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

REPLY BRIEF OF DEFENDANT-APPELLANT

Submitted By:

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REPLY ARGUMENT

Mr. Hunter incorporates herein by reference all of the arguments made in his initial brief. Mr. Hunter further responds to the arguments made by the State to the extent such arguments were not covered in his initial brief.

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

A. The Statements Made by Ms. Rimschneider and Ms. Porter Did Not Qualify as Excited Utterances.

The State argues in its response brief that Ms. Rimschneider and Ms. Porter's statements to both the 911 operator and Officer Saavedra qualify as excited utterances because the emergency was ongoing and both women were still upset by the event when making the statements. (State's Brief at 12-13).

As argued in Mr. Hunter's principal brief, at the time Ms. Rimschneider and Ms. Porter made the contested statements, the stress of the event was over. Specifically, Ms. Rimschneider told the 911 operator that Mr. Hunter ran across the street and thus she was no longer in danger. (R. 33, p. 17:13-18; R. 34, p. 26:10-27:6; R. 39). Ms. Rimschneider thereafter had the opportunity to think carefully about her statements and how they might affect the prosecution of Mr. Hunter—a situation which the excited utterance exception to hearsay is not supposed to protect. ***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").

Moreover, when Officer Saavedra arrived, several minutes had passed since the Incident occurred and Ms. Rimschneider was talking in the middle of the street with two other people. (R. 35, p. 107:20-25). The State argues that Ms. Rimschneider was still under the stress of the event

because Officer Saavedra testified that she was crying and acted frightened. (State's Brief at 12). Officer Saavedra, however, also testified that Ms. Rimschneider was able to calmly answer his questions. (R. 33, p. 36:7-22). Given her ability to answer questions and help the police, the trial court should have excluded these statements. ***Id.*** ("a significant factor is the stress or nervous shock acting on the declarant at the time of the statement").

The State is correct that when this Court determines whether a statement is an excited utterance the time between the startling event and when the statement is made "is not measured in mere lapse of time but by the duration of excitement the event has caused." ***State v. Boshcka***, 178 Wis. 2d 628, 641, 496 N.W.2d 627 (Wis. App. 1992). The State uses ***Boshcka*** to argue that its application of the excited utterance exception three to four hours beyond the startling event means it should apply here where it was only a matter of minutes. The comparison fails, however, because enduring repeated aggravated sexual assaults is vastly different than experiencing a single domestic disturbance that lasted minutes. (R. 39, Ex. 14). The short length of the Incident, as well as the manner in which the women described the event to the 911 operator and police as something that happened in the past, should have led the trial court to conclude the statements were inadmissible hearsay.

Given the fact that the danger had abated, as well as the lapse of time between the startling event and when Ms. Rimschneider and Ms. Porter made the contested statements, the trial court was manifestly wrong by admitting these statements into evidence.

B. The Contested Statements by Ms. Rimschneider and Ms. Porter Were Testimonial and Violated the Confrontation Clause.

The State argues that the contested statements are non-testimonial because the statements were made during an ongoing emergency wherein the police were trying to apprehend the suspect and address the victim's injuries. (State's Brief at 19). This argument disregards a few key points.

First, the emergency truly was over. Ms. Rimschneider told the 911 operator that Mr. Hunter left the house and thereafter felt safe enough to stand outside in the middle of the street talking with two other people. (R. 33, p. 17:13-18; R. 34, p. 26:10-27:6; R. 39; R. 35 p. 107:20-25). These statements are testimonial because she was describing past events. ***Davis v. Washington***, 547 U.S. 813, 827 (2006) (noting significance between "speaking about events *as they were actually happening*, rather than describing past events"). The State argues that this delineation between present and past events is absurd because it would only make statements nontestimonial when the victim was in the process of being beaten. (State's Brief at 18). But the divide is not as fine as the State argues. The statements became testimonial only when the emergency ended—the Defendant left—and the victim was able to calmly answer police questions without fear that Mr. Hunter would hurt her. (R. 33 p. 36:7-22); ***Id.*** at 830 (statements are testimonial when the victim was not under an immediate threat and the emergency is over).

Second, the State incorrectly argues that the questions the police asked and the statements elicited in response are nontestimonial because the purpose was to capture Mr. Hunter and address Ms. Rimschneider's injuries. The evidence, however, shows that the purpose and nature of the questions was no longer to resolve the emergency—the police knew Ms. Rimschneider's location, the nature of the alleged assault, the extent of her injuries and the name and description of the alleged attacker—but rather to obtain details of a past event. (R. 39). ***Id***. The statements here are testimonial because the primary purpose of the questions was to "prove past events potentially relevant to later criminal prosecution." ***Id*** at 822.

Third, the State argues the statements are reliable because they were made during a dangerous situation. (State's Brief at 19-20). As stated above, Ms. Rimschneider was no longer in danger when the police arrived. (R. 35, p. 107:20-109:24). As such, her statements become less reliable because she had time to stop and think about her answers and knew they would likely be used in a future prosecution. ***Muller***, 94 Wis. 2d at 467; *see also* ***State v. Rodriguez***, 2006

WI App 163, ¶ 26, 295 Wis. 2d 801, 722 Wis. 2d 136 (court must analyze the statement to determine whether the declarant "overtly or covertly intended…to implicate an accused at a later judicial proceeding").

The challenged statements are testimonial and require confrontation because the purpose of the police questions was investigatory, the emergency had ended and the statements described a past event.

C. The Trial Court's Decision to Let the Hearsay Testimony into Evidence was Not a Harmless Error.

The State argues that if this Court finds that the trial court abused its discretion by admitting the hearsay statements made by Ms. Rimschneider and Ms. Porter into evidence, any such error was harmless because a reasonable jury would have convicted Mr. Hunter based on the admissible parts of the 911 call, Officer Saavedra's testimony, the police having found Mr. Hunter hiding in the garage and the shotgun recovered by police. (State's Brief at 21). The State's reasoning is flawed on two fronts.

First, the State ignores the grave importance of protecting a defendant's constitutional rights at trial. Although the confrontation clause is not absolute, it's there to ensure the "trier of fact has a satisfactory basis for evaluating the truthfulness of evidence admitted in a criminal case." ***State v. Tomlinson***, 2002 WI 91, ¶ 40, 254 Wis. 2d 502, 648 N.W.2d 367. This Court should not disregard these judicial safeguards based on the *assumption* that the jury would convict due to other evidence. ***Crawford v. Washington,*** 541 U.S. 36, 50 (2004)("the principal evil at which the Confrontation Clause was directed was…its use of *ex parte* examination as evidence against the accused."). Mr. Hunter deserves his day in court to confront his accusers.

Second, the State cannot prove beyond a reasonable doubt that the jury would have convicted absent the hearsay testimony. ***Chapman v. California***, 386 U.S. 18, 24 (1967)("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."). As argued *infra* in Section II, Mr. Hunter contends that the evidence was insufficient to support the convictions. Mr. Hunter is entitled to a new trial in this case where he can either confront his accusers or have a jury make a decision untainted by the hearsay evidence. ***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.").

The contested statements played a large role in Mr. Hunter's conviction. 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. ***State v. Stuart***, 2005 WI 47, ¶ 41, 279 Wis. 2d 659, 695 N.W.2d 259 (court should determine importance of the evidence in determining whether the error was harmless). As such, Mr. Hunter's right to a fair trial, as well as the protection of all defendants' constitutional rights, should encourage this Court to conclude that the admitted statements were not a harmless error.

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

The State's argument that the jury made a fully informed decision that Mr. Hunter possessed a firearm either fails to address or skims over the arguments raised in Mr. Hunter's principal brief that show the jury's decision was unreasonable.

First, the State does not and cannot rebut the evidence that the police never found a gun on Mr. Hunter's person. The State argues that the jury was reasonable to believe that Ms. Rimschneider told Officer Saavedra that Mr. Hunter threatened her with the gun. (State Brief at 26). The evidence, however, fails to support this assertion. The police arrested and searched Mr. Hunter in the garage without incident. The gun was later recovered by the police in the upstairs crawlspace in the house. (R. 35, p. 123:5-10). Thus, the State failed to prove that Mr. Hunter had "physical control

of the firearm," casting reasonable doubt that Mr. Hunter possessed the gun. ***State v. Black***, 2001 WI 31, ¶ 19, 242 Wis. 2d 126, 624 N.W.2d 363.

Second, the State cannot tie the gun to Mr. Hunter through physical evidence. While the State argues that the shotgun rounds found in the hallway and the gun found in the crawlspace was sufficient for the jury to find guilt, the jury was unreasonable to link these items to Mr. Hunter. (State Brief at 26). The fingerprint analysis shows that the fingerprint did not match that of Mr. Hunter. (R. 36, p. 66:9-23). The State skirts over the lack of evidence by stating that a finding of guilt may rest upon circumstantial evidence. (State's Brief at 26). While a conviction may rest on circumstantial evidence, this Court must still decide "that the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." ***State v. Poellinger***, 153 Wis. 2d 493, 508, 451 N.W.2d 752 (1990). A lack of fingerprints on the weapon, in combination with no eyewitness testimony at trial tying him to the gun, is not sufficient to sustain the jury's verdict.

While this Court may not substitute its judgment for that of the jury, it may do so when "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonable, could have found guilt beyond a reasonable doubt." ***Id.*** at 507. The cumulative effect of the evidence—the police never found a gun on Mr. Hunter's person, never found Mr. Hunter's fingerprints on the gun but did find a match for someone else, and Ms. Rimschneider and Ms. Porter, the only people that allegedly saw him with the gun, refused to testify at trial—shows that the jury was unreasonable in convicting Mr. Hunter of the possession charge because all the evidence tilted towards a verdict of innocence.

III. THE STATE'S FAILURE TO DISCLOSE ITS WITNESSES BEFORE TRIAL PREJUDICED THE DEFENSE.

The State misunderstands the Defense's argument as to the prejudice it suffered as a result of the State's failure to

continually disclose its witnesses in accordance with Wis. Stat. § 971.23.[1] Specifically, the State argues that prejudice cannot exist because the 911 operator never testified, but rather Ms. Vasquez and Officer Vance authenticated the 911 recording. The Defense argued in its principal brief and reaffirms here that the last minute replacement of the 911 operator with these two witnesses similarly prejudiced the Defense because it was unable to investigate the witnesses before trial and thus was unprepared for cross-examination.[2]

Wisconsin Statute section 971.23(1)(d) required the State to provide the defendant "a list of all witnesses and their addresses whom the district attorney intends to call at trial." The State argues that it should be absolved of all wrongdoing because it did not originally "intend" to call Ms. Vasquez and Officer Vance until it realized the 911 operator was unavailable.[3] (State Brief at 29-30). Yet, the State provides no citation to this Court that the word "intend" in the statute should be given such a lenient and favorable interpretation. "The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper and intended effect." ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Section 971.23 of the Wisconsin Statutes deals with the State's duty to disclose discovery materials to ensure the defendant has a fair trial. The State's interpretation of the word intend would allow it to call surprise witnesses at any stage of the trial, merely arguing that it did not "intend" to call this witness at the time of drafting their list. This interpretation of the word "intend" goes against the very purpose of the statute. Defense counsel must "be able to rely upon evidence as disclosed by the state; otherwise, the purpose of discovery is frustrated and

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[1] The State asked for a continuance on the first day of trial to call the 911 dispatcher that was not listed on its witness list. (R. 33, p. 4:7-20). Two days later the State no longer wanted to call the 911 operator, but instead wanted to authenticate the 911 recording through Ms. Vasquez and Officer Vance, both of whom the State also failed to list on their witness list. (R. 34 p. 7:11-9:9). Mr. Hunter objected based on Wis. Stat. § 971.23. (R. 33, p. 5:19-6:5; R. 34: p. 9:11-106). *See* Mr. Hunter's principal brief at pp. 7-8.

[2] The State incorrectly focuses on the authentication of the 911 recording. Mr. Hunter objection does not derive from authentication, but rather from the prejudice these last minute witnesses caused to his preparation.

[3] The State also fails to address that it lacked "good cause" for violating Wis. Stat. § 971.23(1)(d). *See* pages 23-24 of the Defendant's principal brief for a discussion of the State's failure to show "good cause" for its violation.

more injustice is done than if no discovery were allowed." ***State v. DeLao***, 2002 WI 49. ¶63, 252 Wis. 2d 289, 643 N.W.2d 480. The State's failure to disclose the 911 operator, as well as the authenticating witnesses, before trial violated both the spirit and the letter of Wis. Stat. § 971.23(1)(d).

Likewise, the State's argument that it did not "intend" to call these witnesses ignores that it had an obligation to disclose its witnesses a "reasonable time" before trial to allow the Defense to adequately prepare. *See* Wis. Stat. 971.23. The day of trial is not considered reasonable. ***DeLao***, 2002 WI 49, ¶ 63.

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 not let these witnesses testify. The State's interpretation of this statute is absurd and consequently this Court should grant Mr. Hunter a new trial wherein he has time to adequately prepare for the State's witnesses.

CONCLUSION

Based on the argument and authorities presented herein and in his initial brief, 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.

Dated this 26th day of March, 2015.

/s/ Marisa R. Dondlinger
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CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a reply brief produced with a proportional serif font. The length of this reply brief is 2,975 words.

I hereby certify that an electronic copy of this reply brief was submitted, which conforms to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the reply brief is identical to the text of the paper copy of the reply brief.

Dated this 26th day of March, 2015.

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/s/ Marisa R. Dondlinger
Marisa R. Dondlinger

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Reply Brief of the Defendant-Appellant Shironski Hunter have been served via U.S. mail to the following on March 26, 2015:

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