as present-sense impressions or excited utterances because the Incident was over and she made the statements roughly ten minutes after the initial 911 call. (R. 33, p. 48:8-23). The statements also were not excited utterances because Ms. Rimschneider was able to calmly answer police questions. (R. 33, p. 48:24-49:3). The Defense further objected based on the confrontation clause, arguing that Ms. Rimschneider's statements to police were testimonial because she was under no immediate threat when making the statements, she was recounting past events and the purpose of the questioning was investigatory. (R. 33, p. 51:6-52:1).

In finding Ms. Rimschneider's initial statements admissible, the trial court drew the line between an ongoing

emergency versus an emergency that has ended. (App. 1-110; R. 33, p. 52:8-12). It reasoned that Ms. Rimschneider was crying and frightened upon the arrival of Officer Saavedra, had visible injuries, reported that Mr. Hunter was inside with a gun and was the one that caused her injuries. (App. 1-110; R. 33, p. 52:13-25). These facts signify that it was an ongoing emergency and her statements were made for the purpose of getting the police to locate and arrest Mr. Hunter. (App. 1-110-111; R. 33, p. 53:1-12). Thus, the statements did not violate the confrontation clause and they were also admissible as an excited utterance. (App. 1-112; R. 33, p. 54:7-22).

Trial Court Decision to Allow the 911 Operator to Testify:

On the day the trial was scheduled to begin, the State asked for a continuance because its witness, the 911 dispatcher that took the call on the night of the Incident, was ill. (R. 33, p. 4:7-20). The Defense objected to calling the witness because the State failed to list the 911 dispatcher on its witness list and subpoena her despite knowing about the 911 call for months. (R. 33, p. 5:19-6:5). The Defense argued that it did not have the opportunity to question this witness before trial and the State failed to show good cause for not subpoenaing the witness. (R. 33, p. 6:11-15, 7:2-8). Moreover, the late notice of this witness prejudiced the Defense because the witness may have provided useful information. (R. 33, p. 9:19-10:7).

The trial court offered the Defense two options: a continuance to investigate the witness or the opportunity to question the witness the morning before trial. (R. 33, p. 10:10-25). It did not find the State's omission purposeful and held it did not prejudice the Defense. (App. 1-115: R. 33, p. 11:1-11). The Defense chose to interview the witness before trial but did not waive its objection that the witness's testimony should be precluded. (R. 33, p. 11:18-12:4). The trial court ordered the State to make the witness available for questioning. (R. 34, p. 7:2-6).

On the day of trial, the State explained that it was unlikely to call the 911 operator who took the calls, but rather planned to call an employee in the Milwaukee Police

Department's telecommunications department to explain how the 911 recording and the corresponding CAD report was created, as well as a police officer in the domestic violence unit to testify to the accuracy of the recording. (R. 34, p. 7:11-9:9). The Defense objected for two reasons: fairness and improper authentication. First, the State once again modified their witness list on the day of trial, changing it from the 911 operator that took the call to the above-listed witnesses. (R. 34, p. 9:11-10:6). This change was in violation of the discovery demand filed by the Defense on January 2, 2014, but also Wis. Stat. § 971.23 requiring the State to produce the names and addresses of its witnesses "a reasonable time before trial." (R.34, p. 10:7-17). Consequently, the Defense moved to preclude the State from calling these witnesses because it was unfair to Mr. Hunter. (R. 34, p. 11:9-17). Second, the Defense argued the State needed to provide the actual 911 operator that took the call to authenticate Ms. Rimschneider's voice and ensure the correct recording was put into the system. (R. 34, p. 12:18-14:18).

The trial court offered the Defense an adjournment to prepare for these witnesses but the Defense declined. (R. 34, p. 15:23-16:5). The trial court allowed the State to authenticate the 911 calls under Wis. Stat. § 909.015(6) as a business record made in the regular course of a 911 operator's business. (R. 34, p. 18:6-19:4). As far as the delay and unfair surprise, the trial court held that little could be gleaned from these witnesses, the Defense could have done a public records request if it wanted to question these witnesses, and that the State was not trying to ambush the Defense or hide anything with these additional witnesses. (App. 1-116-117; R. 34, p. 20:16-21:4).

The Trial:

Upon receipt of the 911 call, Police Officer Martin Saavedra was dispatched to investigate the compliant. (R. 35, p. 104:4-12). Officer Saavedra testified that when he approached the residence he noticed three people standing in the middle of the street, in particular a black female that was screaming and waiving her hands in the air to get his attention. (R. 35, p. 107:20-25; R. 36, p. 27:11). Officer Saavedra identified the woman as Ms. Rimschneider and

testified that she appeared "hysterical, angry, crying, mad, very emotional." (R. 35, p. 108:9-11). He further noted that her face was swollen and she exhibited some minor scratches and bleeding. (R. 35, p. 109:13-15).

Officer Saavedra testified that Ms. Rimschneider told him that Mr. Hunter caused her injuries by punching her multiple times in the face and stabbing her with a screwdriver in her right leg. (R. 35, p. 109:20-110:23). Officer Saavedra further testified that Ms. Rimschneider told him that during the fight, the defendant armed himself with a sawed-off shotgun, pointed it at her and threatened to kill her. (R. 35, p. 110:16-20).

After speaking with Ms. Rimschneider and setting up a containment around the house with other officers, Officer Saavedra testified that he searched the house with Police Officer Edgard Bauzo-Santiago. (R. 35, p. 113:22-114:10). Officer Saavedra testified that he found two unspent shotgun rounds in the hallway leading to Ms. Rimschneider's bedroom. (R. 35, p. 115:20-25). Inside the house, Officer Saavedra located the victim's sister, Ms. Janelle Porter, her boyfriend and a child.[2] (R. 36, p. 30:20-31:2; 37:10-14). Officer Saavedra then searched the rear detached garage. (R. 35, p. 118:3-16). The garage was locked, but Officer Saavedra testified that he forced his way inside and located the defendant, Mr. Hunter. (R. 35, p. 119:11-14). Officer Saavedra reported that Mr. Hunter appeared to be intoxicated at the time of his arrest. (R. 36, p. 11:10-17).

Once Mr. Hunter was in custody, Officer Saavedra interviewed Ms. Rimschneider again and conducted a further search of the house for weapons. (R. 35, p. 122:14-16; 123:2-3). He testified that he found the shotgun hidden in a speaker compartment, inside a blue cloth bag, in the crawlspace near the hallway leading to Ms. Rimschneider's bedroom. (R. 35, p. 123:5-10). Officer Saavedra further stated that he recovered a box of ammunition inside the blue cloth bag. (R. 35, p. 123:9-10).

[2] Officer Saavedra testified that he only questioned Ms. Rimschneider and Ms. Porter and was unaware if any other officers questioned Ms. Porter's boyfriend. (R. 36, p. 34:16-21; 40:8-14).

Officer Saavedra testified that he did not personally find the screwdriver during his search of the house. (R. 36, p. 31:20-24). Rather, Ms. Rimschneider handed him the red and black screwdriver that she alleged Mr. Hunter used to stab her in the leg. (R. 35, p. 124:21-125:5; R. 36, p. 31:8-24).

As part of the booking process, Mr. Hunter was searched for injuries and the police did not note any. (R. 35, p. 120:14-24). Officer Saavedra also testified that he did not recall any injuries on Ms. Rimschneider's hands, but he did indicate on the domestic violence supplemental report that she had either pain or injury to her right hand. (R. 36, p. 34:1-11; 39:1-7).

At the police station, the police took Mr. Hunter's fingerprints and inputted them into an electronic database. (R. 36, p. 32:10-18). Forensic Investigator Jason Reifschneider testified that he found a single fingerprint on the sticky (adhesive) side of the electrical tape, which was holding the pistol grip handle of the gun together. (R. 36, p. 54:10-18, 56:5-6). He did not fingerprint the shell casings. (R. 36, p. 62:7-10). The Milwaukee Police Department's latent print examiner, David Wagoner, confirmed that the print did not belong to Mr. Hunter, and moreover, he could not find a matching to the print within the electronic database. (R. 36, p. 66:9-23).

Police Officer Patrick Elm testified that he conducted an in-custody interview with Mr. Hunter on September 9, 2013. (R. 37, p. 7:6-11). Mr. Hunter told Officer Elm that Ms. Rimschneider was his girlfriend and they had a child together, but that he did not live with her. (R. 37, p. 11:1-5). Officer Elm testified that Mr. Hunter stated that he and Ms. Rimschneider got into an argument on the night of the Incident, wherein she hit him on the forehead. (R. 37, p. 12:8-22). Officer Elm testified that he did not notice any injury on Mr. Hunter's face, but admitted the interview took place two days after the Incident. (R. 37, p. 13:18-23, 17:20-25). During the argument Ms. Rimschneider threatened Mr. Hunter, saying she was going to "fix him" and thereafter called 911. (R. 37, p. 14:18-23). Officer Elm testified that Mr. Hunter said he hid in the garage when Ms. Rimschneider called the police because he was scared of the police coming

because he was falsely accused of domestic violence in the past. (R. 37, p. 15:1-5, 18:3-14). Officer Elm testified that Mr. Hunter denied stabbing Ms. Rimschneider with a screwdriver and further denied ever possessing a shotgun. (R. 37, p. 16:2-10).

The State played the 911 calls of both Ms. Rimschneider and Ms. Porter for the jury. (R. 37, p. 26:10-12; R. 39, Ex. 14). Thereafter the State rested and the Defense moved to dismiss the case. (R. 37, p. 27:22-23, 28:19). The trial court denied the motion to dismiss, stating that the jury could find guilt beyond a reasonable doubt based on the evidence proffered by the State. (App. 1-118; R. 37, p. 29:2-4). The Defense rested and renewed its motion to dismiss. (R. 37, p. 34:18-19). The trial court once again denied the motion, stating that the jury could find guilt beyond a reasonable doubt based on the evidence put forth by the State. (App. 1-119; R. 37, p. 34:23-35:6).

The jury found Mr. Hunter guilty of count one, felon in possession of a firearm; guilty of count two, possession of a short-barreled shotgun; guilty of count three, endangering safety by use of a dangerous weapon (intentionally pointing a firearm at a person); guilty of count four, battery, use of a dangerous weapon; and guilty of count five, disorderly conduct, use of a dangerous weapon. (R. 37, p. 97:13-98:22; R. 13-17). The Defense thereafter moved for judgment notwithstanding the verdicts. (R. 37, p. 101:13-14). The trial court denied this motion, stating that the jury could find guilt beyond a reasonable doubt. (App. 1-120; R. 37, p. 101:18-19). The trial court entered judgments of guilty on all five counts, including a repeater allegation on all five counts. (App. 1-101-104; R. 37, p. 101:18-23).

The trial court sentenced Mr. Hunter to five years confinement and five years extended supervision on count one; three years confinement and three years extended supervision on count two; nine months in the House of Corrections on count three; nine months in the House of Corrections on count four; and nine months in the House of Corrections on count five. (R. 38, p. 29:19-30:5). All sentences ran concurrent for a total sentence of ten years: five

years initial confinement, five years extended supervision. (R. 38, p. 30:6-9).

Mr. Hunter filed a Notice of Intent to Pursue Postconviction Relief on March 18, 2014. (R. 20). He filed a Notice of Appeal on October 28, 2014. (R. 27). Mr. Hunter now appeals the Judgment of Conviction.

ARGUMENT

I. THE CONFRONTATION CLAUSE SHOULD HAVE BARRED TESTIMONY OF STATEMENTS MADE BY MS. RIMSCHNEIDER AND MS. PORTER TO THE 911 OPERATOR AND POLICE.

A. LEGAL STANDARDS.

The Sixth Amendment to the United States Constitution states that "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. CONST. amend. VI. The counterpart provision from the Wisconsin Constitution is essentially the same. WIS. CONST. art I, § 7.

This Court undergoes a three step analysis when deciding a confrontation clause challenge. First, the Court determines whether the challenged statements are admissible under the rules of evidence; second, if the statements are admissible, whether its admission violated the defendant's right to confront its accuser; and third, if the violation occurred, whether such error was harmless. ***State v. Searcy***, 2006 WI App 8, ¶42, 288 Wis. 2d 804, 709 N.W.2d 497 (citations omitted).

B. STANDARD OF REVIEW.

The constitutional issue of whether an out-of-court assertion violates a defendant's right to confrontation is an issue that this Court reviews *de novo*. ***State v. Rodriguez***, 2006 WI App 163, ¶ 13, 295 Wis. 2d 801, 722 Wis. 2d 136; *see also* ***State v. Jenson***, 2007 WI 26, ¶ 12, 299 Wis. 2d 267,

727 N.W.2d 518. "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***State v. Beauchamp***, 2010 WI App. 42, ¶ 7, 324 Wis. 2d 162, 781 N.W.2d 254.

C. ARGUMENT.

1. The Trial Court Improperly Admitted into Evidence the Statements Ms. Rimschneider and Ms. Porter Made in the 911 Calls and those Ms. Rimschneider Made to Police Because the Statements were Hearsay and did not Qualify as Either a Present Sense Impression or an Excited Utterance.

Under Wis. Stat. § 908.03(1-2), the following types of statements are not excluded by the hearsay rule, despite the unavailability of the declarant: (1) present sense impression: A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter; and (2) excited utterance: A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. In determining whether a statement is an excited utterance the important factors to consider are timing and stress. ***State v. Boshcka***, 178 Wis. 2d 628, 641, 496 N.W.2d 627 (Wis. App. 1992).

The trial court held that the statements made to the 911 operator and to the police at the scene came into evidence as exceptions to the hearsay rule, specifically excited utterance and present-sense impression. (App. 1-108-109, 110-112; R. 33 p. 54: 7-23; R. 34, p. 4:1-3). The trial court was incorrect.

The statements made by Ms. Rimschneider and Ms. Porter to the 911 operator do not qualify as a present-sense impression or an excited utterance because the event or condition they both described was over. First, the statements are not present-sense impressions because, beginning at five minutes and twenty seconds into the call, both women describe the event in terms of the past. (R. 37, p. 26:10-27:6;

R. 39). They answered the operators' questions and added details as they recalled them, instead of explaining their perceptions of an ongoing event. (R. 37, p. 26:10-27:6; R. 39). Second, based on Ms. Rimschneider's statements, the statements do not qualify as an excited utterance because Ms. Rimschneider told the 911 operator that Mr. Hunter ran across the street. (R. 33, p. 17:13-18; R. 34, p. 26:10-27:6; R. 39). Thus, the stress of the event was over, rendering these statements inadmissible because both Ms. Rimschneider and Ms. Porter had time to stop and think before speaking. ***Muller v. State***, 94 Wis. 2d 450, 467, 289 N.W.2d 570 (1980) (idea behind excited utterance exception is that "people instinctively tell the truth but when they have time to stop and think they may lie"). Given the time lapse between the triggering event and the subsequent 911 calls, as well as the lack of threat while speaking to the operator, the trial court should have ruled these statements as inadmissible hearsay.

Likewise, the statements Ms. Rimschneider made to Officer Saavedra at the scene of the Incident should have been excluded as inadmissible hearsay. First, the statements were not present-sense impressions because the event ended several minutes before Officer Saavedra arrived. (R. 33, p. 26:11-18, 38:11-20). Second, the statements were not excited utterances because the startling event was over and Ms. Rimschneider was able to calmly recall the event when talking to Officer Saavedra. (R. 33, p. 27:4-8). For purposes of determining the admissibility of an excited utterance, "the interval between the incident and the declaration is not measured by the mere lapse of time but by the duration of the excitement the event caused." ***Boshcka***, 178 Wis. 2d at 641 (citations omitted). Unlike ***Boshcka***, where the Court ruled the statements admissible after the declarant endured repeated and aggravated sexual assaults, the Incident here was a single event that occurred shortly before Ms. Rimschneider called police. (R. 39, Ex. 14). The duration of the event was so short such that the excitement had ended by the time Ms. Rimschneider talked to Officer Saavedra, rendering her statements ripe for cross-examination. Moreover, Ms. Rimschneider was not in danger when Officer Saavedra arrived because she was standing in the street, talking with two other people. (R. 35, p. 107:20-25); ***Muller***, 94 Wis. 2d at 467 ("a significant factor is the stress or nervous shock

acting on the declarant at the time of the statement"). Ms. Rimschneider was able to calmly answer Officer Saavedra's questions. (R. 33, p. 36:7-22). Thus, the trial court should have excluded Mr. Rimschneider's statements made to Officer Saavedra at the scene as inadmissible hearsay.

2. The Statements Ms. Rimschneider and Ms. Porter Made to the 911 Operator and the Police at the Scene Were Testimonial Because the Emergency was Over and the Statements Described Past Events.

Should this Court agree with the trial court that the challenged statements properly came in under the rules of evidence, it must then determine whether the statements violated Mr. Hunter's right to confront his accusers.[3] ***Searcy***, 2006 WI App 8, ¶42. The determination of whether a defendant's constitutional right of confrontation was violated turns on whether the out-of-court statement was testimonial, thus making the declarant a "witness" for purposes of the Sixth Amendment. ***Davis,*** 547 U.S. at 821. ***Davis*** explained that "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ***Id***. at 822.

In ***Rodriguez***, the Wisconsin Court of Appeals synthesized the Supreme Court decisions in ***Crawford*** and ***Davis*** and held that "whether a particular statement made to a 911 dispatcher was testimonial would depend on which capacity the caller was using when contacting the system." 2006 WI App 163, ¶ 22. The court divided the calls between those where law enforcement is needed and those where an emergency response is requested. ***Id***. Moreover, a statement

[3] Ms. Rimschneider and Ms. Porter were both unavailable as neither came to court and Mr. Hunter had no prior opportunity in which to confront them. *Crawford*, 541 U.S. at 68 (requiring a showing of unavailability and a prior opportunity to cross-examine for a viable confrontation clause challenge).

is testimonial when a reasonable person in the position of the declarant would objectively foresee that their statement might be used in prosecuting the crime. ***Jensen***, 2007 WI 26, ¶ 25.

Based on ***Davis***, ***Rodriguez*** and ***Jensen***, the trial court should have prohibited the jury from hearing the contested statements made by Ms. Rimschneider and Ms. Porter to the 911 operator because the emergency was over. ***Davis***, 547 U.S. at 827 (noting significance between "speaking about events *as they were actually happening*, rather than describing past events"). The triggering event here—the alleged attack by Mr. Hunter against Ms. Rimschneider—was over because Mr. Hunter had fled by this point in the conversation[4], rendering her statements discussing a past event testimonial. ***Id***. (R. 33, p. 17:13-18; R. 39). Moreover, ***Davis*** explained that the nature of what was asked and answered is a factor in determining whether the statements were testimonial. ***Id.*** The purpose and nature of the questions at this stage of the call was no longer to resolve the present emergency—the police already had her location, the nature of the alleged assault, the name and description of the alleged attacker—but rather to obtain details of a past event. (R. 39). ***Id***. at 827 (Statements testimonial where interrogation is directed "solely at establishing facts of a past crime."). The timing, purpose and nature of the questions thus show that the statements here were testimonial and should have been excluded.

Likewise, the statements Ms. Rimschneider made to Officer Saavedra should have been excluded by the trial court because the purpose of the questions was to establish facts of a past event and not to address an ongoing emergency. The facts here are similar to those decided by the ***Davis*** Court in ***Hammon v. Indiana***, wherein the police officer questioned an alleged domestic violence victim away from her husband. ***Davis***, 547 U.S. at 830. The ***Davis*** Court explained that the statements were testimonial because the officer was investigating past criminal conduct, the victim was not under an immediate threat and the emergency was over. ***Id.***

[4] Ms. Porter similarly called 911 after Mr. Hunter had fled, rendering her statements testimonial because she was describing a past event. (R. 39).

Applying the reasoning from ***Davis***, this Court should find that Officer Saavedra's questions to Ms. Rimschneider were investigatory in nature. Officer Saavedra confirmed the facts Ms. Rimschneider reported in the 911 call: that she was allegedly threatened with a gun, battered by Mr. Hunter and that he ran away when she called the police. (R. 35, p. 109:20-110:23; R. 33, p. 32:12-15). Officer Saavedra observed that while Ms. Rimschneider was still emotional, she was no longer under an immediate threat as she was standing in the middle of the street, talking with a group of people. (R. 35, p. 107:20-109:24). Consequently, the purpose of Officer Saavedra's questions was to determine "what happened" rather than "what is happening," rendering Ms. Rimschneider's answers testimonial. ***Davis***, 547 U.S. at 830; ***Rodriguez***, 2006 WI App 163, ¶ 23. Moreover, an objectively reasonable person in Ms. Rimschneider's shoes would understand that her statements might be used for future prosecution because she called the police presumably to arrest Mr. Hunter for his conduct. ***Jensen***, 2007 WI 26, ¶ 25. Using the reasonable person standard, this Court should find that she either "overtly or covertly intended…to implicate an accused at a later judicial proceeding" by calling the police and later making accusatory statements when questioned. ***Rodriguez***, 2006 WI App 163, ¶ 26.

Using the factors outlined in ***Davis*** to determine whether a statement is testimonial in nature, it is clear the trial court erred in allowing the jury to hear this evidence. Specifically, the purpose of the questions was investigatory, the emergency had ended and all the challenged statements described a past event. Mr. Hunter is entitled to a new trial wherein he can confront his accusers.

3. The Trial Court's Decision to Allow the Statements of Ms. Rimschneider and Ms. Porter into Evidence was not a Harmless Error.

Upon a finding that the trial court violated the Defendant's right to confront his accusers, this Court must determine whether that error was harmless. ***Jensen***, 2011 WI App 3, ¶30. The U.S. Supreme Court has instructed that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless

beyond a reasonable doubt." ***Chapman v. California***, 386 U.S. 18, 24 (1967).

In ***State v. Stuart***, 2005 WI 47, ¶ 41, 279 Wis. 2d 659, 695 N.W.2d 259, the Wisconsin Supreme Court delineated the factors to determine whether an error is harmless and chief among them was the importance of the erroneously admitted evidence. Here, the statements made by Ms. Rimschneider and Ms. Porter to the 911 operator, as well as the statements Ms. Rimschneider made to police at the scene, were crucial in proving the State's case. These statements placed Mr. Hunter at the scene of the Incident, imputed actions upon him involving battery, possession of a short-barreled shotgun and disorderly conduct and eventually led to his arrest and conviction. The significance of this testimony cannot be overstated.

Moreover, this evidence permitted the jury to hear an unchallenged version of the events comprising the Incident. The jury never got the benefit of hearing a cross-examination or the opportunity to assess the truthfulness of these statements. ***State v. Samuel***, 2002 WI 34, ¶ 32, 252 Wis. 2d 26, 643 N.W.2d 423 (citations omitted) ("Cross-examination is an essential tool for 'sifting the conscious of the witness' and thereby protecting a defendant's right at trial."). It was unable to assess the character and credibility of these witnesses—its essential role in a jury trial. ***State v. Friedrich***, 135 Wis. 2d 1, 16, 398 N.W.2d 763 (1987) (stating that witness credibility and the weight given to their testimony are the sole province of jury). Because the jury only heard Ms. Rimschneider's and Ms. Porter's testimony through Officer Saavedra recollections of the Incident, it was unable to complete its essential function of scrutinizing and weighing the testimony of all the relevant witnesses. ***Hampton v. State***, 92 Wis. 2d 450, 462, 285 N.W.2d 868 (1979) (stating that jury's duty is to "scrutinize and weigh testimony of witnesses and to determine the effect of the evidence as a whole."). For the above-stated reasons, this error was not harmless but rather instrumental in Mr. Hunter's conviction.

Mr. Hunter requests that this Court reverse the conviction and order a new trial wherein the portion of the 911 recording, as well as Ms. Rimschneider's statements to

police at the scene of the Incident, that violate Mr. Hunter's right to confront his accusers are excluded.

II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS.

A. LEGAL STANDARDS.

Whether the evidence is sufficient to sustain a jury's verdict is a question of law. ***State v. Tolliver***, 149 Wis. 2d 166, 174, 440 N.W.2d 571 (Ct. App. 1989). The test is whether the evidence adduced, believed and rationally considered by the jury was sufficient to prove his or her guilt beyond a reasonable doubt. ***State v. Von Loh***, 157 Wis. 2d 91, 101, 458 N.W.2d 556 (Ct. App. 1990).

Circumstantial evidence is as good as direct evidence, but it must "be sufficiently strong to exclude every reasonable theory of innocence, that is, the evidence must be inconsistent with any reasonable hypothesis of innocence. This is a question of probability, not possibility." ***Stewart v. State***, 83 Wis. 2d 185, 192, 265 N.W.2d 489 (1978) (quotations omitted).

Moreover, a criminal conviction must be reversed if no rational trier of fact could have found guilt beyond a reasonable doubt on the trial record. ***Jackson v. Virginia***, 443 U.S. 307, 318-320, 324 (1979).

B. STANDARD OF REVIEW.

On appeal, this Court must approve a jury's verdict if it is supported by credible evidence. ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 408, 331 N.W.2d 585 (1983). Additionally, the evidence must be viewed in a light most favorable to sustain the verdict. ***York v. National Continental Ins. Co.***, 158 Wis. 2d 486, 493, 463 N.W.2d 364 (1990).

C. ARGUMENT.

1. The Circumstantial Evidence Fell Short of Proving Mr. Hunter had Actual Possession of a Firearm, Namely the Short-Barreled Shotgun.

In order to prove possession, the State must show that the defendant "knowingly had physical control of the firearm." ***State v. Black***, 2001 WI 31, ¶19, 242 Wis. 2d 126, 624 N.W.2d 363. Knowingly means "conscious possession." ***Id***. at ¶20. Possession can be proved two ways: actual possession or constructive possession. ***State v. Peete***, 185 Wis. 2d 4, 14-15, 517 N.W.2d 149 (1994). Actual possession, however, is the only issue relevant in this case.[5]

The State cannot prove that Mr. Hunter had actual possession of the short-barreled shotgun for several reasons.[6] First, no gun was ever found on Mr. Hunter's person. When Mr. Hunter was arrested, he was searched and no gun was located. Rather, the gun was found inside Ms. Rimschneider's residence by Officer Saavedra during a second sweep of the residence. (R. 35, p. 123:5-10). Moreover, Officer Elm testified that during his interrogation of Mr. Hunter, Mr. Hunter denied ever being inside the residence on the night of the Incident. (R. 37, p. 16:11-18). The evidence shows that Mr. Hunter had never possession the firearm in question on the night of the Incident.

Second, Mr. Hunter did not live at the property wherein the gun was recovered by the police and had no knowledge that a gun was on the property during his visit. (R. 37, p. 11:2-5). Constructive possession "may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion or control, *provided that the accused has knowledge of the drug*." ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977) (emphasis added). Using the

[5] The trial court only instructed the jury as to actual possession. (R. 37, p. 37:2-39:16).

[6] As argued in Section II, because the evidence was insufficient to prove the Defendant ever possessed a firearm on the night of the Incident, it is likewise insufficient to prove the charge of endangering safety by use of a dangerous weapon (intentionally pointing a firearm at a person). The reasons argued in Section II for a reversal apply equally to counts one through three because each count relies on the Defendant having possessed the short-barreled shotgun—a fact the evidence refutes.

law of ***Schmidt***, the State cannot prove constructive possession using these facts, because there is no evidence Mr. Hunter knew of the presence of the gun, the gun was hidden inside a cloth bag in a speaker compartment in the crawl space leading to Ms. Rimschneider's bedroom and any of Ms. Rimschneider's visitors could have accessed or stored it there. (R. 35, p. 123:5-10; R. 37, p. 16:7-10). In fact, on the night of the Incident, Ms. Porter had a male guest at the house, but Officer Saavedra was not aware if he was ever questioned regarding the gun. (R. 36, p. 34:16-21; 40:8-14). Because the trial court did not instruct the jury on constructive possession, however, any such inference that Mr. Hunter's visit to the house implied possession should be overturned by this Court as an unreasonable assumption and not based on the law because Mr. Hunter never knowingly had physical control of the firearm. ***Black***, 2001 WI 31, ¶19; (R. 77 p. 91:1-22).

Third, the fingerprint evidence supports the theory that Mr. Hunter did not possess the firearm. The fingerprint analysis shows that while a fingerprint was found on the short-barreled shotgun, the fingerprint did not match that of Mr. Hunter. (R. 36, p. 66:9-23). The State declined to test the cartridges found in the hallway for fingerprints. (R. 36, p. 62:7-10). Moreover, David Wagoner, the latent print examiner, testified that although fingerprints are not recovered in a high number of cases, that percentage goes up when, as here, the gun is handled in the summer and put into a storage container, the bag within the speaker unit, for protection. (R. 36, p. 70:11-71:9). Given that a print with comparative value was recovered in this case and did not match Mr. Hunter, and no other prints were found despite the conditions under which the gun was stored, it was a remote possibility that he possessed the gun—not a probability. ***Stewart***, 83 Wis. 2d at 192.

Finally, the 911 calls were used as the chief evidence to convict Mr. Hunter but nowhere on the calls can you hear Mr. Hunter's voice to confirm his presence. The jury heard Ms. Rimschneider screaming and shouting on the recording but this only confirms half of the story—what Ms. Rimschneider experienced. (R. 37, p. 26:10-25; R. 39, Ex. 14). The other side of the story, Mr. Hunter's, was explained

to Officer Elm. Officer Elm testified that Mr. Hunter never stepped foot inside Ms. Rimschneider's residence on the night of the Incident and only ran into the garage when Ms. Rimschneider called 911 because of previous bad experiences with the police. (R. 37, p. 14:24-15:5, p. 16:11-18 p. 18:3-12). Officer Elm further testified that Mr. Hunter told him he did not possess the short-barreled shotgun. (R. 37, p. 16:7-10). Given that Ms. Rimschneider did not appear at trial to corroborate her testimony, the jury was unreasonable to rely on the 911 calls to convict Mr. Hunter because there was no evidence that he ever possessed the gun beyond Ms. Rimschneider unfounded accusations.

Due to the lack of evidence and testimony linking Mr. McGowan to the gun, the jury was unreasonable to conclude that the gun recovered by police meant Mr. Hunter knowingly had physical control of the firearm. ***Black***, 2001 WI 31, ¶19

III. THE TRIAL COURT ERRED IN ALLOWING THE 911 OPERATOR TO TESTIFY BECAUSE THE STATE'S FAILURE TO DISCLOSE THIS WITNESS AHEAD OF TRIAL PREJUDICED THE DEFENSE.

A. LEGAL STANDARDS.

When reviewing a discovery violation, this Court must take three steps: first, determine whether the State violated the discovery statute; second, decide whether the State has shown "good cause" for said violation; and three, if no good cause shown by the State, decide whether the defendant was prejudiced by the evidence or testimony. ***State v. DeLao***, 2002 WI 49, ¶¶14-15, 252 Wis. 2d 289, 643 N.W.2d 480.

B. STANDARD OF REVIEW.

The issue of whether the State violated the discovery statute, whether there was "good cause" for such a violation and whether that violation prejudiced the defendant are questions of law this Court reviews independently. ***State v. Harris***, 2008 WI 15, ¶15, 307 Wis. 2d 555, 745 N.W.2d 397.

C. ARGUMENT.

1. The State violated Wis. Stat. § 971.23(1)(d).

The first step in reviewing an alleged discovery violation is to determine whether the State violated the discovery statute. ***DeLao***, 2002 WI 49, ¶14. Section 971.23(d) of the Wisconsin Statutes states, in relevant part, that the district attorney must disclose to the defendant "a list of all witnesses and their addresses whom the district attorney intends to call at the trial."

Here, Wis. Stat. § 971.23(1)(d) required the State to provide the Defense with the name and address of all their witnesses, including the 911 operator and any authenticating witnesses they planned to call at trial. The trial court found that the State, in failing to timely list both the actual 911 operator and later the authenticating witnesses, did not comply with its discovery obligations. (App. 1-113-117; R. 33, p. 9:7-14, 11:7-8; R. 34, p. 21:14-19). Thus, the record shows that the State violated Wis. Stat. § 971.23(d).

2. The State cannot prove "good cause" for its violation of Wis. Stat. § 971.23(1)(d).

This Court decides whether the State has shown "good cause" for the discovery violation without deference to the trial court's decision. ***State v. Martinez***, 166 Wis. 2d 250, 259, 479 N.W.2d 224 (Ct. App. 1991). In making this decision, the fact that the State acted in "good faith" is not sufficient to show "good cause." ***DeLao***, 2002 WI 49, ¶53.

Pursuant to Wis. Stat. § 971.23(7)(m) governing sanctions for discovery violations, "the court shall exclude any witness not listed…unless good cause is shown for failure to comply." The State's reason for its discovery violation was that the prosecuting attorney had been involved with the case "for a very brief time" and could not speak to what happened before he joined the case, and instead argued that the damage was minimal because the Defendant had the 911 call. (R. 33, p. 7:22-8:8). The trial court expressed the desire that the district attorney's office work more efficiently when someone goes on maternity leave but ultimately concluded that the

State did not have any "ill will" or act "purposeful" in excluding the 911 operator from the witness list. (App. 1-113-115: R. 33, p. 9:7-12, 11:1-3).

The State failed to show good cause for its discovery violation for not listing the 911 operator on its witness list. The State's reasoning that the attorney came into the case late and was unaware of the previous attorney's actions is not sufficient because negligence does not "constitute good cause as a matter of law." ***Martinez***, 166 Wis. 2d at 259. In refusing to draw a distinction between information the State possesses and information the police possesses, the Wisconsin Supreme Court explained that the "State is charged with knowledge of material and information in the possession or control of others who have participated in the investigation…." ***DeLao***, 2002 WI 49, ¶24. Surely this reasoning should apply to attorneys working within the same office. Consequently, the breakdown of communication between the attorneys in the State's office does not qualify as "good cause" for the discovery violation and the trial court erred by excusing such conduct because it found the conduct neither willful nor purposeful.

3. The inability to timely and properly investigate the 911 operator before trial prejudiced Mr. Hunter's defense and justifies a new trial.

The defendant only receives a new trial where it can prove it was prejudiced by the State's discovery violation. ***DeLao***, 2002 WI 49, ¶60. The error is harmless and no prejudice results from the discovery violation "when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Harris***, 2008 WI 15, ¶43.

The trial court here concluded that there was no prejudice in failing to list the witnesses because the Defense had the actual 911 call, little information could be gleaned from the witnesses and the Defense could have done a public records request if it really wanted to investigate this information. (App. 1-115-117; R. 33, p. 11:9-11; R. 34, p. 20:4-21:4).

The Defense was ambushed by the State's initial decision to call the 911 operator on the first day of trial and its later decision to instead call two employees from the police department as authenticating witnesses because they were not listed on the State's witness list and the Defense did not have an opportunity to question these witnesses before trial. The State had an obligation pursuant to Wis. Stat. § 971.23 to disclose these witnesses a "reasonable time" before trial to allow the Defense to adequately prepare. The day of trial is not considered reasonable. ***DeLao***, 2002 WI 49, ¶ 63 (it was *particularly significant* for the court's prejudice determination that the State disclosed the witness statements during trial).

Moreover, the twin purposes of criminal discovery—to ensure fair trials and encourage plea deals—are frustrated where the state fails to provide the required information before trial. ***Id***. at ¶64. Defense counsel must "be able to rely upon evidence as disclosed by the state; otherwise, the purpose of discovery is frustrated and more injustice is done than if no discovery were allowed." ***Id***. at ¶63 (citation omitted). These last minute disclosures prejudiced Mr. Hunter because he had the choice of proceeding with a trial where his attorney was not fully prepared to cross-examine these witnesses or take a continuance and spend extra time in jail for the State's mistakes. The trial court erred in allowing these witnesses to testify because Mr. Hunter's defense was prejudiced due to a lack of preparation arising out of the State's negligence.

As the ***DeLao*** court explained, if the defense cannot rely on the discovery disclosed by the State "more injustice is done than if no discovery were allowed." ***Id***. Such is the case here where the Defense was ambushed with witnesses it had no previous knowledge of and was not given the opportunity to investigate before trial. The State's violation of Wis. Stat. § 971.23(1)(d), its failure to show good cause for this violation and the fact that it prejudiced Mr. Hunter's defense should have caused the trial court to grant a mistrial. Mr. Hunter is entitled to a new trial.

CONCLUSION

Based upon the argument and authorities presented herein, the Defendant-appellant respectfully requests this Court to vacate the convictions for felon in possession of a firearm, felon in possession of a short-barreled shotgun and endangering safety by use of a dangerous weapon (intentionally pointing a firearm at person) entirely due to a lack of sufficient evidence and direct the trial court to dismiss these charges with prejudice or, in the alternative, grant a new trial with the instruction to exclude the portions of the 911 call and victim statements that violate the Confrontation Clause, as well as exclude the 911 operator from testifying at trial.

Dated this 15th day of January, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7,789 words.

I hereby further certify that filed with this brief, as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I hereby further certify that an electronic copy of this Brief was submitted pursuant to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the Brief is identical to the text of the paper copy of the Brief.

Dated this 15th day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Brief of Defendant-Appellant Shironski A. Hunter and corresponding appendix have been served via U.S. mail to the following on January 15, 2015:

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