STATE OF WISCONSIN : COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

GARY ABDULLAH SALAAM,
Defendant-Appellant.

2014AP2666-CR, 2014AP2667-CR
Milwaukee County Circuit Court
Case #: 11-CF4809
12-CF-69

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES

Did the trial court improperly join and fail to sever the recklessly endangering safety and felon in possession of a firearm case with the felony intimidation of a witness case?

The trial court answered no.

Was the evidence admitted at trial sufficient to support the jury's finding on the intimidation of witness charges that Mr. Salaam was charged with a felony in connection with a proceeding for that felony?

The trial court answered yes.

Did the admission of Elizabeth Brunner's testimony regarding her receipt of a non-emergency call alleged to be from K.H. reporting that she received a call from Mr. Salaam and the purported contents of that call violate the Confrontation Clause of the Sixth Amendment and the Wisconsin Rules of Evidence?

The trial court answered no.

Was Mr. Salaam afforded his due process right to present a defense when he was prohibited from introducing evidence relating to T.A.'s delusional and paranoid thought processes at trial?

The trial court denied Mr. Salaam's motions to admit relevant evidence relating to T.A.'s delusional and paranoid thought processes pursuant to Shiffra/Green which severely limited Mr. Salaam's ability to cross-examine T.A.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither are requested.

STATEMENT OF THE CASE

On November 7, 2011, Defendant-Appellant Gary A. Salaam (hereinafter "Mr. Salaam") was charged by criminal complaint in 2011CF4809 with one count of First Degree Recklessly Endangering Safety, as an act of domestic abuse, as a repeater, in violation of Wis. Stats. 941.30(1), 939.50(3)(f), 968.075(1)(a), and 939.62(1)(c), and one count of Felon in Possession of a Firearm as a repeater, in violation of Wis. Stat. 941.29(2), 939.50(3)(g), and 939.62(1)(b). [R.3] The criminal complaint alleged that on

or about September 19, 2011, Mr. Salaam fired shots at T.A., his former live-in girlfriend, in the area of 13th and Arthur Streets in Milwaukee. Id. Mr. Salaam appeared initially on November 10, 2011. [R.40] Cash bond was set in the amount of $10,000, and Mr. Salaam was ordered to have no contact with T.A., A.R., K.H., A.P., or K.M. [R.40,6]

On November 17, 2011, at the preliminary hearing in 2011CF4809, the State indicated that it had perfected personal service on the alleged victim, T.A., and requested a body attachment on T.A., who failed to appear. [R.41] The State further indicated that it believed it had evidence of felony intimidation of a witness by Mr. Salaam via a series of three telephone calls made on November 15, 2011 from the Milwaukee County House of Correction to T.A. in violation of the Court's no contact order in which Mr. Salaam was alleged to have encouraged T.A. to avoid appearance at the preliminary hearing. Id. These allegations formed the factual basis for the criminal complaint in 2012CF69. After a continued preliminary hearing held on November 30, 2011, at which T.A. appeared as a hostile witness for the State, Mr. Salaam was bound over for trial and an information was filed. [R.43, 11] Mr. Salaam was arraigned on December 13, 2011 and entered a plea of not guilty. [R.44]

On January 6, 2012, Mr. Salaam was formally charged in 2012CF69 by criminal complaint with three counts of Felony Intimidation of a Witness, in violation of Wis. Stat. 940.37(7) and 939.50(3)(g). [R.2] Mr. Salaam appeared initially in that case on January 17, 2012. [R.59] Cash bond was set at $10,000, and Mr. Salaam was ordered to have no contact with T.A., A.R., K.H., and A.P. [R.59,7] A preliminary hearing was

held on February 13, 2012, Mr. Salaam was bound over for trial and an information was filed.[1] [R.60, 61, 8]

On February 14, 2012, Mr. Salaam was arraigned in 2012CF69 and entered a plea of not guilty. [R.60] The State moved to consolidate 2011CF4809 and 2012CF69, which the Court granted. Id. On February 27, 2014, Mr. Salaam moved for relief from prejudicial joinder of the two cases; the Court heard argument on that motion and denied it via oral ruling on April 2, 2012. [2],[3] [R.9, 63]

On May 2, 2012, Attorney Jeffrey W. Jensen filed a notice of appearance on behalf of Mr. Salaam. [R.14] On May 3, 2012, he filed a motion to admit other acts evidence pursuant to 904.04(2), and on June 15, 2012 filed motion requesting an order of the release of T.A.'s medical and mental health records pursuant to State v. Shiffra. [R.16, 18] The Court held a hearing on the motions and denied both on June 28, 2012, finding them irrelevant. [R.68]

On October 8, 2012, the parties filed cross motions requesting that the Court review and rule on the relevance of Children's Court records relating to a child in common between Mr. Salaam and T.A. [R.23-24] The Court, after an in camera review of the documents, denied Mr. Salaam's motion to allow the Children's Court documents to be used by Mr. Salaam at trial, finding them irrelevant. [R. 60:45]

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[1] Due to judicial substitution and Milwaukee County judicial assignment rules, both cases were eventually assigned to the Hon. Ellen Brostrom from February 14, 2012 until August DATE, 2012, at which time the cases were assigned to the Hon. Rebecca Dallet.

[2] A final pretrial was held on April 24, 2013. [R.65] Mr. Salaam's trial counsel at the time, Glen Kulkowski, improperly filed a notice of alibi outside the time limits, and the trial court barred Mr. Salaam from calling the witness at trial. Mr. Salaam requested new counsel and requested modification of his communication privileges to allow him to retain private counsel, both requests were denied. Attorney Jensen was retained to represent Mr. Salaam and the jury trial set for May 8, 2012 was adjourned, with Mr. Salaam waiving his right to a speedy trial. [R.66]

[3] The State filed a conditional Motion to admit T.A.'s testimonial statements made at the preliminary hearing under the forfeiture by wrongdoing on April 27, 2013. Because T.A. appeared at and testified at trial, the Court did not rule on this motion.

Mr. Salaam's consolidated cases were tried before a jury on January 22-25, 2013.[4] [R.74-81] On January 25, 2013, the jury returned a verdict of guilty on all counts. [R.28, 29: 33-35]. On April 19, 2013, Mr. Salaam was sentenced in 11CF4809 on count one to 7 years initial confinement and 5 years extended supervision, consecutive to any other sentence, and on count two to 4 years initial confinement and one year extended supervision, consecutive to any other sentence. [R.35] In case 12CF69, Mr. Salaam was sentenced on all counts to three years initial confinement and one year extended supervision, concurrent to all other counts but consecutive to any other sentence. [R.39] Trial counsel filed a notice of intent to pursue postconviction relief on May 1, 2013. [R.34, 40] Undersigned counsel was appointed to represent Mr. Salaam for any postconviction proceedings on June 19, 2013, and filed a Notice of Appeal on behalf of Mr. Salaam in both cases on November 13, 2014. [R.38, 57] This appeal follows.

STATEMENT OF THE FACTS

The State moved to consolidate Mr. Salaam's cases for trial and Mr. Salaam opposed the motion and further moved to sever the first degree recklessly endangering safety count from the felon in possession of firearm count in 11CF4809, arguing that the jury would necessarily hear as part of the case on the felon in possession count that Mr. Salaam had a prior felony conviction, which would be inadmissible against him if he chose not to testify in his own defense on the recklessly endangering safety count and would improperly prejudice him in that case. [R.9, 12] Mr. Salaam also moved to sever the 2012 intimidation case from the 2011 case, arguing that the cases were not similar and there was no overlapping evidence in the 2011 and 2012 cases. Id. The Court ruled

[4] Trial was adjourned on December 10, 2012 due to the illness of the victim, T.A. [R.74]

that the counts were properly joined for trial. With respect to the felon in possession and the recklessly endangering safety counts, the Court held:

> This is one act or transaction. The first degree recklessly endangering is not an unrelated felony. It is alleged that Mr. Salaam commited that felony, with a gun, while being a felon in possession. [...] The fact is they are one transaction. It is not an unrelated felony. And where there is this one act or transaction, I think that the prejudice to the defendant has got to be quite high to override the public's interest in the efficiency and in not basically trying a case twice. I mean all of the same evidence would come in to prove Mr. Salaam to be a felon in possession other than the fact of the prior felony conviction, and so the overlap is enormous. I don't think that the prejudice to the defendant is so substantial as to merit severance.

[R.63:19-20] With respect to the 2011 and 2012 cases, the Court concluded:

> [T]he evidence of intimidation goes directly to consciousness of guilt. The jury may decide that they don't think it is consciousness of guilt. It is certainly relevant to that. It is certainly admissible to that. [...] Effectively,when I look at how you would have to try either of the cases, they immediately bleed into each other [...]. The old case would be admissible in the new, because the jury would need to know what was the intimidation about. The new case is admissible in the old for the reasons that I just stated.

Id. Mr. Salaam further requested a pretrial ruling allowing him to proffer evidence that T.A.'s mental health issues and drug abuse caused her to have a paranoid perspective; specifically, the defense sought to introduce evidence that Mr. Salaam's landlord witnessed T.A. lose her temper and break into the apartment she shared with Mr. Salaam, for the purpose of showing that the witness had a habit of reacting to separation from Mr. Salaam with a loss of temper and erratic, paranoid behavior. [R.16] The Court denied the motion:

> I don't even see how it is relevant. [...] I don't think that it relates to the facts or a proposition that's of consequence in the determination of the action. I don't think it has any probative value -- or it's very limited, and as a result it's really, just in my opinion, an effort to smear [T.A.'s] character in front of the jury.

[R.68:14-15] Moreover, Mr. Salaam requested that the Court order T.A.'s mental health and drug treatment records to be disclosed to the Court for in camera review pursuant to Shiffra, alleging specifically that in March 2011 he personally observed delusional, erratic behavior on the part of T.A. that he attributed to drug use, and that her mother, K.M., had similar concerns about T.A.'s mental health and paranoia which she attributes to an excessive drug habit, that he personally had observed her drug use, that she told na number of people that she ran a restaurant, and that she was receiving treatment for drug and alcohol abuse and refused to take prescription medication for mental health treatment. [R.68:24] In denying the motion for in camera inspection, the Court held:

> There are multiple third party witnesses that claim to have also seen these events, including A.R., K.H., and A.P. It was her car that was parked in the area and was struck by a bullet, and she also heard multiple gunshots. Officer Regner observed a bullet hole. [....]
>
> So if in fact there are all of these third party witnesses -- or at least witnesses and corroborating evidence, it would really undercut the defense assertion that it was all made up out of paranoia or a desire to get back at Mr. Salaam or was actually a delusion, which makes it very unlikely that anything in her mental health records would have any reasonable likelihood to contain information necessary to the determination of guilt or innocence, so I will deny the Shiffra motion.

[R. 73:51] Finally, Mr. Salaam requested that the Court conduct an in-camera review of Children's Court records pertaining to a CHIPS petition regarding Mr. Salaam's child with T.A. and allow admission of a number of admissions made by T.A. relating to her perceptions of Mr. Salaam in order to show that T.A.'s perception of Mr. Salaam was subject to delusional, erratic thinking. [R.24, 26] In denying the defense motion, the Court noted:

> I'm not going to allow the use of the records. As I said before, I did review them. While I think they certainly contain information about other days and the actions of this victim on other days related to the child and related to the Court and

> related to this other CHIPS case I don't think there is very much relevance. I think there is a lot of danger or prejudice here on the ability to really focus on the issues and to take the jury on some kind of sidetracking[.]

[R. 73:51]

The morning of trial, the State indicated that it intended to proffer to the jury testimony from Elizabeth Brunner, a 911 dispatcher, relating to a call she received from K.M., T.A.'s mother, relating to a telephone call K.M. received from a male voice purported to be Mr. Salaam. [R.76:4-28] K.M. had been subpoenaed but was an out of state witness and had not appeared; the State intended to offer Ms. Brunner's testimony in lieu of K.M.'s testimony regarding a call she purportedly received from Mr. Salaam. Id. The defense objected, citing numerous hearsay and foundation problems. Id.

As an offer of proof, the State offered the following: Elizabeth Brunner testified that she was a dispatcher and telecommunicator for the Milwaukee Police Department and on September 19, 2011 at approximately 6:03 P.M. she received a call from a K.M. from the city of Jefferson, Wisconsin on the non-emergency line. Ms. Brunner testified that K.M. indicated that she was concerned for her daughter, T.A., because she, K.M., had received a call from Mr. Salaam within the last 20 minutes wherein he told K.M. that if she didn't have T.A. call him within two hours he wouldn't miss next time. She indicated that she entered the information regarding this telephone call into a CAD sheet, which she was using to refresh her recollection. [R. 80:6-13}

Mr. Salaam objected to the admission of the CAD report as well as Ms. Brunner's testimony on the following grounds: (1) that the State had not laid a proper foundation that the caller to K.M. was in fact Mr. Salaam or that K.M. was in fact the caller to Ms. Brunner; (2) that admitting the call from K.M. without K.M.'s availability for cross-

examination violated the Confrontation Clause; and (3) that the statements were inadmissible hearsay. Id.

In allowing the CAD report and the testimony of Ms. Brunner, the Court held:

> I am analyzing this on a number of levels and the first, Confrontation Clause, that is Crawford and the case that stems from Crawford. The real question is, and Davis is the main case, is whether or not this was a testimonial statement or not. Crawford decided that up for us. If there is testimonial [sic] there has to be confrontation. If there is not, there doesn't. In Davis -- the Court talked about the nontestimonial statements in terms of an emergency and detailing an ongoing emergency. [...]
>
> The 911 calls are those dealing with the ongoig emergency where the primary purpose is to meet that emergency and anything past that becomes testimonial. [...] As far as Crawford goes, I think that is a nontestimonial statement. [...] This call was made within a short time period of this alleged call to her and the purpose of it was to seek emergency help to get ahold of her daughter. She can't get ahold of her daughter and she is worried about her daughter and that is why she is calling. It's an ongoing emergency.
>
> I then move through the levels of hearsay. Frankly, I don't think this is hearsay; the actual statement to Ms. M.. . . I think you are offering that she felt threatened or this was a threat to her, not the truth of the actual statement. [...]
>
> If it is hearsay, it comes in as an admission to a party opponent to the extent it's alleging coming from Mr. Salaam. I know we don't have a voice ID and we don't know for a fact that it's him, but that is the allegation.
>
> The next level of hearsay is Ms. M. to the dispatcher. The dispatcher talked about how she called within 20 minutes of it occurring and that she was clearly concerned enough for her daughter to make that call. [...] I think that does fall within the present tense [sic] impression. [...]
>
> The last level is the report itself. I think that clearly falls within a business record exception. We have got the person who actually recorded it, not just a person saying the CAD kept in the regular course of business and I wrote this with the call and this is what I entereed and this is how we keep -- this is what we do.

Id. at 24-28.

The State further indicated it intended to offer the three telephone calls from Mr. Salaam to T.A. Mr. Salaam objected to the second of the calls in its entirety on the basis of relevance, and to other portions of the two other calls. The Court indicated it would allow portions of the call. Id.

At trial, the State offered the following testimony. A.P. testified that on September 19, 2011 in the early afternoon, she lived at 2629 South 13th Street in Milwaukee, Wisconsin, and contacted Milwaukee police to report shots fired in her neighborhood and a gunshot hole in her vehicle parked in front of her home. [R.77:86-98] She noted that when she heard the shots fired she looked out her window and saw two young white women standing outside screaming. One of them said "I am not afraid of him," and the other said "Come on let's go." After a few minutes, they walked away. Milwaukee Police Officer Matthew Vega testified that he was dispatched on September 19, 2011 to the area of 2629 South 13th Street in Milwaukee to take a report of a car struck by gunfire. [R.78:67-70] He identified A.P.'s vehicle as the object of his report.

C.R. testified that on September 19, 2011 in the early afternoon she contacted the Milwaukee Police Department about shots fired in the area of 2634 South 13th Street in Milwaukee, Wisconsin. [R.78:7-21] She testified she was on 13th Street between Cleveland and Harrison when she observed a tan SUV travel south on 13th Street, nearly hit her own vehicle, and make a u-turn. She observed a sole occupant in the vehicle, the driver, duck down and fire two gunshots in the general direction of three white women on the opposite side of the street.

A.R. testified that on September 19, 2011 in the early afternoon she contacted Milwaukee Police Department regarding shots fired at her and her sister T.A. and friend K. H. [R.78:30-44] A.R. testified that on September 19, 2011 she was in the vicinity of South 13th Street and Cleveland Street in Milwaukee, Wisconsin with her friend K.H. walking back home from Aldi and met up with her sister T.A. on the bridge at 13th and Cleveland. While talking, T.A. yelled "there's Gary." A.R. testified she knew Mr.

Salaam through her sister and identified him in open court. At that time, she saw Mr. Salaam's gold Jeep pull up and saw Mr. Salaam's face and heard his gun cock, and her sister began to run south and she and K.H. went north. A.R. testified she heard two shots fired. After the incident, A.R. testified that T.A. was very scared and wanted to go home right away. Over objection, A.R. testified that T.A. told her that the shooter was Gary and that she had to go home before he found her again. A.R. testified she was hit by something because she had a slight burn mark and burning sensation on her right calf.

K.H. testified that on September 19, 2011 she was with A.R. in the vicinity of South 13th Street in Milwaukee, Wisconsin. [R.78:53-65] In the early afternoon, she and A.R. were returning from a trip to Aldi and were on the bridge on 13th Street heading north, and met T.A. on the bridge. While talking on the bridge, A.R. and T.A. said "there's Gary, oh my gosh, run." K.H. testified she saw a gold Explorer driving toward them, complete a u-turn, and she heard two shots. The Explorer drove off. K.H. testified she did not know Mr. Salaam; however, she did see the gun in the window of the Explorer. She testified she felt something burn on her shoulders, and believed she had been hit with shrapnel or ricochet. She testified she split off from A.R. and T.A., returned to her home, and contacted police.

The State offered the testimony of Milwaukee County Sheriff's Deputy Dennis O'Donnell, who testified that he is the inmate phone administrator for Milwaukee County and the keeper of records for telephone calls placed to and from Milwaukee County jails. [R.78:82-89] He testified that the audio recordings and transcripts of of telephone calls which came from the Milwaukee County Jails on November 15, 2011, at 3:23, 3:51, and

6:57 P.M. were true and accurate reflections of the calls made from Mr. Salaam, who was housed at the jail, at that time.

T. A. identified Mr. Salaam in open court and testified that on September 19, 2011, she had separated from Mr. Salaam, having been in an intimate relationship with him for about a year prior. [R.78:90-121; 79:23-42] She was living at that time at South 9th Street and Cleveland in Milwaukee, Wisconsin and was coming back from Aldi when she noticed her sister, A.R., with K.H. She crossed the street to meet them, and then saw Mr. Salaam's vehicle and said to A.R. "there's Gary." She observed Mr. Salaam's vehicle do a u-turn and began running and heard gunshots. She observed a black gun in Mr. Salaam's hands. She further testified that once Mr. Salaam left she returned home. She did not contact police regarding the incident: however, she did meet with officers from District 2 regarding the incident a few days later. She further testified that she was with Mr. Salaam in a gold Jeep Cherokee on November 3, 2011, which she identified as Mr. Salaam's, at which time Mr. Salaam's vehicle was pulled over by MPD on a traffic stop. She testifed she and Mr. Salaam intended to move to Green Bay prior to that traffic stop.

T.A. further testified that she received three calls from Mr. Salaam on November 15, 2011 at her home at 1567 West Windlake in Milwaukee, Wisconsin. Id. She testified that in those calls and in letters to her Mr. Salaam communicated to her that he wanted her to contact her sister, A.R., to ask her not to appear in court regarding the incident occurring on September 19. T.A. could not produce the letters, having ripped them up. The jury listened to redacted portions of the telephone calls, with transcripts of the redacted calls provided as aids.

Elizabeth Brunner testified, over the renewed objection of counsel, essentially as she had during the offer of proof, indicating that she had taken the call from K.M. on September 19, 2011 at 6:03 P.M. on a non-emergency administrative line from Jefferson, Wisconsin, regarding a phone call that K.M. had allegedly taken from Mr. Salaam, in which K.M. was told she needed to have her daughter call him within two hours or he would not miss again. [R.80:5-12]

Joseph Link testified that he is an investigator with the Milwaukee County District Attorney's office and that he was assigned to the Witness Protection Unit in November 2011. [R. 80:13-26] Over objection of defense counsel, citing a discovery violation, Investigator Link testified that he has the ability to trace three-way calls, and that during his investigation of this case he became aware through those calls that Mr. Salaam had sent letters to T.A. and had requested that T.A. send letters to him under an alias. The State attempted to offer into evidence the judgment roll in 2011CF4809; however, instead, the Court took judicial notice and the parties stipulated that a preliminary hearing was scheduled in that case on November 10, 2011 for the dates of November 17, 2011, at 1:30 P.M., and that that preliminary hearing was adjourned to November 30, 2011 at 1:30.

Mr. Salaam and the State stipulated that Mr. Salaam had been previously convicted of a felony as of September 19, 2011. [R.80:28-32] At this, the close of the State's case, defense counsel moved to dismiss counts 2 and 3 of the felony intimidation of a witness case on the grounds of multiplicitous charging on the grounds that the break in time between the calls was artificially imposed by the calling machinery. Id. at 33. Defense counsel also moved to dismiss the recklessly endangering safety count on the

grounds of insufficiency of the evidence. Id. at 38-40. The Court denied both motions. Id. at 41.

Mr. Salaam, after being fully advised of his right to remain silent, testified in his own defense. [R.80:50-71] He testified that he and T.A. had been in an intimate relationship for about a year, ending in September 2011, and that T.A. was pregnant with Mr. Salaam's child. Mr. Salaam testified that after September 3, 2011, he made no attempts to reconcile with her, though T.A. attempted numerous times to contact him. He testified he was not in the vicinity of South 13th Street on September 19, 2011, and that he did not possess a firearm that day. He testified he had no contact with T.A. from September 3, 2011 until November 3, 2011, when she was found in his car with him at the traffic stop. He testified that he knew he should not call her after his arrest on November 3, 2011, but did so anyway; he indicated his purpose in discouraging her from coming to court was to ensure she did not go to jail while pregnant. He further indicated he wished for her to "stay off Lincoln" because she had stolen money and goods from retailers on Lincoln and he wanted her to stay out of jail, and that his statement "don't come anywhere near that building" related to the building where she purchased drugs. Mr. Salaam categorically denied threatening her or others, and categorically denied making any phone call to K.M. on September 19. He denied telling the police officer that the gold Jeep Cherokee he was driving on November 3 was not his.

In rebuttal, the State called Officer Matthew Bell, who testified that he took Mr. Salaam into custody on November 3, 2011, and that Mr. Salaam told him that the gold Jeep Cherokee he was driving was owned by Valerie Sprewell and provided a phone number for her. Id. The State also called Valerie Sprewell, who identified Mr. Salaam as

her brother and indicated that a police officer contacted her about whether she owned the gold Jeep driven by Mr. Salaam on November 3, 2011, and denied ownership of same. [R.81:9-12] She further testified that she was asked if she would pick up the gold Jeep Cherokee from the police in November 2011, but that she declined to do so.

After deliberation, the jury returned a verdict of guilty on all counts. [R.81:69] After the return of the verdicts, defense counsel renewed his motion challenging the sufficiency of the evidence on the intimidating witness charges on the grounds that there was insufficient evidence to support a verdict that Mr. Salaam had committed the act in connection with a trial, proceeding, or inquiry in a felony case in which he was charged. Id. at 72-76. The State responded that it believed Mr. Salaam stipulated to his felony status; the Court responded that the State sought to enter the judgment roll from case number 2011CF4809 into evidence, but noted that it did not take judicial notice that the case was a felony. Specifically, the Court noted:

> that wasn't specifically introduced, any testimony or evidence, about the type of, nature of the case of a shooting, but it is certainly a serious case. [...] I do note that the State wanted to put in a judgment roll, although that's not really -- I didn't take judicial notice that it was a felony, the first case. So I don't know.

Id. The Court reserved ruling on the motion and set a briefing schedule. At the hearing, the State argued that it had entered into a Wallerman-type stipulation regarding the that element. After briefing and oral argument, the Court noted that the state retains the burden of proof on every element, noting "if the state forgets or makes a choice not to, or for whatever reason doesn't enter into evidence a piece of evidence, a document like this, number 16, Exhibit 16, or ask the Court to enter a stipulation to tell the jury or to take judicial notice even of the fact that the case is a felony, that is on the state." [R. 82:XX] Even so, the Court denied the motion, finding:

> I think in today's day and age, in this society, at this time, there is an understanding of how serious that type of conduct is, both shooting at somebody and also being a felon in possession of a firearm. Those are things that I think people understand to be felony offenses and not misdemeanor offenses. They understand them to be punishable by prison potentially. [...] [I]t's a circumstantial type of argument here, *because they weren't told it was a felony*. But I do think it rises to the sufficiency of the evidence.

Id.

ARGUMENT AND AUTHORITIES

I. The evidence at trial was insufficient to support the jury's finding on the three counts of Felony Intimidation of a Witness that Mr. Salaam "was charged with a felony in connection with a proceeding for that felony" as required by Wis. Stat. 940.43(7).

Whether the evidence submitted to the jury is sufficient to sustain a verdict of guilty in a criminal prosecution is a question of law and the standard of review is de novo, considering the evidence in the light most favorable to the state. State v. Smith, 342 Wis.2d 710, 726 (2012). A conviction must be reversed where the evidence is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. Id.

To secure a conviction for felony intimidation of a witness, the State must prove beyond a reasonable doubt that (1) T.A. was a witness, (2) that Mr. Salaam attempted to dissuade T.A. from attending or giving testimony at a proceeding authorized by law, (3) that Mr. Salaam acted knowingly and maliciously, and (4) that Mr. Salaam commited the act in connection with a trial, proceeding or inquiry in a felony case in which he was charged. See Wis. Stat. 940.42, 940.43; see also WI-CJI 1292. The jury instruction for this offense, which was given to the jury in this case, provides that the jury must find beyond a reasonable doubt that Mr. Salaam "commited the act [of intimidation] in connection with a trial, proceeding or inquiry in a felony case in which he was charged" in order to support a verdict of guilt. See WI-CJI 1292.

In this case, the record is clear that the State did not proffer sufficient evidence from which a reasonable jury could conclude that the nature of the charge in 2011CF4809 was a felony. The circuit court noted a number of times that it had not taken judicial notice that 2011CF4809 was a felony; the State, in its brief to the circuit court, admitted as much when it believed that the stipulation of facts relating to the existence of a preliminary hearing scheduled in that case rose to the level of a Wallerman-type stipulation. State v. Wallerman, 203 Wis.2d 158 (Wis. App. 1996).

The State's contention that the factual stipulations that preliminary hearings were scheduled in 2011CF4809 are sufficient to prove an essential element of the offense simply does not hold water given the law in Wisconsin. In Wisconsin, the right to a jury trial includes the right to have a jury determine each element of the crime, and partial waivers of that right, such as when a defendant and the State enter into a stipulation, require the same knowing and voluntary waiver of the right, made personally on the record by the defendant, as a full waiver of a jury trial. See State v. Hauk, 2002 WI App. 226, at ¶32 (stipulation to an element of a crime requires jury waiver colloquy, and failure to engage in colloquy results in failure to waive right to jury determination on that element). No such colloquy occured with Mr. Salaam regarding his personal waiver of his right to have the jury decide that element, and accordingly, no waiver occurred. Hauk, at ¶34.

Moreover, the circuit court's determination that a jury could circumstantially conclude that 2011CF4809 is a felony is erroneous. Wis. Stat. § 939.60 provides that a "crime punishable by imprisonment in the Wisconsin state prisons is a felony. Every other crime is a misdemeanor." There is absolutely nothing in the evidence presented to

the jury that would support such a finding; indeed, evidence relating to the possible penalty to be imposed after the jury has determined guilt must be withheld from the jury, and failure to do so is reversible error. See Mulkovich v. State, 73 Wis. 2d 464 (1976). Because no such evidence was presented to the jury, via stipulation, judicial notice, or otherwise, there is simply no evidentiary basis, circumstantial or otherwise, from which the jury acting reasonably could have found that Mr. Salaam "commited the act [of intimidation] in connection with a trial, proceeding or inquiry *in a felony case in which he was charged.*"

Because the state failed to proffer sufficient evidence from which a reasonable jury could find that Mr. Salaam commited the act of intimidation in connection with a proceeding in a felony case, double jeopardy principles prevent Mr. Salaam from being retried. See State v. Henning, 2004 WI 89, 273 Wis. 2d 352. Accordingly, Mr. Salaam requests that this Court vacate the conviction on all three counts of felony intimidation of a witness and direct the trial court to enter a judgment of acquittal on all three counts.

II. The trial court improperly joined and failed to sever the recklessly endangering safety and felon in possession of a firearm case with the felony intimidation of a witness case.

Whether the initial joinder of offenses is proper is a question of law that this Court reviews de novo, though the joinder statute is construed broadly. See State v. Locke, 177 Wis.2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). If the offenses do not meet the criteria for joinder, it is presumed that the defendant is prejudiced by a joint trial. State v. Leach, 124 Wis.2d 648, 669 (1985).

Mr. Salaam submits that the trial court erroneously joined the recklessly endangering safety and felon in possession of a firearm case with the felony intimidation

of a witness case. Wis. Stat. 971.12(4) permits joinder of charges for trial "if the crimes could have been joined in a singe complaint." Joinder of charges is governed by Wis. Stat. §971.12(1), which provides that crimes may be joined if they "are of the same or similar character or are based of the same act or transaction or on 2 or more acts or transactions connected together or constituting part of a common scheme or plan." Id. To be of "the same or similar character," crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap. See State v. Hamm, 146 Wis.2d 130, 138 (Ct. App. 1988).

In this case, the intimidation claims were not of the same or similar character as the recklessly endangering safety and felon in possession of a firearm claims because they are not the same type of offenses. Making phone calls in an attempt to influence a witness is completely unlike possessing and discharging a firearm. See Hamm, 146 Wis.2d at 138; see also State v. Salinas, unpub. opin in 2013AP2686-CR, at ¶22 (holding that sexual assault of child and intimidation claims do not meet joinder requirement of same or similar character). Offenses are not similar simply because the defendant and the victim are the same in both cases. Id. Moreover, there was little to no overlapping evidence. Specifically, the 2011 and 2012 cases occured almost a month apart, with the only overlapping witness being T.A. The only evidence from the 2011 case required to prove the essential elements of the 2012 case was the felony nature of the 2011 proceeding, and evidence of the specifics regarding the 2011 case would have been inadmissible in the 2012 case, had it been properly severed, as overly prejudicial. See Leach, 124 Wis.2d at 669 ("When a jury is informed of the accused's previous wrongful conduct, it is likely that it will consider that the defendant is a "bad person" prone to

criminal conduct. It is also possible that the jury will confuse the issues and will be incapable of separating the evidence."). Accordingly, the trial court improperly joined and then failed to sever the two cases, and improper joinder is presumptively prejudicial. See Leach, 124 Wis.2d at 672-73. Thus, this Court should reverse both convictions and remand the 2011 case for a new trial.

II. Elizabeth Brunner's testimony regarding her receipt of a non-emergency call alleged to be from K.H. reporting that she received a call from Mr. Salaam and the purported contents of that call were improperly admitted by the trial court in violation of Mr. Salaam's right to confrontation and was not properly authenticated.

The trial court, over the repeated objection of trial counsel, admitted the testimony of Elizabeth Brunner, a telecommunicator for the Milwaukee Police Department, regarding a purported phone call received by K.M. from a person purported to be Mr. Salaam on September 19, 2011 at 6:03 P.M. and a summary of the contents of the call recollected by Ms. Brunner. The trial court's admission of the call and its contents was erroneous on several levels.

A. The trial court improperly admitted Elizabeth Brunner's testimony regarding the non-emergency call from K.M. as nontestimonial statements of a witness in violation of the Confrontation Clause.

The trial court made a threshold determination that the call from K.M. was nontestimonial under the Confrontation Clause and Crawford v. Washington and its progeny:

> I am analyzing this on a number of levels and the first, Confrontation Clause, that is Crawford and the case that stems from Crawford. The real question is, and Davis is the main case, is whether or not this was a testimonial statement or not. Crawford decided that up for us. If there is testimonial [sic] there has to be confrontation. If there is not, there doesn't. In Davis -- the Court talked about the nontestimonial statements in terms of an emergency and detailing an ongoing emergency. [...]

> The 911 calls are those dealing with the ongoing emergency where the primary purpose is to meet that emergency and anything past that becomes testimonial. [...] As far as Crawford goes, I think that is a nontestimonial statement. [...] This call was made within a short time period of this alleged call to her and the purpose of it was to seek emergency help to get ahold of her daughter. She can't get ahold of her daughter and she is worried about her daughter and that is why she is calling. It's an ongoing emergency.

"Whether admission of a hearsay statement violates a defendant's right to confrontation presents a question of law that this court reviews de novo." State v. Weed, 2003 WI 85, ¶ 10, 263 Wis.2d 434, 666 N.W.2d 485 (citing Lilly v. Virginia, 527 U.S. 116, 136–37, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)).

The trial court's conclusion that the call from K.M. was nontestimonial under Crawford and Davis is clearly erroneous. The Confrontation Clause bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54. In Davis v. Washington, 547 U.S. 813 (2006) and its companion case, Hammon v. Indiana, the U.S. Supreme Court clarified that statements are nontestimonial, and thus admissible without confrontation, when "made in the course of police investigation unde circumstances objectively indicating that the primary purpose of the investigation is to enable police assistance to meet an ongoing emergency." They are testimonial, and thus invoke the Sixth Amendment protection of confrontation, when "circumstances objectively indicate that there is no such ongoing emergency[.]" Id. at 823-24.

The factual distinction between Davis and Hammon, which delineated the border between testimonial and nontestimonial statements in 911 calls, makes clear that the distinction rests entirely on the nature of the call -- and when it is neither a "cry for help

nor the provision of information enabling officers immediately to end a threatening situation," the call must be excluded under the Sixth Amendment. See Davis, 547 U.S. 832. Wisconsin courts have reinforced this border, noting that the line between testimonial and nontestimonial statements made to law enforcement in the context of responding to an ongoing or recently completed crime, as with 911 calls, is the line between "finding out what is happening, as opposed to recording what had happened." See State v. Rodriguez, 2006 WI App 163, at ¶ 23. Only statements made to law enforcement in the course of finding out what *is happening* are nontestimonial. All others require that the defendant be allowed to cross-examine, or must not be admitted.

In this case, the record is clear that the statements made by K.M. to Elizabeth Brunner were not of an emergent nature and were, accordingly, testimonial; thus, the circuit court's admission of the statements violated Mr. Salaam's right to confrontation. As a threshold matter, the call to Ms. Brunner was not an emergency call; she testified that the call came in on an administrative, non-emergency line, and not the 911 line. Moreover, Ms. Brunner testified that K.M. informed her she had received the call regarding T.A. approximately 20 minutes prior to calling the non-emergency line. She further indicated that K.M. simply sought a wellness check on T.A. Thus, the circuit court's determination that this was an "emergency" is not supported by the testimony and is clearly erroneous. Moreover, the record indicates that the call did not in any way reflect the sort of "stress generated words whose main function is to get help and succor or to secure safety" which Davis and Rodriguez require to characterize statements as nontestimonial. See Rodriguez, at ¶26. A full 20 minutes had passed between the time K.M. allegedly received the call and the time K.M. called the non-emergency line and

reached Ms. Brunner; thus, the nature of the conversation between Ms.Brunner and K.M. was designed to capture what had happened, and not what was happening. Thus, the nature of the call was far more like that in Hammon, which was held testimonial and inadmissible. See Davis at 819-820. Accordingly, the contents of the telephone call from K.M. were testimonial, and the admission of the statements of K.M. without her availability for cross examination violated Mr. Salaam's right to confrontation.

B. The trial court admitted the contents of the statement made by K.M. without proper authentication that K.M. and the person who called K.M. were who they purported to be.

Additionally, the contents of the call to Ms. Brunner were improperly admitted without foundation. A prerequisite to the admissibility of all evidence is that it meet the authentication requirements of Wis. Stat. § 909.01. See Nelson v. Zeimetz, 150 Wis.2d 785, 797, 442 N.W.2d 530, 535 (Ct.App.1989). Wis. Stat. 909.01 states that the "requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id.

In this case, the only basis for authentication that the calls were made by K.M. and by Mr. Salaam were self-identication, as Ms. Brunner admitted she did not know K.M. and could not identify her by voice, and did not ask if K.M. knew or could identify Mr. Salaam by his voice. The alleged statements of self-identification by a caller may not themselves be used to identify the speaker. See Nischke v. Farmers & Merchants Bank & Trust, 522 N.W.2d 542, 187 Wis.2d 96 (Wis. App., 1994)(citing 2 McCormick on Evidence § 226 at 51 (John W. Strong ed. 1992)("As one authority notes, "a telephone call out of the blue from one who identified himself as 'X'... is not sufficient

authentication of the call as in fact coming from X."). Thus, even assuming arguendo Ms. Brunner's testimony regarding the call from K.M. clears the Confrontation Clause hurdle, the statements allegedly made by K.M. and by Mr. Salaam to K.M. were not properly authenticated and are inadmissible.

Under either standard, Mr. Salaam respectfully submits that the testimony of Elizabeth Brunner was improperly admitted, and respectfully requests that this Court reverse the judgment of convictions in both cases and remand for a new trial in case 2011.

III. Mr. Salaam's inability to present evidence regarding the paranoid and delusional tendencies of T.A. denied his due process right to present a defense; thus, the real controversy was not fully or fairly tried and this Court should order a new trial in the interest of justice pursuant to Wis. Stat. 751.06.

Whether a defendant's right to due process was violated [is] a question of law for this Court's independent review. State v. McGuire, 2010 WI 91, ¶ 26, 328 Wis.2d 289, 786 N.W.2d 227.

Mr. Salaam moved for a pretrial preliminary ruling on the admissibility of evidence contained in records provided to him in the context of a CHIPS petition regarding his child in common with T.A., and also requested the trial court order disclosure of T.A.'s medical and mental health records for in-camera inspection pursuant to State v. Shiffra, 175 Wis.2d 600 (Ct. App. 1993) and State v. Green, 2002 WI 68. Mr. Salaam sought to introduce evidence that T.A.'s perceptions were often clouded by drug abuse and mental illness, matters which go to the heart of T.A.'s credibility. The trial court denied both motions, concluding that the information provided by Mr. Salaam in his Shiffra/Green motion and in the CHIPS records were not material to the defense. In

so doing, the trial court radically curtailed Mr. Salaam's opportunity to cross examine T.A.'s "believability [...] and the truth of [her] testimony." See Davis v. Alaska, 415 U.S. 308, 315–16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); see also Crawford, 541 U.S. at 61 (the confrontation clause is intended to allow the reliability of testimony to be assessed "by testing in the crucible of cross-examination"). In so doing, the trial court again violated Mr. Salaam's right to confrontation. His inability to fully cross-examine T.A. meant that "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." State v. Hicks, 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996).

The U.S. Supreme Court has held that the "main and essential purpose" of the confrontation clause is to give the accused an opportunity to cross-examine the witnesses against him. Davis v. Alaska, 415 U.S. at 315–16 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed.1940)). The right to cross-examine is often implicated in the context of an accused's attempt to test the credibility of an adversary witness. See Delaware v. Van Arsdall, 475 U.S. 673, 678–79; Davis, 415 U.S. at 316–17. In Davis the Supreme Court considered a case in which the trial court allowed limited cross-examination of a prosecution witness. Id. at 313–14. The Supreme Court held that the defendant's right to confrontation was violated when he was prevented from cross-examination regarding the witness' probation status at the time of the events to which he was testifying that might "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." Id. at 318, 94 S.Ct. 1105. In State v. Rhodes, 2011 WI 73, the Wisconsin Supreme Court affirmed

that to determine whether a violation of the Confrontation Clause has occurred where a defendant's right to cross-examine has been limited:

> [T]he focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial.... We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness.

See Rhodes, at ¶ 31 (citing Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431 (1986).

This Court has been given statutory authority to order a new trial under Wis .Stat. § 751.06, which provides that "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from[.]" Discretionary reversals based on a determination that the jury was denied the opportunity to hear important evidence have occurred when "the jury was erroneously denied the opportunity" to hear important, relevant evidence while other evidence was erroneously admitted. State v. Doss, 312 Wis.2d 570, ¶ 86, 754 N.W.2d 150. The "erroneous" denial of relevant evidence refers to a legal evidentiary error by the trial court. See, e.g., State v. Cuyler, 110 Wis.2d 133, 141, 327 N.W.2d 662 (1983) ("We conclude that the case was not fully tried inasmuch as the circuit court erred in its interpretation of sec. 906.08(1) and excluded admissible and material evidence on the critical issue of credibility."). The court need not find a substantial probability of a different result to make this finding. See State v. Armstrong, 2005 WI 119, ¶ 114 n. 26, 283 Wis.2d 639, 700 N.W.2d 98 (2005).

In this case, Mr. Salaam was forced to defend himself against two unrelated series of events in the same trial. He was forced to defend himself against those unrelated

series of events without the ability to fully cross examine the key witness in both series of events regarding the accuracy of her perception of both the events and of Mr. Salaam. In addition, the jury heard a damning statement from a caller alleged to be Mr. Salaam which would cast Mr. Salaam unfavorably in both matters, and Mr. Salaam was unable to test the veracity of the caller, K.M. Under the totality of these circumstances, the real controversy has not been fully or fairly tried, and Mr. Salaam respectfully requests that this Corut reverse the judgments of conviction and remand for further proceedings.

CONCLUSION

Based on the argument and authorities set forth above, Mr. Salaam respectfully requests that this Court reverse the judgments of conviction in the cases referenced above, vacate the judgment of conviction and enter a judgment of acquittal in 2012CF69 and order a new trial in 2011CF4809.

Respectfully submitted this ____ day of _____, 2015.

_____

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FORM AND LENGTH CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 12 point body text, 12 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 12 point type and the length of the brief is __ pages and _____ words.

Dated this _____ day of _____, 2015.

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CERTIFICATE OF SERVICE AND MAILING

I hereby certify that on this day I have served upon the Court of Appeals, the Attorney General, and the District Attorney the appropriate number of copies of this opening brief via first class mail.

Dated this ____ day of _____, 2015.

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CERTIFICATION ON APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a 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 the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this___ day of _____, 2015.

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STATE OF WISCONSIN : COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,
Plaintiff,

v.

GARY ABDULLAH SALAAM,
Defendant.

2014AP2666-CR, 2014AP2667-CR
Milwaukee County Circuit Court
Case #: 11-CF4809
12-CF-69

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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