STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP1667 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROSS HARRIS, JR.,

Defendant-Appellant.

Appeal from a Judgment of Conviction
Entered in the Circuit Court for Dane County,
the Honorable David T. Flanagan Presiding
Circuit Court Case No: 2016CM1408

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
P.O. Box 5414
Madison, WI 53705
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE ISSUES

Was Mr. Harris entitled to a mistrial after state witnesses repeatedly testified improperly to alleged other acts and alleged statements of Mr. Harris which had not been disclosed to him in discovery?

Trial Court Answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because the briefs can adequately set forth the arguments in this matter. This case does not qualify for publication because it is a misdemeanor appeal. *See* Wis. Stats. §§ 809.23(1)(b)4 and 751.31(2)(f).

STATEMENT OF THE CASE

This is an appeal from the Judgment of Conviction entered on January 17, 2018, in the Circuit Court for Dane County, the Honorable David T. Flanagan presiding, wherein the Court entered judgments on a jury verdict finding Ross Harris, Jr. guilty of one count of disorderly conduct as a repeater contrary to Wis. Stat. §§ 947.01(1), 939.62(1)(a). (59; App. 101-02.)

This case arises out of a physical altercation between Harris and A.D. in an elevator at St. Mary's Hospital during the afternoon of July 26, 2016. (3:2.) The parties disputed who initiated the altercation. (3:2.) A.D. claimed that Harris initially hit him. (67:80-81.) Harris testified that A.D. initiated the altercation by swinging at him, and that he struck at A.D. to defend himself. (67:176, 183.)

Harris was charged with disorderly conduct, repeater, and misdemeanor battery, repeater. (3.) A.D. was not arrested or charged. (67:151.)

Prior to trial and pursuant to Wis. Stat. § 971.23(1)(b), Harris filed a discovery demand requesting that the State provide him with written summaries of any oral statements he made. (5:1.)

Prior to trial, Harris moved to preclude the state from presenting evidence that A.D. and/or his fiancé had accused Harris of stealing property. (17; 67:12-13.) The State acknowledged it could be prejudicial to accuse Harris of having committed theft but argued A.D. should be able to testify he spoke with Harris "about the return of property…or something to that effect" to provide context. (67:13-14.) The ruled:

> It seems to me that the jury is going to -- probably going to want to have and probably should have some context for whatever happened. Obviously, from what you are telling me, there's some -- a little bit of ill-will between [A.D.] and the defendant.
>
> I think what I -- I understand that the prosecution to be saying they will not be accusing Mr. Harris of having stolen something or taken something improperly.
>
> I think the best way to deal with it is not to cut it out artificially from the story of what happened, but for me to craft an instruction if appropriate at the end to make it very clear to the jury that there is no allegation of theft that's any part of this case. That there is no charge or suggestion that Mr. Harris was – had wrongfully stolen something.

> We will have to see where the testimony goes. If it goes too far in the direction of suggesting theft, I certainly will entertain an objection. But I think if it doesn't go very far, we should be able to take care of it if necessary by a curative instruction.

(67:14-15; App.102-03.)

During trial, Harris moved for a mistrial on three occasions during testimony by state witnesses. Harris made two motions during A.D.'s testimony, the first after A.D. testified regarding an alleged statement of Harris that had not been disclosed in discovery. (67:70-71.) Harris also moved for a mistrial on the basis that A.D. accused Harris of stealing during his testimony. (67:73.) Harris' third motion was made during the testimony of A.D.'s fiancé, Rachel Amos, who also testified regarding alleged statements of Harris that were not disclosed in discovery. (67:119.) In each instance, the court expressed noted the testimony was prejudicial to Harris, but withheld ruling on the motions until after the jury returned its verdicts. (67:74-79, 122-27; App.104-15). After the jury returned its verdicts, the court denied the motions. (67:281; App.116.)

The jury convicted Harris of disorderly conduct but acquitted him of battery. (53:2-3; 67:277.) The court sentenced Harris to a fine and ordered he pay restitution. (58; 59; App.101.)

Harris filed a timely notice of appeal. (61.) Harris now appeals the decision of the circuit court denying his repeated requests for a mistrial.

STATEMENT OF FACTS

Evidence at trial[1]

Harris and A.D. were both at the hospital on July 26, 2016, to visit Harris' newborn grandchild. (67:61, 67.) Harris' son and Rachel Amos' daughter were the parents of newborn. (67:61, 67.) A.D. was Amos' fiancé; approximately one year before the incident, Amos had left A.D. to date Harris for several months before reuniting with A.D. (67:61, 67, 110, 112, 134-35.) Harris and A.D. had never met prior to the day of the incident; however, A.D. was aware that Amos and Harris had a prior relationship. (67:67, 134.)

A.D. was of the opinion that Harris had taken Amos' property after Amos and Harris ended their relationship and intended to confront Harris about this issue at the hospital. (67:69, 115-16.) In fact, Harris was never criminally charged relating to this property dispute, and Amos had failed to prevail in a lawsuit against Harris over her claims. (67:135-36, 140.)

On the afternoon in question, Harris was in the hospital room meeting his grandchild along with other family members when Amos and A.D. arrived. (67:66, 170.) A.D. admitted he confronted Harris about Amos' property in the hospital room and asked him to go outside to talk about it. (67:69-70, 100-01.) Harris testified that A.D. demanded to speak with Harris regarding Amos' property, but Harris told A.D. it was not the time to discuss that issue. (67:172-73.) Harris recalled that A.D. spoke in a hostile, raised voice while he stood above where Harris was seated, then pulled up a

[1] The following summary is based on testimony which was not objected to at trial. The testimony which Harris asserts was improper is summarized, *infra*, under the heading "Motions for Mistrial."

chair next to Harris and kept repeating his concerns about the missing items and wanting to talk to Harris. (67:173, 182-83.) Amos testified that A.D.'s tone of voice was normal when he first spoke to Harris, but he got fairly close to Harris as they were sitting together in the hospital room. (67:138.) She testified that A.D. brought up the subject, asking Harris if he would discuss it, and that A.D. was not happy about items not being in her possession. (67:134.) She testified that A.D. asked Harris to go downstairs. (67:136.) A.D. and Harris left the room at one point. (67:115.)

Harris testified he decided to leave the room in order to get away from A.D. and Amos, and A.D. followed him. (67:174.) Given the fact that A.D. had immediately made demands to discuss the situation with Amos' property upon meeting Harris, he felt uncomfortable with the fact that A.D. was following him. (67:174-75.) At some point, Harris asked A.D. why he was following him. (67:182.)

A.D. testified he left the hospital room with Harris and walked to the elevator. (67:80.) Both men got in the elevator, and A.D. stood near the controls. (67:80.) A.D. testified that he asked Harris a question about which floor was the main level, "Then I just started getting hit. Punched around. I got dazed and I went back into the corner and tried to block myself." (67:80-81.) A.D. testified Harris hit him on his check, nose, and the left top corner of his head. (67:81-82.) A.D. testified he then backed into the corner of the elevator, but also that Harris was hitting him on his back. (67:83, 89-90.)

Harris testified that he entered the elevator first, A.D. then entered and stood facing him. (67:175-76.) A.D. asked Harris where the property was and Harris responded that he didn't have any property and also stated "fuck you and you

bitch" to A.D. (67:184-85.) A.D. then took the first swing at Harris, who ducked. (67:176, 183.) Harris then swung and missed A.D. (67:176.) A.D. then grabbed Harris around the waist as if trying to pick him up and Harris hit A.D. (67:176, 186.) A.D. did not let go of Harris' waist until Harris hit him. (67:187-88.)

Harris testified that A.D. hit him back. (67:176, 186.) However, in his direct testimony, A.D. denied touching, pushing, or hitting Harris in the elevator. (67:86.) On cross-examination, A.D. admitted he crouched down in the elevator and pushed Harris when he was trying to push his way up and out of the elevator. (67:88.) He then recalled laying a hand on Harris and that he may have hit Harris in the arm. (67:88-89.) A.D. later acknowledged telling police that he tried to punch Harris twice. (67:98.)

A.D. testified that when the elevator doors opened, he tried to exit the elevator, but was initially unable to because Harris pulled his shirt, which then ripped as A.D. exited the elevator. (67:84.) Harris did not exit the elevator but returned to the hospital room upstairs. (67:85, 176.) Harris did not recall grabbing A.D.'s shirt as he left the elevator, though he did not deny it was possible that he did so. (67:177, 193.) Harris' shirt was also ripped during the encounter, though he did not realize it at the time. (49; 67:152-53, 178.)

Amos testified that Harris eventually came back to the room, where the two of them argued, with Harris stating, "Your boyfriend is a bitch," "I kicked your boyfriend's ass and he called the cops," and "I will take you outside next," and Amos calling Harris a "punk ass bitch." (67:116-17, 136.) Harris testified that when he got back to the room, he apologized to his son and said he had to leave. (67:176.) Harris denied saying anything about police or telling Amos

that he had kicked A.D.'s ass or called him a "little bitch," or asking Amos to go out and fight. (67:177, 194.)

Jared Yeargin, a hospital security officer responded to the atrium area around 4:30 p.m. and made contact with A.D. (67:47-48, 50.) A.D. declined medical treatment but was provided an icepack for his head. (67:48.) Yeargin reviewed surveillance footage from an atrium camera showing the elevator bay and elevator doors for evidence. (67:49-50.) The hospital elevators were not equipped with cameras. (67:49.) The atrium video footage only showed A.D. exiting the middle elevator. (43; 67:55.)

Officer John Christian was dispatched to St. Mary's in response to a call regarding a disturbance in the lobby area. (67:143.) On his way to the hospital, he made contact with Officer Lovett who had located Harris waiting at a bus stop several blocks from the hospital. (67:144, 196-97.) Lovett interviewed Harris at that location and briefed Christian. (67:146, 154-55.) Christian made phone contact with A.D. from that location, then, based upon the information provided by A.D. over the phone, Christian arrested Harris at that time for disorderly conduct. (67:146, 149.) Christian later made personal contact with A.D. in the lobby of St. Mary's. (67:145.) A.D. was not arrested. (67:151.) Police did not interview any of the other individuals present in the hospital room, including Amos. (67:155-56.)

Motions for Mistrial

When A.D. testified about confronting Harris about Amos' belongings, the following exchange was had during the State's examination:

> Q. When you approached the defendant to say that, did you immediately have a conversation about belongings?
>
> A. Yes. I told him it was wrong to steal from a lady. That she is a single mother and she works hard for her stuff. If we could go outside and talk.

(67:69-70.)

A.D. testified that the parties remained in the room visiting, then "eventually [Harris] asked me if I was ready and we went out to the hallway." (67:70.) Harris objected, and outside the presence of the jury, moved for a mistrial on the basis that Harris's alleged statement "let's go outside" was never disclosed in discovery. (67:70-71.) The court withheld ruling until the State could review discovery and answer whether the statement had been disclosed. (67:72.)

At that point, Harris also questioned whether the State had discussed the court's ruling on his motion in limine with its witnesses, noting that A.D. had used the word "steal." (67:73.) The State informed the court it had "admonished him not to use the words steal or theft." (67:73.) Harris moved for a mistrial based on A.D.'s testimony in violation of the State's representation during motions in limine that A.D.'s testimony would reference only recovery of property. (67:75; App.105.)

The court then adjourned for the State to determine whether the statement had been disclosed in discovery. (67:76; App.106.) Prior to adjourning, the court noted, "I certainly see that's a significant admission." (67:75; App.105.)

After reviewing discovery, the State informed the court:

> Discovery consists of police reports numbered 1-10 bates stamped, as well as reports that have been provided for the defense investigators.
>
> …
>
> Your Honor, the statement, quote, unquote, are you ready – that statement has a quote. It isn't part of the materials.
>
> There is in the police report the statement or, sorry, at the top of page six of the discovery packet, …
>
> "[A.D.] continued that he told Harris, who was also present in the room, that they needed to talk about items that had been stolen from [A.D.'s] girlfriend Amos.
>
> "Delgado advised that Harris had said that, quote, this is not the place, unquote. However, that after approximately ten minutes, that Harris had gone" or it says had go – "discuss the issue regarding the property."

(67:76-77; App.106-07.) Noting the statement in the police report did not make sense, the court read the report into the record verbatim: "However, after approximately 10 minutes, that Harris had go discuss the issues regarding the property." (48; 67:78; App.108.)

Harris argued the State was obligated to disclose any statement by the defendant it intended to use at trial pursuant to Wis. Stat. § 971.23(1)(a), and that the poor English used in the police report was not a disclosure of the statement provided in testimony by A.D. (67:78-79; App.108-09.)

The court again withheld ruling on the two motions for mistrial, stating "You are right. It's a really close call, and I'm going to give a little thought to it." (67:79; App.109.) The court did not strike any of the previous testimony or state a ruling on Harris' objection in front of the jury. (67:80.)

Prior to calling its next witness to the stand, the State requested a sidebar, stating that it intended to call Rachel Amos, who had only been interviewed by defense counsel's investigator. (67:106-07.) The State requested to address any objections to Amos' testimony prior to putting the witness on the stand. (67:107.) Harris noted there would be no objection if Amos testified consistently with what she told the defense investigator, however "if she starts adding new statements that have not been disclosed to us, it will be the same. And it is the DA's job make sure that she doesn't add new information of statements supposedly made by Mr. Harris that have not been disclosed to us." (67:107-08.)

During the State's direct examination of Amos, the following exchange was had:

> Q. When the defendant returned to the room, did he state that something had occurred between him and [A.D.]?
>
> A. Yeah. He came – I was standing next to the bed, and he came running past out of breath and said that "your boyfriend is a bitch." And I went on the other side of the bed and I said – I asked him why. He said "because I kicked your boyfriend's ass and he called the cops."
>
> Q. Did the defendant actually leave the room after that?

A. Yes. Right after that.

…

Q. Do you have any idea where the defendant went after making the statement and exiting the hospital room?

A. No. He just told his son he had to leave before the cops – before the cops came.

(67:116-17.) Harris objected and reserved a motion. (67:117.)

Outside the presence of the jury, Harris argued the state had again introduced a purported statement of Harris not disclosed to the defense when Amos testified Harris said, "I have to leave before the cops get here." (67:118.) The police did not interview Amos; only her statement to the defense investigator was contained in discovery. (67:118-19.) That investigator's report stated, "Rachel said that Ross, Jr. then hugged his son, Ross the third, said goodbye and left. Rachel stated she then proceeded to look for [A.D.]." (47; 67:119.)

Harris argued attributing the statement "I have to leave before the cops get here," suggested evidence of flight to avoid apprehension that had not previously been disclosed. (67:119.) Harris made his third motion for a mistrial, noting this was not the first instance the state had presented testimony not disclosed in discovery. (67:119.)

The State argued it was not an issue of nondisclosure because the statement that Harris had to leave before the police arrived was not previously known to the State: "that's the first I'm hearing this statement and it did not come up in witness prep last week." (67:120.) The State suggested if the court did feel need to take action it could do so by striking testimony and/or giving a curative instruction. (67:120.)

Further, the State argued that the inference that Harris wanted to get away because he knew the police were coming would be supported by the testimony of its next witness, Officer Christian, who would testify that Harris did leave the scene. (67:121-22.)

The court stated,

> Well, it's clearly inculpatory. My sense is this isn't a failure to disclose, but it is a - it is use of testimony that's completely improper under circumstances. The idea is if you are going to use something that's going – if something is going to be presented to the jury that suggests he's guilty, that he has the chance to know about it beforehand.
>
> I don't know where in a different interview or a more thorough re-interview that could have been elicited. I don't know that that is the case, but I know it's very harmful testimony and I'm very concerned that a motion to strike won't cure the problem. A motion to strike and a curative instruction I'm not sure will deal with this problem, and it is in fact cumulative.
>
> I have – I'm holding in abeyance two motions for mistrial and I now have a third before me. They are stacking up pretty fast. I'm not going to declare a mistrial at this time, but I'm getting pretty close to it, to be perfectly honest with you folks. I'm getting very close to it.

(67:122-23; App.110-11.)

Regarding Harris' earlier motions for mistrial, the court rejected the State's argument that the statements were not material, (67:124-25), stating:

> It's inculpatory and it very much hurts the defendant. It's prejudicial to the defendant, very prejudicial. And coming into – coming in context of [A.D.] accusing the defendant of being a thief and asking if you want to go outside – the suggestion that he responded at some point saying are you ready – that's completing a let's go do this man-to-man, as [A.D.] suggested. That certainly looks like [A.D.] – that portrays Mr. Harris as the aggressor at that moment, when all of the other evidence absent that statement, suggests that [A.D.] was the aggressor here.
>
> …
>
> So that's a pretty powerful statement that wasn't given to them and seems to have been somehow missed in a police report.

(67:125-26; App.113-14.) The court also rejected the state's argument that the testimony did not support an inference that the phrase "are you ready to go outside" was an invitation to fight, (67:126-27; App.114-15), stating, "I'm not in agreement with the inferences you have drawn, and I'm getting close to a mistrial." (67:127; App.115.)

Harris argued in further support of his earlier motions for mistrial:

> It is a lack of disclosure of a statement of the defense pursuant to that statute. And I would just reiterate the fact that these are state's witnesses. The state takes the time to sit and prepare these witnesses. When state doesn't take time to tell their witnesses, "now, you can't say anything new that we haven't given to the other side. If there is something new, you have to

> tell me right now because we have to turn it over to the other side.'
>
> And then just blurt it out, here in court when they don't take that care – or when they do take care and the witness just blurts it out anyway – I believe that that is sufficient and appropriate grounds for a mistrial, and I'm asking the court to grant that.

(67:127-28.)

The court did not strike any of the objected-to testimony or rule on the objection in front of the jury. (67:130-31.)

During closing arguments, the State argued that A.D. had some motive to instigate a physical fight with Harris given his concern about the return of Amos' property. (67:245.) Given that, the State questioned why A.D. would concede that he had that potential motive if it were true that A.D. had attacked Harris first. (67:245.) The State argued A.D. would not have remained in the lobby and waited for police if he had been the aggressor and questioned why Harris did not do so. (67:248-49.)

Harris argued that the evidence was clear that A.D. and, to some extent, Amos were the ones who started the disturbance by bringing up the property dispute in the hospital room, and that A.D. caused the disturbance by initiating the altercation in the elevator. (67:256, 261-64.) After the altercation in the elevator, Harris left the hospital to avoid further animosity from A.D. and Amos. (67:263.)

After the jury returned its verdicts, acquitting Harris of battery and convicting him of disorderly conduct (67:277), the court denied the motions for mistrial:

> I was concerned early on, but as the trial went along and as – particularly as closing arguments came in, which I thought were very reasonable on both sides – my concerns were satisfied. So I deny the motions for mistrial – each of the three of them.
>
> Particularly with regard – I was particularly concerned about the stealing and – but as it turned out, that whole question of bias was used by both sides, and I think pretty effectively by both sides. So to the extent there was any kind of a problem, initially I think it was largely dealt with by later testimony and argument on closing.

(67:281; App.116.)

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT GRANTING MISTRIAL BASED ON IMPROPER TESTIMONY BY STATE'S WITNESSES

On three separate occasions, the State's witnesses gave improper and highly prejudicial testimony against Harris. *First*, A.D. accused Harris of stealing, contrary to the agreement of the parties during motions in limine. (67:70, 73.) *Second*, A.D. testified that Harris had initiated the confrontation outside the hospital room by saying "are you ready to go?" – a purported statement of Harris that had never been disclosed in discovery. (67:70-71.) *Third*, Amos testified that when Harris returned to the hospital room after leaving with A.D., Harris told his son he "had to leave before the cops come," – again, a purported statement of Harris that had never been disclosed in discovery. (67:119.) Harris objected and moved for a mistrial in response to each statement. The court found the statements prejudicial to Harris, but withheld

ruling on the motions and did not offer any lesser forms of relief such as striking the statements or providing a curative jury instruction. (67:122-27; App.110-15.) The trial court was correct to find each of the errors prejudicial to Harris, and should have granted a mistrial – particularly given the repeated and cumulative nature of the improper testimony.

A. Legal Principles and Standard of Review

A mistrial must be granted when a trial court determines an error is prejudicial to a party's case. *Oseman v. State*, 32 Wis. 2d 523, 528, 145 N.W.2d 766 (1966). In considering a motion for a mistrial, the "trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." *State v. Sigarroa*, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894.

Not all errors warrant a mistrial, and "the law prefers less drastic alternatives, if available and practical." *State v. Bunch*, 191 Wis. 2d 501, 512, 529 N.W.2d 923 (Ct. App. 1995). The court must weigh the strength of all the evidence to determine the effect of the error on the result. *Oseman*, 32 Wis. 2d at 528-29. If the evidence presented in the case was extremely weak, a mistrial may be appropriate because it is more likely that the error improperly influenced the jury's conclusion. *Id*.

A motion for a mistrial is committed to the discretion of the circuit court, and review of the circuit court's ruling on such a motion is for erroneous exercise of discretion. *State v. Ford*, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61. A court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a reasoned decision-making process. *Bunch*, 191 Wis. 2d at 506-07. An erroneous exercise of discretion may

arise from an error in law or from the failure of the circuit court to base its decisions on the facts in the record. *Ford*, 2007 WI 138, ¶28.

B. A Mistrial Should Have Been Granted Due to Improper Testimony by State's Witness Regarding Alleged Other Acts of Harris

A.D. testified, "I told him it was wrong to steal from a lady. That she is a single mother and she works hard for her stuff." (67:70.) This testimony was improper because it alleged a crime that was never charged, never proven, and never ordered admitted in this case. Harris moved to keep this type of allegation out of the trial in his motion in limine, (17), and while the court left open the extent to which the State could provide evidence of a property dispute between the parties, the court clearly warned prior to trial that allegations of stealing or theft were improper. (67:14-15; App.102-03 ("I understand…the prosecution to be saying they will not be accusing Mr. Harris of having stolen something or taken something improperly. … [T]here is no charge or suggestion that Mr. Harris…had wrongfully stolen something.").)

A.D.'s inflammatory allegation against Harris went well beyond the court's ruling in motions in limine. Instead of referencing a dispute over property between Harris and Amos, Harris was accused of "stealing from…a single mother." (67:70.) The prejudicial nature of this comment is the basis for Wisconsin's prohibition on the use of evidence of other acts as character evidence to show that the person acted in conformity therewith. Wis. Stat. § 904.04(2). "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions

in the case." *State v. Sullivan*, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998). Here, A.D.'s improper testimony accusing Harris of stealing was "an invitation to focus on an accused's character [that] magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." *Id.* at 783. Once the jury heard this accusation, Harris could not receive a fair trial.

Here, in light of the whole proceeding, this error was sufficiently prejudicial to warrant a new trial. *Sigarroa*, 2004 WI App 16, ¶ 24. The State's evidence against Harris was not strong in this case. The incident occurred when Harris and A.D. were alone in an elevator; the only evidence as to who initiated the disturbance was the conflicting testimony of Harris and A.D. Video footage from the atrium simply showed A.D. exiting the elevator. Because the evidence against Harris was weak, it is more likely that the error improperly influenced the jury's conclusion. *Oseman*, 32 Wis.2d at 528-29.

Finally, the Court of Appeals has warned that trial courts must be proactive in dealing with the "practice of flouting motion in limine orders." *Sigarroa*, 2004 WI App 16, ¶¶ 29-31. Here, the State's witness failed to comply with the order in limine to Harris' prejudice. The proper remedy was for the court to grant a mistrial.

C. A Mistrial Should Have Been Granted Due to Repeated Improper Testimony by State's Witnesses Regarding Alleged Statements of Harris Which Were Not Disclosed in Discovery

A.D.'s allegation that Harris said, "are you ready to go" was not disclosed in discovery, despite A.D. making a statement to law enforcement which was documented in a police report. (67:76-78; App.106-08.) Amos' allegation that

Harris said, "I have to leave before the cops come," was not disclosed during her conversation with a defense investigator. (67:118-19.) Both witnesses improperly testified to these purported statements of Harris which were not disclosed to him prior to trial. Because Harris was prejudiced by being surprised with this testimony at trial, these errors warranted a mistrial.

The State is required to provide, within a reasonable time before trial begins, a written summary of the defendant's oral statements that the prosecutor plans to use at trial. Wis. Stat. § 971.23(1)(b). When reviewing a discovery violation for the purposes of a mistrial motion, the court must determine whether the State violated the discovery statute, and if so whether the State has shown "good cause" for said violation; if no good cause shown by the State, the court must decide whether the defendant was prejudiced by the evidence or testimony. *State v. DeLao*, 2002 WI 49, ¶¶14-15, 252 Wis. 2d 289, 643 N.W.2d 480. A prosecutor's compliance with discovery obligations is judged by an objective standard. *Id.* ¶ 25. The issue becomes whether a reasonable prosecutor, exercising due diligence, should have known of the statements before trial, and if so, whether a reasonable prosecutor would have planned to use them in the course of trial. *Id.* ¶ 33.

A prosecutor cannot escape the obligations of § 971.23(1)(b) simply by arguing he or she was unaware of a statement of the defendant. Under certain circumstances, the knowledge of law enforcement officers may be imputed to the prosecutor. *DeLao*, 2002 WI 49, ¶ 21. "The test of whether evidence should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence [the prosecutor] should have

discovered it." *Jones v. State*, 69 Wis.2d 337, 349, 230 N.W.2d 677 (1975).

Here, even if the purported statements of Harris were unknown to the prosecutor prior to trial, he should have exercised due diligence to discover them. The police report containing A.D.'s statement about what Harris said contained grammatical errors to the point it was rendered nonsensical. (48; 67:77-78; App.107-08.) It was incumbent upon the prosecutor to verify what, exactly, A.D. had told police and to ensure that information was disclosed to the defense.

Further, it was the State's duty to prepare its witnesses for their testimony by alerting them to relevant discovery rules and court orders, ensuring those witnesses had disclosed everything they intended to testify that Harris said, and disclosing any new information to the defense prior to trial. Despite spending over 45 minutes with A.D. in preparation for trial, (67:99-100, 103), the State failed to ensure it was complying with its discovery obligations.

Given the powers and responsibilities of prosecutors, the State should not be able to benefit from the errors of its witnesses. As the Supreme Court of Wisconsin has noted in the context of discovery violations,

> The prosecutor has a special role in the federal and Wisconsin criminal justice systems. The United States Supreme Court has described the United States Attorney as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Our court and the Wisconsin Attorney

> General have similarly described the role of the Wisconsin prosecutor.

State v. Harris, 2008 WI 15, ¶ 37, 307 Wis. 2d 555, 745 N.W.2d 397 (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935)).

The erroneous testimony of A.D. and Amos prejudiced Harris and prevented him from receiving a fair trial. A.D.'s testimony suggested that it was Harris who ultimately suggested the men go outside to settle the dispute – a statement that the trial court found to be a "significant admission," (67:75; App.105), "pretty powerful stuff," (67:124; App.112), and suggested that it was Harris rather A.D. who was the aggressor. (67:125-26; App.113-14.) Then, Amos' testimony clearly suggested that Harris fled from the scene to avoid law enforcement, an inference that was highlighted by the State in its closing arguments. (67:248-49.)

Weighing the State's evidence against the improper testimony of its witnesses, the repeated and cumulative errors were sufficiently prejudicial to warrant a new trial in this case. *Sigarroa*, 2004 WI App 16, ¶ 24. The trial court erred by denying Harris' multiple motions for mistrial.

CONCLUSION

For the foregoing reasons, Harris asks this Court to vacate the Judgment of Conviction and remand this case to the circuit court for a new trial.

Dated this 22nd day of July, 2019.

Respectfully submitted,

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
P.O. Box 5414
Madison, WI 53705
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Appellant

CERTIFICATION AS TO FORM/LENGTH

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 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5443 words.

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 § 809.19(12). I further certify that:

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

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

Dated this 22nd day of July, 2019.

Signed:

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
P.O. Box 5414
Madison, WI 53705
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Appellant

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on July 22, 2019, I deposited in the United States mail for delivery to the clerk by first-class mail, ten copies of the defendant-appellant's brief and appendix.

Dated this 22nd day of July, 2019.

Signed:

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
P.O. Box 5414
Madison, WI 53705
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Appellant

CERTIFICATION AS TO 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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated this 22nd day of July, 2019.

Signed:

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
P.O. Box 5414
Madison, WI 53705
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Appellant