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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT AND AUTHORITIES

I. The State concedes that it failed to prove the essential elements of felony intimidation of a witness at trial, and the appropriate remedy is entry of a judgment of acquittal on all three counts.

The State concedes that "the record does not support entry of the judgments for the felony witness intimidation" charges. See State's Brief at 9. Specifically, the State concedes, as did the circuit court, that there was a lack of any affirmative evidence that the underlying charges were felonies: the State failed to ask the circuit court to take judicial notice of it, and the judgment roll was not received into evidence. See State's Brief at 12. See also [R. 82:6-7, 80:20, 37:12, 81:74]. Moreover, the State specifically declines to advance the Circuit Court's reasoning for concluding the the underlying charges were based on their seriousness, correctly noting there is no legal authority to support that proposition. See State's Brief at 12, fn.5.

The State, instead, argues that the proper remedy for its utter failure to prove every element of the offense is not acquittal, but modification of the judgment to reflect conviction of the lesser offense of misdemeanor intimidation of a witness, relying on State v. Myers, 461 N.W.2d 777 (Wis. 1980). See State's Brief at 12, 14. The State essentially argues that the jury instruction on felony intimidation of a witness necessarily includes the essential elements of misdemeanor intimidation of a witness, and that this instruction is sufficient to shoehorn this case into the holding of Myers. See State's Response at 12-13. The State's position is neither supported by the record in this case nor the holding of Myers.

Myers holds that "the court of appeals may not direct the circuit court to enter a judgment of conviction of a lesser included offense when a jury verdict of guilty of the

greater offense is reversed for insufficient evidence and the jury was not instructed on the lesser included offense." Myers, at 778. In Myers, the State charged Myers with aggravated battery and the jury was instructed on the crime of aggravated battery only. The court of appeals refused the State's request to direct the circuit court to enter a judgment of conviction of battery, viewing the State's request at "attempt to remedy its failure to request an instruction for that offense at trial." Id. The Supreme Court agreed, and in fact expressly rejected the argument the State proffers now:

> The state argues that even if the evidence of great bodily harm was insufficient, sufficient evidence nevertheless exists in the record to support the jury's guilty verdict on the remaining elements of the greater offense. These elements, asserts the state, constitute a lesser included offense and the conviction of the greater offense is reversed because of insufficient evidence of one or more elements of the crime, the jury's verdict a priori constitutes a finding of guilty of the remaining elements of the greater offense. [...]
>
> The state's argument ignores the crucial distinction between an appellate court finding evidence in the record to support a jury verdict and a jury finding the evidence sufficient beyond a reasonable doubt. Even though the record contains evidence sufficient for an appellate court to uphold a jury verdict of guilty of the lesser included felony . . . a properly instructed jury would not necessarily find the evidence persuasive of guilt of this crime beyond a reasonable doubt. [...]
>
> Moreover, we conclude that although the state's argument is made in terms of modification of the judgment, the state is in effect asking the appellate court to give it the benefit of jury instructions it failed to request at trial. The state is asking us to rescue it from a trial strategy that went awry.

Myers, at 781-782. The Myers court squarely places the risks and benefits of trial strategy and instructions which reflect that strategy on the parties, and refuses to allow the state the opportunity to modify its trial position on appeal. Id. at 783.

The record in this case reflects that the jury was instructed pursuant to the standard jury instruction for felony intimidation of a witness, WIS JI-Criminal 1292, See Supp. App. 1-4, and that the instruction was provided to the jury for the felony penalty increase as directed by the comments:

> 7. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . . "

WIS JI-Criminal 1292, cmt. 7. The jury verdict forms also reflect the State's "all in" strategy, reflecting that the jury was asked to choose between "not guilty" and "guilty as charged in . . . the information." See Supp. App. 5-10. The State did not request, and the instructions do not reflect, that the jury was instructed that it had the option of convicting Mr. Salaam on the lesser included offense of misdemeanor intimidation of a witness. Id. at 1-4. Both the instruction and the jury forms could have easily been adapted to reflect this option; neither was requested by the State. Id. Thus, the State gave the jury the option of acquittal or conviction of felony intimidation of a witness. Now, faced with its own failure, the State asks this Court to allow the State another kick at the cat on appeal. Myers specifically prohibits this, and double jeopardy principles prevent Mr. Salaam from being retried. See State v. Henning, 2004 WI 89, 273 Wis. 2d 352. Accordingly, Mr. Salaam again requests that this Court vacate the convictions 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 circuit court improperly joined the 2011 and 2012 cases, improper joinder is presumed prejudicial, and the appropriate remedy for that error is a new trial.

In responding to Mr. Salaam's assertion that the 2011 and 2012 cases were improperly joined, the State baldly asserts that the cases were of the same or similar character, citing absolutely no authority in support, and fails to address the impact of the Salinas case, arguing that the case is unpublished and thus unpersuasive. See State's Brief at 6, fn. 2. In so doing the State hopes to softpedal the impact of Salinas, which is

currently before the Wisconsin Supreme Court, and fails to rebut the presumption that improperly joined cases are prejudicial.

First, in State v. Luis Salinas, 2013AP2686C-CR (Wis. Ct. App. April 21, 2015) (per curiam)(petition for review granted), the Court of Appeals, District III, held that the trial court improperly joined sexual assault of a child counts with victim intimidation counts. Supp. App. 11-27. In Salinas, the defendant was charged with sexual assault of a child and victim intimidation, both of which stemmed from a prior domestic abuse case. Supp. App. 11-19. On the State's motion and over Salinas' objection, the court joined the counts for trial. Citing Wis. Stat. 971.12, the Court of Appeals rejected the State's argument that the intimidation and sexual assault charges were properly joined, holding that they were not of the same or similar character because they were not the same type of offense and there was little to no overlapping evidence. Id. at 20. The Court further held that the evidence did not overlap, and the only potentially overlapping evidence was that related to the underlying domestic abuse case. Id. Moreover, the Salinas court, citing Leach, held that the improperly joined charges were not harmless to Salinas, noting that the presumption of prejudicial joinder could have been rebutted by the State, but was not. Id. at 23-26.

The State's response to Mr. Salaam's opening brief are strikingly similar to the State's position in Salinas. The State baldly asserts that the evidence for each case was "of the same or similar character" and "relied on overlapping evidence" without a single citation to either the factual record or legal authority. See State's Brief at 8. The State utterly fails to address specific facts and apply those facts to legal standards. This Court need not address undeveloped arguments. See State v. Flynn, 190 Wis.2d 31, 29 n.2,

527 N.W.2d 343 (Ct. App. 1994); Charolais Breeding Ranches, Ltd. v. FPC Secs Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). In fact, as Mr. Salaam pointed out in his opening brief, *the only* evidence from the 2011 case required to prove an essential element of the 2012 case was the felony nature of the 2011 proceeding, which the State has now conceded it failed to prove; thus, there was NO overlapping evidence in the two cases. The State has simply not proffered any support in the record or the law for its assertion that the 2011 and 2012 cases were properly joined.

Moreover, 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). Accordingly, the prejudice analysis under Leach requires an other-acts analysis under Wis. Stat. 904.02(2) and State v. Sullivan, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998). Leach also squarely places the burden of proving that a presumptively prejudicial joinder is harmless on the State, not the defendant. See Leach, 124 Wis. 2d at 672-73. Accordingly, the State bears the burden of providing specific citations to the record and to legal authorities that the evidence of each case would have been admissible in the other under Wis. Stat. 904.02 and Sullivan. Again, the State completely fails to address specific facts and apply those facts to legal standards; it baldly asserts that "under the circumstances, the evidence from each case would be admissible in the other," completely failing to cite or apply Wis. Stat. 904.02 or Sullivan. Again, this Court need not address undeveloped arguments and may deem unaddressed arguments conceded. See Flynn, at 29 n.2; Charolais, at 109. Because the State has failed to rebut the

presumption of prejudice, the approprate remedy for these improperly joined cases is, as Leach directs, reversal and a new trial.

III. Elizabeth Brunner's testimony regarding the contents of the call she received from K.H. was improperly admitted by the trial court, in violation of the Confrontation Clause and the hearsay and authentication rules of evidence, and the admission of that evidence was prejudicial.

The State argues that Elizabeth Brunner's testimony regarding the phone call she received from K.H. clears the constitutional and evidentiary hurdles necessary to protect Mr. Salaam from an unfair trial, and in the alternative argues that even if the statements were improperly admitted, they were harmless. The State is simply incorrect.

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.

In response to Mr. Salaam's argument that Elizabeth Brunner's testimony was erroneously admitted as nontestimonial, the State does not challenge Mr. Salaam's description of the constitutional facts supporting the circuit court's finding that the statement was nontestimonial, nor does the State proffer its own citations to the record that would indicate the call itself was testimonial, nor, in fact, does the State argue that Mr. Salaam misunderstands the holdings of Crawford, Davis, or Rodriguez. Instead, the State baldly asserts that the facts in this case are similar to those in Davis. The State clearly misunderstands Davis, the facts of which indicate that the information relating to defendant Davis was taken by the 911 dispatcher at *the time of the emergency, while Davis was still present at the location*. See Davis, 547 U.S.813, at 817-818. The record, which the State does not refute, indicates 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. App. 55 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. App. 59. She took K.M.'s information and entered a call for one of the officers working inside the district to return a call to K.M. to get further information regarding her concerns. App. 61. 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.

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.

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.

Moreover, the State argues that the circuit court properly admitted K.M.'s out of court statement through Brunner, arguing essentially that the call in its entirety, including the statement allegedly made by Mr. Salaam, was admissible as it was properly

authenticated and met a number of exceptions to the hearsay rule. Simply put, the statements allegedly made by K.M. and by Mr. Salaam to K.M. are inadmissible because they were improperly authenticated, were hearsay, and did not fit within an exception to the hearsay rule.

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. App. 59-60. 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.").

The State does not in fact respond directly to Mr. Salaam's argument that KM.'s statement and Mr. Salaam's alleged statement to K.M. has not been authenticated, but instead argues that the call was appropriately authenticated under Wis. Stat. 909.015(6)(b), because it was "evidence that a call was made to the number assigned at

the time by the telecommunications company to a particular person or business." However, the record reflects that Ms. Brunner did not in fact determine who the number was listed to by the telephone company:

Q: No. My question is, did you determine who that number was listed to by the telephone company?
A. That's not something that we would routinely do for any of our calls.
Q: So the answer is no, you didn't?
A: I did not.
Q: Did you cause anybody to do that?
A: No.

App. 60. Thus, the call was not authenticated pursuant to Wis. Stat. 909.015(6)(b).

Moreover, the State argues that K.M.'s statement was not hearsay, and was in fact offered to show K.M.'s perception that the call was threatening. See State's Response Brief at 22. The jury, however, received no such limiting instructions. App. 54-60. In short, the record simply does not support the State's argument that the admission of K.M.'s out of court statement was not clear error.

Finally, the State's argument that the admission of this statement was harmless error is specious. As the State correctly notes, an error is harmless "if there is no reasonable possiblity that the error affected the outcome of the trial." State v. Koller, 2001 WI App 253, 248 Wis.2d 259. In this case, Mr. Salaam was forced to defend himself against two unrelated series of events in the same trial, which is itself prejudicial. In addition, the jury heard a damning statement from a caller attributing an inculpatory statement to 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., because she was unavailable for cross examination. Moreover, the State concedes it failed to prove the essential elements of the offense in one of the two improperly joined cases. K.M.'s

statement attributed to Mr. Salaam, admitted without limiting instructions, is the very essence of character evidence of a defendant, which Wis. Stat. 904.02 flatly prohibits. Accordingly, this Court should find that the admission of K.M.'s statements was not harmless.

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 judgments of acquittal on all three counts in 2012CF69 and order a new trial in 2011CF4809.

Respectfully submitted this ____ day of _____, 2016.

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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 _____, 2016.

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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 _____, 2016.

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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:

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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 _____, 2016.

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SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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