STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2014AP2666-CR & 2014AP2667-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY ABDULLAH SALAAM,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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C O U R T O F A P P E A L S

DISTRICT I

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ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did the public interest in efficient judicial administration outweigh any potential prejudice that arose from the consolidation of Salaam's witness intimidation charges with his charges of first-degree recklessly endangering safety and felon in possession of a firearm?

Circuit court answered: Yes (63:20).

2. Did the evidence presented at trial support the jury's verdicts finding that Salaam had intimidated a witness and the special verdict findings that he did so in connection with a proceeding in a felony case in which he was charged?

Circuit court answered: Yes (82:6-8).

3. Did a witness' out-of-court statement to a dispatcher constitute admissible evidence that did not violate Salaam's confrontation rights?

Circuit court answered: No (77:24-28).

4. Did Salaam's due process right to present a defense include the right to cross-examine the victim about information contained in Children's Court records about her mental health?

Circuit court answered: No (73:6-9).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE AND THE FACTS

The State will supplement Salaam's statement of the case and statement of the facts as appropriate in its argument.

ARGUMENT

I. The circuit court properly denied Salaam's motions for relief from prejudicial joinder of his charges and cases.

A. Introduction

Salaam argues that the circuit court improperly joined a new case that alleged three counts of witness intimidation with his pending case that alleged first-degree recklessly endangering safety and felon in possession of a firearm. Salaam's brief at 20-22. The circuit court properly denied Salaam's motion for relief from prejudicial joinder. It correctly concluded that the public interest in conducting a joint trial of all charges in both cases outweighed any potential prejudice to Salaam (63:20).

B. Procedural history related to Salaam's prejudicial joinder claim.

The State filed a two-count criminal complaint against Salaam. With respect to count one, the State alleged that Salaam committed first-degree recklessly endangering safety, as an act of domestic abuse and as a repeater. With respect to count two, the State alleged that Salaam possessed a firearm after being convicted of a felony, as a repeater (2666CR:2:1).[1] The State filed a second criminal complaint alleging that Salaam had committed three counts

[1] This consolidated appeal in this case involves two circuit court cases and two corresponding records. Appeals case number 2014AP2666CR relates to Milwaukee County Circuit Court case number 2011CF4809. Appeals case number 2014AP2667CR relates to Milwaukee County Circuit Court case number 2012CF69. Because the transcripts appear in the record for case number 2012CF69/2014AP2667CR, the State will refer to the record cites using the standard format of "(:)." To the extent that the State refers to the record in case number 2011CF4809/2014AP2666CR, the state will use the following format: "(2666CR:___:___)."

of intimidation of a witness by a person charged with a felony (2:1-2).

At the arraignment hearing on the intimidation charges, the State asked the circuit court to consolidate the trial of the intimidation charges with the charges of recklessly endangering safety and felon in possession of a firearm (60:3). The circuit court granted the request, but allowed Salaam to move to sever the charges (60:4).

Salaam filed a motion for relief from prejudicial joinder of the recklessly endangering safety charge and the felon in possession of a firearm charge (2666CR:12:1). The circuit court denied Salaam's motion to sever the recklessly endangering safety charge from the felon in possession of a firearm charge. In reaching its decision, the circuit court determined that the public interest in trying two charges that arose from the same transaction outweighed any potential prejudice in trying the cases jointly (63:10-12).

Salaam also moved for relief from the circuit court's decision to consolidate the intimidation of a witness charges with the first-degree reckless endangering safety charge and felon in possession of a firearm charge (9:1). The circuit court also denied this motion. It determined that the intimidation charges were not other act evidence, but demonstrated` Salaam's guilt on the other charges (63:18-19). The circuit court concluded that the public interest in conducting a joint trial on both cases outweighed any potential prejudice to Salaam (63:20).

C. General legal principles related to joinder and severance.

Wisconsin Stat. § 971.12(1), (3), and (4) governs the joinder and severance of charges.

- Section 971.12(1) authorizes the joinder of two or more crimes in the same information if the charged crimes

are (1) of the same or similar character; (2) based on the same act or transaction; or (3) based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. *Id*.

- Section 971.12(4) authorizes the joinder of two or more cases for a single trial if the crimes could have been joined in a single complaint or information.

- Section 971.12(3) allows a circuit court to grant relief from prejudicial joinder of charges. Relief may include separate trials of the counts or "whatever other relief justice requires." *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." *State v. Hamm*, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Courts determine whether the offenses occurred over a "relatively short period of time" on a case-by-case basis. *Id*. at 139-140 (almost two-year interval between incidents deemed a "relatively short period of time").

Wisconsin courts broadly construe Wis. Stat. § 971.12(1) in favor of joinder. *State v. Locke*, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). Joinder of charges against the same defendant avoids repetitious litigation and facilitates the speedy, efficient administration of justice. *Francis v. State*, 86 Wis. 2d 554, 558, 273 N.W.2d 310 (1979).

In considering whether to grant severance under Wis. Stat. § 971.12(3), a circuit court must determine what prejudice may flow from the joinder of charges. It must then balance the potential prejudice against the public interest in conducting a joint trial on multiple counts. *State v. Huff*, 123 Wis. 2d 397, 409, 367 N.W.2d 226, 232 (Ct. App.1985).

Standard of review. Appellate courts review a joinder decision applying a two-step process. First, whether charges

were properly joined presents a question of law that this court reviews *de novo*. *State v. Locke*, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). Second, an appellate court applies an erroneous exercise of discretion standard when it reviews a circuit court's denial of a defendant's severance motion. *Huff*, 123 Wis. 2d at 409-10. [2]

D. The circuit court properly joined the charges of first-degree recklessly endangering safety, felon in possession of a firearm, and intimidation of a witness for trial.

Joinder of the first-degree recklessly endangering safety and felon in possession charges. The State properly joined the first-degree recklessly endangering safety charge and the felon in possession of a firearm charge (2666CR:2:1). The circuit court properly exercised its discretion when it denied Salaam's motion to sever these charges (63:10-11). The record demonstrates that both offenses are related, arising from the same transaction. Equally important, the evidence as to each overlaps (63:11).

The complaint reflects that both the recklessly endangering safety charges and felon in possession of a firearm charge occurred at the same place and at the same time. Both T.A., and her sister, A.R., saw Salaam driving a gold jeep. Both observed Salaam in possession of a handgun and saw him discharge it (2666CR:3:2). The State would rely on the same facts to establish both offenses. Based on this record, the circuit court correctly concluded that any prejudice to Salaam was not so substantial such that it outweighed the public interest in efficiency (63:11).

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[2] In support of his joinder argument, Salaam cites *State v. Luis Salinas*, case no. 2013AP2686-CR (Wis. Ct. App. April 21, 2015) (*per curiam*) (*petition for review granted*). Salaam's brief at 21. Wisconsin Stat. (Rule) § 809.23(3)(a) & (b) restricts citation of unpublished decisions to authored decisions issued on or after July 1, 2009.

While the circuit court did not grant severance, it exercised its discretion under Wis. Stat. § 971.12(3) in a manner to limit prejudice to Salaam from joinder. The circuit court declined to identify the nature of the underlying felony that supported the felon in possession of a firearm charge (63:12). At trial, it simply referenced the parties' stipulation that "the defendant was convicted of a felony" before the charged offense (81:17).

Joinder of the witness intimidation case with earlier case. The circuit court also properly joined the witness intimidation charges with Salaam's other charges of recklessly endangering safety and felon in possession of a firearm. In reaching its decision, the circuit court determined that the alleged acts of intimidation of a witness demonstrated Salaam's consciousness of guilt with respect to the recklessly endangering safety charge (63:18-19). The circuit court observed, "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 same reasons (63:20). Based on its assessment, the circuit court concluded that the risk of prejudice did not outweigh the public interest in conducting a trial on the multiple counts (63:20).

The record supports the circuit court's decision. Salaam's recklessly endangering safety and felon in possession of a firearm charges were set for a preliminary hearing on November 17, 2011. As a condition of release on those charges, the court ordered Salaam to have no contact with T.A. (2:3) On November 15, 2013, Salaam placed three telephone calls from the House of Corrections to T.A. T.A. was Salaam's former girlfriend and a witness on his earlier case (2:3-4).

In each call, Salaam made statements to T.A. discouraging her cooperation. In the first call, Salaam told T.A. that the police were out looking for her. T.A. told him that she would not show up in court tomorrow (2:4). In the

second call, Salaam told T.A. not to show up around the building and to stay in the house. "If they catch you they are going to lock your ass up and bring you" (2:4). In the third call, Salaam told T.A. to stay off Layton and that his life depended on T.A. getting out of town (2:4). T.A. did not appear at the November 17, 2011 preliminary examination, even though authorities had personally served her with a subpoena to appear (7:1-2).

The first-degree recklessly endangering and felon in possession of a firearm charges were intertwined with the witness intimidation charges. Through the telephone calls, Salaam sought to dissuade a critical witness, T.A., from testifying in his pending case. The witness intimidation charges would not exist but for the recklessly endangering safety and felon in possession of a firearm charges.

The evidence for each case was of the same or similar character. The cases relied on overlapping evidence. Salaam, a convicted felon, discharged a firearm toward T.A., a person with whom he previously had a domestic relationship. Once the State charged Salaam, Salaam sought to dissuade T.A. from cooperating with authorities. The reckless endangerment conduct and the intimidation occurred within two months of each other, a relatively short period of time. Under the circumstances, the evidence from each case would be admissible in the prosecution of the other case. Any risk of prejudice that flowed from joinder was minimal.

II. Even if the State did not establish that Salaam intimidated a witness in connection with a felony proceeding, it presented sufficient evidence to convict Salaam of three counts of misdemeanor witness intimidation.

A. Introduction

Salaam challenges the sufficiency of the evidence with respect to three counts of witness intimidation. He contends that the State failed to prove that Salaam intimidated the

witness in connection with a proceeding in a felony case in which he was charged. Salaam asks this Court to vacate the three counts of intimidation of a witness. Salaam's brief 18-20.

The circuit court denied Salaam's post-verdict motion challenging the sufficiency of the evidence (82:8). At a minimum, the record demonstrates that the record is sufficient to sustain the jury's verdicts that Salaam intimidated a witness. The only question is whether the State presented evidence sufficient to support the jury's special verdict finding that Salaam committed "the act in connection with a trial, proceeding, or inquiry in a felony case in which he was charged?" (33; 34; 35).

Based on the record, the State's position is that the record does not support entry of the judgments for the felony witness intimidation. Because the jury necessarily found that Salaam committed misdemeanor witness intimidation, this Court should remand the case for resentencing for the lesser-included charges.

B. Procedural history relevant to Salaam's sufficiency of the evidence challenge to his three convictions for witness intimidation.

The State filed a second criminal complaint alleging that Salaam had committed three counts of intimidation of a witness by a person charged with a felony (2:1-2).

At the close of the evidence, the circuit court advised the jury of the elements of witness intimidation. It read Wisconsin Jury Instruction Criminal—1292 to the jurors. The relevant portions of the instruction read as follows:

> 1. As to each count, [T.A.] was a witness. "Witness" means any person who has been called to testify or who is expected to be called to testify.

> 2. As to each count, the defendant attempted to dissuade [T.A.] from attending or giving testimony at a proceeding authorized by law. A preliminary hearing is a proceeding authorized by law.
>
> 3. As to each count, the defendant acted knowingly and maliciously. This requires that the defendant knew [T.A.] was a witness and that the defendant acted with the purpose to prevent [T.A.] from testifying.
>
> . . . .
>
> If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved as to [counts 3-5] of the information, . . you should find the defendant guilty and answer the following question "yes" or "no";
>
> "Did the defendant commit the act in connection with a trial, proceeding or inquiry in a felony case in which he was charged?"

(81:19-21; 30:6).[3]

Following closing arguments, Salaam challenged the sufficiency of the evidence as to the special verdict question. "I don't think there is any basis for the 'yes' answer on each of the three intimidating witness charges, because there was no evidence as to the nature of the charge" (81:73). The circuit court reserved ruling on the Salaam's motion (81:6).

The circuit court later denied the motion. It reasoned that based on the seriousness of the recklessly endangering safety and felon in possession of a firearm charges, the jury could reasonably understand them to be punishable by prison and would circumstantially constitute a felony (82:8).

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[3] The jury instruction's incorporation of the lesser offense into the instruction of the greater offense is also consistent with the statutes. To commit felony intimidation of witness under Wis. Stat. § 940.43, a person must (a) violate Wis. Stat. § 940.42, which prohibits misdemeanor witness intimidation; and (b) do so under special circumstances.

C. General legal principles related to the sufficiency of the evidence claims.

A court reviews a challenge to the sufficiency of the evidence in a light most favorable to the conviction. A reviewing court should not reverse a conviction based upon the insufficiency of the evidence unless the evidence is "so lacking in probative value and force" that no reasonable jury could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one reasonable inference may be drawn from the evidence, the reviewing court must adopt the inference that supports the verdict. *Id.* at 503-04. "Once the jury accepts the theory of guilt, an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict." *State v. Mertes*, 2008 WI App 179, ¶ 11, 315 Wis. 2d 756, 762 N.W.2d 813.

When the evidence is insufficient to support a conviction for the greater offense, but is sufficient to support a conviction for the lesser included offenses, an appellate court may modify the judgment where the jury necessarily found that the defendant committed the lesser offense. *Dickenson v. State*, 75 Wis. 2d 47, 51-52, 248 N.W.2d 447 (1977); *see also State v. Myers*, 158 Wis. 2d 356, 461 N.W.2d 777 (1990) (noting that jury must be instructed on lesser included charge for appellate court to order remand and resentencing upon invalidation of greater charge).

D. The evidence supports the jury's verdicts that Salaam intimidated a witness, but does not support the special verdict finding that he intimidated a witness in connection with a proceeding in a felony case in which he was charged.

Salaam challenges the jury's special verdict finding that he intimidated T.A. in connection with a proceeding in a felony case. He contends that the State did not present any evidence that either the recklessly endangering safety or the

felon in possession of a firearm charges were felonies. (Salaam's brief at 19).

The circuit court noted the lack of any affirmative evidence that that Salaam's underlying charges were felonies. The parties did not stipulate to it[4] and the State did not ask the circuit court to take judicial notice of that fact (82:6-7). The State attempted to offer the judgment roll from the underlying case that would have established that recklessly endangering safety and felon in possession of a firearm charge were felonies (80:20; 37:12). But the judgment roll was not received (81:74). Based on its review of the record, the State acknowledges that it did not present any evidence that the recklessly endangering safety charge or the felon in possession of a firearm charge were felonies.[5]

Because the record does not support the jury's special verdict finding, Salaam asks this Court to enter a judgment of acquittal on all three counts of intimidation. Salaam's brief at 20. The State disagrees. The proper remedy is to vacate the jury's finding on the special verdict question, but allow its finding of guilt on three counts of misdemeanor witness intimidation to stand.

The lack of sufficient evidence to sustain the jury's special verdict finding does not call into question the jury's

---

[4] The State considered whether Salaam's stipulation to his prior felony conviction for felon in possession of a firearm circumstantially supported the jury's special verdict finding (29). Had the jury heard that his prior conviction was for a felony offense identical to the charge under consideration, it could have inferred that the pending felon in possession of a firearm charge was also a felony. But the circuit court only told the jury he had a prior felony conviction without specifying the charge (81:17).

[5] The circuit court determined that the jurors could still reasonably conclude that the underlying charges were felonies based on their seriousness (82:8). The State was unable to locate any legal authority for the proposition that a jury could infer the nature of a charge is a "felony." The State declines to advance this argument on appeal.

finding that Salaam was guilty of three counts of misdemeanor witness intimidation. Here, the circuit court first asked the jury to determine if Salaam was guilty of the lesser offense of witness intimidation. Only if it found Salaam guilty of the misdemeanor witness intimidation was it to consider the special verdict question: Did Salaam intimidate T.A. in connection with a proceeding in a felony case in which he was charged? (33; 34; 35).

Salaam never argued that the evidence in support of the guilty verdicts themselves was insufficient. Salaam's brief at 18-20. He cannot. The record demonstrates that the State proved each elements of the lesser, misdemeanor offense of witness intimidation.

1. *T.A. was a witness*. T.A. testified that Salaam discharged a firearm at her. T.A. knew that Salaam was arrested on these charges (78:98-102).

2. *Salaam attempted to prevent T.A. from giving testimony in a proceeding authorized by law*. T.A. testified that Salaam placed three jail calls to her on November 15 (79:24-25). The jurors listened to portions of the calls and read transcripts of the call (80:4-5). Based on the calls, T.A. stated that Salaam asked T.A. to get a hold of her sister so that they would not come to court (79:25). After T.A. made those calls, T.A. testified that she failed to appear at scheduled hearings (79:41). T.A. did not come to court because she "was asked not to come to court" (79:42).

3. *Salaam knew that T.A. was a witness and that he acted to prevent her from testifying*. Salaam admitted placing the calls to T.A. after he was arrested and he knew that he was not to call her (80:56). Salaam denied that he was attempting to dissuade T.A. from appearing at trial (80:57-62). But the jury was certainly free to find his testimony on this point incredible.

While the evidence may not have supported the jury's special verdict finding, the evidence is sufficient to sustain the jury's guilty verdicts that Salaam intimidated T.A. Under the circumstances, this Court should remand the case to the circuit court with directions that the circuit court (1) enter a directed verdict of "no" on the special verdict finding as to each felony witness intimidation counts; (2) vacate the judgment of convictions as to each felony witness intimidation; (3) enter judgments of conviction on three counts of misdemeanor witness intimidation; and (4) resentence Salaam on the three counts of misdemeanor witness intimidation.

III. The dispatcher's testimony about T.A.'s mother's out-of-court statement was admissible and its admission did not violate Salaam's confrontation rights.

A. Introduction

Salaam argues that the circuit court erred when it admitted the testimony of dispatcher Elizabeth Brunner about a call she received from T.A.'s mother, K.M., within hours of the shooting incident. Salaam asserts that testimony constituted inadmissible hearsay and violated Salaam's confrontation rights. Salaam's brief at 22-26.

The State disagrees. K.M.'s statements to Brunner were admissible. The admission of K.M.'s statement also did not violate Salaam's confrontation rights. But even if the statements were improperly admitted, the error was harmless.

B. Procedural history relevant to Salaam's claim that the circuit court erred when it improperly admitted the dispatcher's testimony about T.A.'s mother's telephone call.

Following K.M.'s failure to appear at a scheduled trial, the State moved to admit Bruner's testimony about K.M.'s call to the Milwaukee Police Department (2666CR:24). The recording of K.M.'s call had been purged. But the State sought to introduce information contained within the computer assisted dispatch ("CAD") entry that Brunner prepared in conjunction with K.M.'s call. The CAD entry contains the following information:

> Date/Time: September 19, 2011 at 18:03:10 (6:03:10 p.m.)
>
> From: [K.M.] for [A.R.]
>
> Location of Incident: S. 13th Street/W. Cleveland
>
> Location of Caller: lives in Jefferson, Wisconsin
>
> Subject: Gary Salaam, B/M, 01/16/67, 44 years old, called her about twenty minutes ago saying that if she does not have her daughter call him in 2 hours, he won't miss next time
>
> Request: She wants to speak with officer regarding

(2666CR:24:1-2).

At an admissibility hearing, Brunner testified she reviewed the record and independently recalled K.M.'s September 19, 2011 telephone call (77:4). Salaam had called K.M. and told K.M. that if her daughter does not "call him in two hours, he wouldn't miss the next time" (77:5-6). K.M. informed Brunner that Salaam called her approximately 20 minutes before K.M. had contacted the police (77:7). Burner made the CAD entries at the time of the call (77:13). At trial, Brunner testified that K.M. called the police because K.M.

was concerned for her daughter's safety and K.M. was unable to get ahold of her (80:10-11).

The circuit court concluded that K.M.'s statement to Brunner was admissible. It found that K.M.'s statement was nontestimonial for confrontation purposes (77:24-25). Further, it also found that the statement was not hearsay because it was not being offered for the truth of the matter asserted (77:25). Finally, the circuit court held that even if K.M.'s statements were hearsay, they were admissible as a present sense impression (77:26).

C. The dispatcher's testimony about her conversation with K.M. was nontestimonial and did not violate Salaam's confrontation rights.

1. General legal principles related to nontestimonial statements and confrontation.

The Sixth Amendment of the United States Constitution protects a criminal defendant's right to cross-examine and confront witnesses against him.[6] In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the Supreme Court held that that Confrontation Clause prohibits the admission of a declarant's out-of-court testimonial statements if the declarant does not testify at trial and the defendant has not had an opportunity to cross-examine the declarant. *Id.*

In the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006), the Supreme

[6] Salaam does not argue that he has a separate and distinct confrontation right under Article I, § 7 of the Wisconsin Constitution. Wisconsin courts have interpreted both the state and federal constitutional provisions in a coterminous manner. *See State v. Hale*, 2005 WI 7, ¶ 43, 277 Wis. 2d 593, 691 N.W.2d 637.

Court provided a framework for differentiating between testimonial and nontestimonial statements.

> 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

Davis, 547 U.S. at 822.

In *Davis*, a citizen placed a 911 call. The call terminated and the dispatcher reversed the call. Based on the dispatcher's conversation with the citizen, the dispatcher learned that the citizen had been involved in a domestic disturbance with Davis. The dispatcher asked the citizen several questions about Davis including his date of birth, Davis's reason for coming to the house, and other information about the assault. *Id*. at 818.

The Supreme Court found that the dispatcher asked the citizen questions to enable police assistance to meet an ongoing emergency. This required the dispatcher to obtain information necessary to help responding officers identify the assailant. *Id*. at 827. Under the circumstances, the Supreme Court held that the citizen's call was nontestimonial.

In *State v. Rodriguez,* 2006 WI App 163, ¶ 13, 295 Wis. 2d 801, 722 N.W. 2d 136, this Court provided guidance for determining whether a victim's excited utterances to responding law enforcement officers are testimonial. A court must evaluate the out-of-court declaration to determine if it is intended by the speaker to implicate an accused at a later judicial proceeding, or if it is a "burst of stress-generated words whose main function is to get help and succor, or to secure safety and are thus devoid of the 'possibility of

fabrication coaching, or confabulation.'" *Id*. ¶ 26 (citation omitted). Statements made to facilitate the treatment of a victim or apprehend an assailant serve "other societal goals other than adducing evidence for later use at trial." *Id*. ¶ 23.

Applicable standard of review to confrontation challenges. Whether the admission of evidence violates a defendant's right to confrontation presents an issue of constitutional fact. Under this standard of review, this court will adopt the circuit court's findings of fact unless they are clearly erroneous, but independently applies the appropriate constitutional standard to those facts. *State v. Norman*, 2003 WI 72, ¶ 24, 262 Wis. 2d 506, 664 N.W.2d 97.

2. K.M.'s telephone call to the dispatcher was nontestimonial and its admission did not violate Salaam's confrontation rights.

The circuit court concluded that K.M.'s call was nontestimonial (77:24). In arriving at its decision, the circuit court reasoned that that K.M. made the call

> within a short time period of [Salaam's] alleged call to her and the purpose of it was to seek emergency help to get a hold 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. At the initial statement relating the threat [sic], I believe to be nontestimonial. It's dealing with this emergency that the threat to her leads her to fear for her daughter's safety and she wants help and she doesn't know where her daughter is.

(77:25). The record supports the circuit court's decision.

This is precisely the type of call that fits within *Davis'* nontestimonial framework. The information exchanged between Brunner and K.M. was the kind of information that the police needed to respond to an ongoing emergency. It identified the potential perpetrator (Salaam) and potential

victim (her daughter). The statement "I won't miss again" (2666CR:24:1-2), suggest that Salaam is threatening to engage in a violent act and that he has done so previously. Finally, Salaam's demand that K.M.'s daughter call her within two hours would lead a reasonable person to believe that the threat is not merely potential, but imminent (2666CR:24:1-2). K.M. called the police within twenty minutes of Salaam's call to her because she was concerned for her daughter's safety and K.M. was unable to contact her daughter (80:10-11).

The circuit court's factual findings were not clearly erroneous. The record demonstrates that K.M.'s out-of-court statements were not testimonial. The admission of Brunner's testimony about the call did not violate Salaam's confrontation rights.

D. K.M.'s out-of-court statement was properly authenticated and admissible.

Salaam also contends that the circuit court admitted K.M.'s out-of-court statement to Dispatcher Brunner without proper authentication. Salaam's brief at 25-26. The State disagrees.

1. General legal principles related to authenticity, admissibility, and the hearsay rule.

Authenticity requirements. Under Wis. Stat. §909.01, "[t]he 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." *See also City of New Berlin v. Wertz,* 105 Wis. 2d 670, 676, 314 N.W.2d 911 (Ct. App. 1981) ("The question of authenticity is preliminary to the question of admissibility."). Wisconsin Stat. § 909.015 provides for methods of authentication of evidence, but "expressly states that it is not an exhaustive or exclusive list [and] … [i]ndeed,

telephone calls can be authenticated by circumstantial evidence." *State v. Baldwin*, 2010 WI App 162, ¶ 55, 330 Wis. 2d 500, 794 N.W. 2d 769 (Wis. App. 2010).

Issues of authentication and identification relate to the admissibility of evidence. Under Wis. Stat. §901.04(1), a judge decides preliminary questions such as the admissibility of evidence. The rules of evidence do not bind the judge determining a preliminary question. *Id*.

Relevant exceptions to the hearsay rule. Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Wis. Stat. § 908.01(3). Hearsay is generally inadmissible unless it falls within a delineated exception. Wis. Stat. § 908.02. A "present sense impression" is an exception to the hearsay rule. A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Wis. Stat. § 908.03(1). *See State v. Ballos*, 230 Wis. 2d 495, 505, 602 N.W.2d 117 (Ct. App. 1999) (holding that a 911 caller's statement may be admissible as a present sense impression if it describes events that the caller perceived or just observed).

Records of regularly conducted activities also fall outside of the exception to the hearsay rule. Under Wis. Stat. § 908.03(6), a report or record documenting events made at or near in time to the events documented and prepared in the course of a regularly conducted activity does not constitute hearsay. Police reports may fall within this exception. *See Ballos*, 230 Wis. 2d 508 (characterizing this exception as the business records exception).

Standard of review. The decision to admit or exclude evidence rests within the circuit court's discretion. *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis. 2d 253, 759 N.W.2d 557. An appellate court will only reverse a decision to admit or exclude evidence when the circuit court has erroneously

exercised its discretion. *Id*. An appellate court will not find an erroneous exercise of discretion if the record contains a reasonable basis for the circuit court's ruling. *State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis. 2d 686, 613 N.W.2d 629.

2. The circuit court correctly concluded that K.M.'s out-of-court statement was admissible.

The circuit court's decision properly admitted K.M.'s out-of-court statement through Brunner.

K.M.'s out-of-court statement was properly authenticated. Salaam contends that K.M.'s statement was not admissible because the State did not properly authenticate it. Relying on *Nischke v. Farmers & Merchants Bank*, 187 Wis. 2d 96, 106, 522 N.W.2d 542 (Ct. App. 1994), Salaam asserts that statements of self-identification are not, by themselves, sufficient to identify the speaker. Salaam's brief at 25. But Salaam's case is readily distinguishable from *Nischke*.

First, K.M.'s call falls within one of the examples for the authentication and identification that conforms to Wis. Stat. § 909.01's requirements. Under Wis. Stat. § 909.015(6)(b),

> Telephone conversations, by evidence that a call was made to the number assigned at the time by the telecommunications company to a particular person or business, if:
> . . . .
>
> (b) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

K.M.'s call to the Milwaukee Police Department fits within this exception. The department provides public safety services to the public and has created a system to record and

document calls from citizens to it. K.M.'s call related to business reasonably transacted over the telephone. Brunner properly documented information related to K.M.'s call including the nature of the complaint and the persons involved (2666CR:24:1-2).

K.M.'s call also had other indicia of reliability that would allow the court to find that authentication requirements had been satisfied. First, the public would generally understand that telephone calls to the police are recorded and are traceable. The caller's number came up on the dispatcher's screen (77:9). Second, an individual who provides false information is subject to prosecution. *State v. Williams*, 2001 WI 21, ¶¶ 69, 75-77, 241 Wis. 2d 631, 623 NW2d 106 (Prosser, concurring) (describing the Milwaukee 911 system, the information it captures, and the potential for prosecution for a false report). Third, while Brunner spoke to K.M., Brunner confirmed that K.M.'s call related to another call that occurred on Cleveland Avenue (77:6, 12). The shooting incident occurred on 13th Street, between Harrison and Cleveland earlier in the day (78:8).

Based on this record, the circuit court could reasonably conclude that the State had properly authenticated K.M.'s out-of-court statement as memorialized in the CAD report.

The admissibility of K.M.'s out-of-court statement. Brunner's testimony about K.M.'s out-of-court statement was admissible on several different grounds. First, the circuit court concluded that K.M.'s statement was not hearsay at all because it was not offered to show the truth of any matter in the statement. Rather, it was offered to show K.M.'s perception that the call was threatening (77:25).

Second, even if K.M.'s out-of-court statement was hearsay, it was admissible as a present sense impression. It was a present sense impression because it documented K.M.'s statement concerning an event (Salaam's call and

K.M.'s inability to get a hold of her daughter) made immediately after the event (within twenty minutes).[7]

K.M.'s out-of-court statement was also admissible as a record of a regularly conducted activity. Brunner's CAD report itself constitutes a detailed record of a regularly conducted activity of the police department because it documents events (K.M.'s call) as K.M. is speaking to Brunner (77:16). To the extent that K.M. restated Salaam's comments, Salaam's statement constituted an admission of a party opponent and was not hearsay.

The circuit court's determination of the admissibility of K.M.'s out-of-court statement is not clearly erroneous. This Court should affirm its decision.

E. Any error in admitting K.M.'s out-of-court statement was harmless.

The admission of inadmissible evidence is subject to the harmless error rule, under which the reviewing court will reverse only if there is a reasonable possibility that the error contributed to the conviction. *See State v. Dyess*, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985). "An error is harmless if there is no reasonable possibility that the error affected the outcome of the trial." *State v. Koller*, 2001 WI App 253, ¶ 62, 248 Wis. 2d 259, 635 N.W.2d 838.

At trial, Salaam claimed that he was not present when someone in a gold colored SUV shot in the direction of T.A. and the other women (80:54). The State presented

[7] The State also sought to introduce K.M.'s out-of-court statement as an excited utterance (2666CR:24:2-3). An excited utterance relates to a startling event and must be made while the declarant is under the stress of the event. Wis. Stat. § 908.03(2). Because the circuit court was unable to ascertain K.M.'s demeanor (77:26), the State does not advance the excited utterance argument on appeal.

significant additional evidence over and apart from K.M.'s out-of-court statement linking Salaam to the shooting.

T.A. testified that she had lived with Salaam for approximately a year, but had separated within the weeks before September 19, 2011 (78:91). On September 19, T.A. stopped to talk to her sister, A.R., and K.H. on a bridge on 13th Street (78:93, 98). Salaam drove past them in a gold Jeep Cherokee, made a U-turn, and approached where the women were. T.A. started running. (78:99-100). T.A. saw a black handgun in Salaam's hands (78:102). Salaam stopped the car. The driver's window was down. And Salaam shot at them (78:103). T.A. heard at least three shots and believed that Salaam shot two at her (78:101, 104).

A.R. testified that on September 19, 2011, A.R. and a friend, K.H., were on the 13th Street Bridge near Cleveland Avenue (78:31). While on the bridge, they stopped to talk to A.R.'s sister, T.A. (78:37-38). T.A. yelled, "there's Gary." A.R. saw Salaam's gold Jeep pull up. The window was open and she saw his face. The women ran when A.R. heard Salaam's gun cock (78:38). A.R. saw Salaam pull a gun and point it out the window (78:41). He pointed the gun in in the direction of T.A., A.R., and K.H. (78:42). A.R. heard two shots fired from the gun (78:39). A.R. testified that T.A. was scared and told A.R. that "that was Gary and that she had to go home before he found her again" (78:40). A.R. believed that she was hit by something because she had a burning sensation on her calf and a small burn mark (78:43).

K.H. testified that she was with A.R. when they stopped to speak to T.A. on the bridge (78:57-58). She then heard A.R. and T.A. say, "here comes Gary" and "run" (78:58). As she was running, K.H. saw a gold SUV like an Explorer whip around on the bridge and then she heard two or three shots. The guy in the car had a gun. She also felt burning on her shoulders where she got hit by a ricochet (78:59-60). The driver was shooting at someone "like he was gonna kill somebody" (78:65).

T.A. testified that she was with Salaam when the police pulled them over on November 3, 2011 (78:107-08). They were in a gold Jeep Cherokee. Salaam was taken into custody (79:23). T.A. identified the gold Jeep as Salaam's. She said that the gold Jeep that police pulled them over in was the same Jeep that Salaam was driving the day he shot at her (79:26).

Finally, as discussed in Section II. D. above, Salaam made three telephone calls to T.A. before the preliminary hearing to dissuade T.A. and A.R. from appearing in court (79:25, 42). T.A. failed to appear at the scheduled hearing (79:41).

The State presented substantial evidence connecting Salaam to the shooting. There is no reasonable probability that any error in admitting K.M.'s out-of-court statement contributed to Salaam's conviction. Any error in admitting this evidence was harmless.

IV. Salaam is not entitled to a new trial in the interest of justice because Salaam's due process right to present a defense did not include the right to cross-examine the victim, T.A., about information contained in Children's Court records about her mental health.

A. Salaam's claim and its related procedural history.

Salaam claims that the circuit court deprived him of the opportunity to present a defense. He contends that the circuit should have permitted him to introduce evidence that T.A.'s allegedly paranoid and delusional tendencies undermined her credibility. As a result, he contends that this Court should grant him a new trial in the interest of justice. Salaam's brief at 26-29.

The State disagrees. The record demonstrates that the circuit court properly exercised its discretion when it declined to allow Salaam to introduce information about T.A.'s mental health.

Salaam filed a *Shiffra-Green*[8] motion seeking access to T.A.'s mental health records. As grounds for his motion, he alleged that T.A. suffered from "paranoia and delusions" (18:1). The circuit court denied the motion. It reasoned that the presence of third-party witness and other corroborating evidence undercut the Salaam's assertion that T.A. made up a claim about the shooting incident out of paranoia or a delusion (68:25-26).

Salaam subsequently came into possession of certain Children's Court records. He requested the circuit court to examine the records in camera because the information reflects on T.A.'s credibility. He also asked that he be allowed to inquire into the subject matter of the records during his cross-examination of Salaam (24:1).

Following the circuit court's review of the records, it denied Salaam's motion. It rejected the argument that T.A.'s belief that Salaam was a drug dealer was delusional (73:6). The circuit court noted that while someone may experience delusions associated with drug use or other mental health issues, it does not mean that they were suffering from those delusions at the time of the offense (73:7-8). The circuit court found that the records it reviewed did not necessarily established T.A.'s mental condition at the time of Salaam's crimes (73:9). Finally, it also found that discussion of T.A.'s mental health would be potentially prejudicial because it would sidetrack the jury from the trial issues (73:9). The circuit court did allow Salaam to inquire into T.A.'s substance use at the time of the offense as that would impact her credibility and ability to perceive the incident (73:8).

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[8] *See State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

B. General legal principles related to the right to present a defense and interest of justice claims.

1. The due process right to present a defense.

The right to present a defense is grounded in the confrontation and compulsory process clauses of the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. *State v. Pulizzano,* 155 Wis.2d 633, 645, 456 N.W.2d 325 (1990). Confrontation and compulsory process only grant a defendant the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect. *Id* at 646. A court may exclude irrelevant and evidence otherwise inadmissible under the rules of evidence without violating a defendant's right to present a defense. *State v. Muckerheide,* 2007 WI 5, ¶40, 298 Wis. 2d 553, 725 N.W.2d 930. Unless a court applies the rules of evidence in an manner arbitrary or disproportionate to the purposes that the rules serve, application of the rules does not abridge a the right to present a defense. *State v. St. George*, 2002 WI 50, ¶52, 252 Wis. 2d 499, 643 N.W.2d 777.

Standard of review. A circuit court errs if it exercises its discretion to admit or exclude evidence in a manner that deprives a defendant of the constitutional right to present a defense. *St. George*, 252 Wis. 2d 499, ¶49. Whether a circuit court's evidentiary ruling implicates a defendant's right to present a defense is a question of constitutional fact that this Court independently reviews. *State v. Wilson*, 2015 WI 48, ¶ 47, 362 Wis. 2d 193, 864 N.W.2d 52.

2. New trials in the interest of justice.

Wisconsin Stat. § 752.35 confers discretionary authority upon the court of appeals to review an otherwise waived error, reverse a judgment and order a new trial in the interest of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1,

17-19, 456 N.W.2d 797 (1990). But a court should exercise this discretionary authority "infrequently and judiciously," only in "exceptional cases." *State v. Avery,* 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted).

A court may grant discretionary reversal if it determines that "the jury was erroneously denied the opportunity to hear important, relevant evidence while other evidence was erroneously admitted . . . [E]rroneous denial of relevant evidence refers to a legal evidentiary error by the circuit court." *State v. Burns*, 2011 WI 22, ¶ 45, 332 Wis. 2d 730, 798 N.W.2d 166 (internal quotation marks and citations omitted).

C. The circuit court properly limited Salaam's inquiry into T.A.'s mental health.

Salaam claims that the circuit court deprived him of the opportunity to fully challenge T.A.'s credibility based on the assertion that drug abuse and mental illness affected T.A.'s perceptions. Salaam's brief at 26-27.

Salaam does not cite any material in the record that undermines the circuit court's findings. He cannot. The Children's Court records that the circuit court reviewed are not part of the record on appeal. As the appellant, Salaam is responsible for providing this Court with a record adequate for review of the issues raised. In the absence of the Children's Court records, this Court will "presume that every fact essential to sustain the circuit court's decision is supported in the record. *Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶ 35, 298 Wis. 2d 468, 727 N.W.2d 546.

The record demonstrates that the circuit court reasonably exercised its discretion based on the records before it. It recognized that Salaam wanted to attack T.A.'s credibility based on her allegedly delusional statement that Salaam was a drug dealer (73:6). The fact that T.A. may have mental health issues or was delusional at some point in

time does not mean that she was suffering from these issues at the moment of the crime (73:6-7). Absent expert witness testimony, the circuit court did not believe that there was a basis to assert that T.A. had a specific mental health condition at the time of the offense (73:8).

The circuit court also effectively excluded this evidence on legal relevance grounds. See Wis. Stat. § 904.03. The circuit court was concerned that exploration of these issues would sidetrack the jury (73:9). It did not want to conduct a trial within a trial for the purpose of determining whether T.A.'s belief that Salaam was a drug dealer was delusional or based on fact (73:7). The circuit court also wanted to avoid a testimony from experts attempting to explain when T.A. has delusions and when she does not (73:8). At best, the evidence of her delusions on other occasions was of limited relevance and did not outweigh the danger of prejudice that would flow from its admission (73:9).

The circuit court did not deny Salaam the opportunity to present a defense. It merely restricted Salaam from attacking T.A.'s credibility based on marginally relevant, but unduly prejudicial evidence. Based on this record, Salaam has not demonstrated that his case is the exceptional case that should compel this Court to exercise its discretionary authority and grant him a new trial.

D. Any error in excluding this evidence was harmless.

Any errors in precluding Salaam from impeaching T.A.'s credibility with information from the Children's Court record were harmless. The circuit court's decision did not foreclose Salaam from attacking T.A.'s credibility. Salaam cross-examined T.A. about her prior statements that she had been drinking heavily on the day of the shooting (79:27-28). He also challenged inconsistencies in T.A.'s prior statements about how she knew Salaam was the driver (79:36-37).

In addition, Salaam ignores the fact that T.A. was not the only witness to the shooting. The circuit court recognized that the presence of other witnesses to the shooting substantially limited Salaam's ability to attack T.A.'s credibility (73:5).

For the above reasons, including its argument in Section III., E. above, there is no reasonable probability that the circuit court's limitations on Salaam's cross-examination of T.A. affected the outcome of Salaam's trial.

CONCLUSION

For the above reasons, the State respectfully requests this Court to affirm Salaam's judgment of conviction.

Dated this 16th day of December, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,107 words.

_____
Donald V. Latorraca
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 16th day of December, 2015.

_____
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