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STATE OF WISCONSIN

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

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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Ross Harris, Jr. appeals his conviction of disorderly conduct on the basis that the trial court erroneously exercised its discretion by denying his multiple motions for mistrial after the following improper and highly prejudicial testimony by two of the state's witnesses:

- The complaining witness, A.D., accused Harris of "steal[ing] from a lady…a single mother… [who] works hard for her stuff," despite a pretrial stipulation and order that allegations of theft would not be admitted. (67:69-70.)

- A.D. suggested Harris was the aggressor who asked A.D. to step outside by testifying,s "eventually [Harris] asked me if I was ready and we went out to the hallway," an alleged statement of Harris that had not been disclosed to the defense in discovery. (67:70-71.)

- A.D.'s fiancé, Rachel Amos, suggested Harris fled from police after the altercation by testifying he "told his son he had to leave…before the cops came," an alleged statement of Harris that had not been disclosed to the defense in discovery. (67:117-18.)

In his initial brief, Harris established this testimony was prejudicial to his case and should have entitled him to a mistrial. (App. Br. at 17-21.) The State does not dispute this argument. *See Charolais Breeding Ranches, Ltd. v. FPC*

Securities Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (propositions not refuted are deemed conceded).

Instead, the State argues that testimony accusing Harris of theft should not be considered other acts evidence and that the State did not violate discovery rules. (*See generally* Resp. Br.) The State is wrong on both points. But even if it were correct, Harris's motions for mistrial did not hinge on whether the evidence was other acts evidence or whether the State violated discovery rules. Harris argues a mistrial was warranted because the prejudicial nature of the testimony is so great and so cumulative that he was deprived of his right to fair trial. *See State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894.

I. THE TESTIMONY OF TWO STATE WITNESSES WAS IMPROPER AND UNFAIRLY PREJUDICIAL TO HARRIS

A. Testimony Accusing Harris of Theft Violated the Court's Pretrial Order, Was Improper Other Acts Evidence, and Was Unfairly Prejudicial

Despite a stipulation between the parties and a court order granting Harris' motion to exclude any testimony alleging that Harris committed theft, the complaining witness 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. Further, the allegation was not relevant to any issue at trial and could therefore only be an improper attempt to prove Harris' character through an alleged prior bad act.

The State argues the testimony was not other acts evidence. (Resp. Br. at 1-4). This court need not consider this argument because the State forfeited it below and the trial court appropriately exercised its discretion in finding the testimony inadmissible. Even if this court were to address the argument, the State fails to show that the circuit court erred in excluding the evidence as prejudicial to Harris.

1. The State conceded allegations of theft are prejudicial and has forfeited any argument to the contrary on appeal.

Prior to trial, Harris moved to exclude any references to "any allegation that the defendant committed a theft against any other person related to this case." (67:12.) In his motion, Harris characterized this evidence as other acts evidence. (*Id.*)

The State did not argue that such evidence would be admissible because it was not other acts or for any other reason. Instead, the State's position was:

> I think that [A.D.] should be able to testify to what he said to the defendant or the context of what he said. I could see an argument that it would be unfairly prejudicial to accuse the defendant of having committed a theft or of stealing.
>
> But I think that [A.D.] should be able to testify that if this is his testimony, that he spoke to the defendant about return of property that belonged to Ms. Amos or something to that effect.
>
> So my position is that [A.D.] should still be able to testify about the context of what was being said, why he had approached the defendant. You know, I just want to be clear that I don't think that would violate the spirit

> of what this motion in limine is getting at by seeking an order to omit any reference to theft.

(67:13-14.) Likewise, after Harris moved for a mistrial based on the testimony, the State did not argue that the testimony was proper. The State informed the court it had "admonished [the witness] not to use the words steal or theft." (67:73.)

The State forfeited its argument that the evidence was admissible by not making the argument before the trial court. *See State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612 (forfeiture rule promotes judicial economy and fairness by "prevent[ing] attorneys from 'sandbagging' opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal"); *In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 26, 338 Wis. 2d 114, 808 N.W.2d 155 (forfeiture rule "promotes efficient and fair litigation"). The State cannot in fairness withhold making an argument to the trial court only to raise it on appeal; this court should find the argument that the testimony alleging Harris committed theft was admissible is forfeited.

2. The trial court excluded the evidence because it was prejudicial, then found A.D.'s testimony in violation of its order prejudiced Harris

When addressing Harris' motion in limine to keep accusations of theft out of evidence, the court first noted, "I understand that the prosecution to be saying they will not be accusing Mr. Harris of having stolen something or taken something improperly." (67:14; App. 102.) The court agreed with the State that there could be some evidence of the context between the parties, but "[i]f it goes too far in the direction of suggesting theft, I certainly will entertain an

objection." (67:15; App. 103.) Importantly, it was clear to the court 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." (67:14-15; App. 102-03.)

A trial court's decision to admit or exclude evidence is discretionary and this court will not overturn the trial court's decision if the trial court reviewed the relevant facts, applied the proper standard of law and used a rational process to reach a reasonable conclusion. *See State v. Davidson*, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606. The State makes no argument that the trial court's decision not to admit evidence of theft was in error; therefore the complaining witness's testimony in violation of this order was improper.

After the testimony and Harris' motion for mistrial, the court found that the testimony was prejudicial to Harris. (67:125; App.115.) The State makes no argument that the court's finding of prejudice was in error.

3. Evidence that the complaining witness accused Harris of theft was not relevant to any issue at trial other than improper character evidence

The State argues that this evidence was not other acts evidence, because "[t]he purpose of the testimony regarding an alleged that, in the underlying trial, was to show why the victim and defendant would have a reason to argue." (Resp. at 3.)[1] Again, the State ignores the stipulation of the parties and

[1] The State also argues that the evidence was relevant to show that "the victim, seconds before the defendant committed a crime, had the mental state and belief that the defendant had stolen something from him." (Resp. Br. at 3.) The State does not explain how the alleged victim's mental state is relevant to whether Harris committed battery or

the pretrial order of the court regarding the admissibility of allegations of theft. The State agreed that accusing Harris of theft would be unfairly prejudicial, and instead stated its witnesses would testify about "return of property that belonged to Ms. Amos or something to that effect." (67:13.) The court agreed that some evidence of the context of the parties' relationship was appropriate, but that it should not go "too far in the direction of suggesting theft." (67:14; App.102.) Thus, contextual information about the parties' relationship could have been provided within the framework of the court's order, and accusations of theft against Harris were irrelevant to any issue at trial, given "there is no allegation of theft that's any part of this case. …[T]here is no charge or suggestions that Mr. Harris…had wrongfully stolen something." (67:14-15; App.102-03). The court properly limited the admission of this contextual evidence by excluded allegations of theft on the basis such allegations would be unfairly prejudicial to Harris.

Contrary to the State's argument, testimony accusing Harris of theft is not "part of the panorama of evidence needed to completely describe" the charges alleged against Harris, nor was it "inextricably intertwined with the crimes." *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515. *Dukes* is distinguishable from this case.[2] There,

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disorderly conduct, nor does it cite case law holding that proving the mental state of the alleged victim is a proper purpose for other acts evidence.

[2] Likewise, other cases cited by the State for the proposition that the evidence is admissible as panorama evidence are distinguishable and do not support the admission of this evidence. *See State v. Bauer*, 2000 WI App 206, 238 Wis. 2d 687, 617 N.W.2d 902 (evidence that, while in jail awaiting trial on charge of attempted first-degree homicide of his wife, defendant attempted to solicit murder of his wife and a potential witness was properly admitted as evidence of consciousness of guilt);

the defendant challenged the admissibility of evidence of a drug transaction at his residence where he was charged with maintaining a drug house. That evidence was not other acts evidence, because it was the defendant was not implicated in the prior drug transaction – it was "not evidence of another act by Dukes…and was certainly not an impermissible attempt to introduce character evidence about Dukes." *Dukes*, 2007 WI App 175, ¶ 30. This is obviously not the case here, where A.D. testified that Harris committed theft.

Further, in *Dukes* the evidence was introduced for the purpose of establishing an element of the charge against the defendant – "introducing evidence to show that a drug house existed was central to the charge of maintaining a drug house." *Id*. Here, evidence an alleged prior theft was not central to any elements of the battery or disorderly conduct charges against Harris. This leaves only the impermissible purpose of propensity for the evidence.

The State's final argument is that because the alleged prior theft is a different crime than Harris was charged with at trial, and because the witness did not explicitly say Harris had a propensity to commit crimes, the evidence could not be other acts evidence. These technicalities are contrary to body of caselaw applying Wis. Stat. § 904.04(2). "Unfair prejudice results when the proffered evidence has a tendency to

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State v. Jensen, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482; (evidence that defendant left pornographic photos around house to upset wife admissible as other acts or panorama evidence because it "traveled directly to the State's theory as to why [defendant] murdered [wife]); *State v. Johnson*, 184 Wis. 2d 324, 516 N.W.2d 463 (Ct. App. 1994) (where theory of defense was that victim falsely accused defendant of assault so that she could misappropriate defendant's property while he was incarcerated, court erred by excluding evidence of victim's attempts to obtain defendant's property).

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.

B. Testimony Alleging Statements of Harris Which Were Not Disclosed in Discovery Was Improper and Unfairly Prejudicial

Harris objected to testimony by A.D. and Amos alleging statements by Harris that were not provided to Harris in discovery. On appeal, the State argues that it did not violate discovery rules because there were no written statements of the defendant that it did not turn over to the defense. (Resp. Br. at 6.) The State's argument misconstrues the reasonable due diligence standard applicable to its discovery duties.

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). If a reasonable prosecutor, exercising due diligence, would have known of the statements before trial and would have planned to use them in the course of trial, the State is obligated to provide those statements. *State v. DeLao*, 2002 WI 49, ¶ 33, 252 Wis. 2d 289, 643 N.W.2d 480. Even if a prosecutor is not aware of a particular statement, knowledge of law enforcement officers may be imputed to the prosecutor if "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); *DeLao*, 2002 WI 49, ¶ 21.

Here, given the nonsensical statement contained in the police report and the fact that A.D. met with the prosecutor to prepare for his testimony for over 45 minutes the week prior to trial, (67:103), a reasonable prosecutor should have discovered that A.D. had additional information beyond what was recorded in the police report, and that information should have been provided to Harris prior to trial.[3] Contrary to the State's argument, (resp. br. at 7), this requires no new rules or obligations for law enforcement other than the existing requirement for prosecutors to exercise due diligence in discovery.

The State argues that A.D. and Amos provided statements that were not included in any police report, investigator report, or by the witnesses themselves to the State. (Resp. Br. at 8-9) Even if the court were to agree and find there was no discovery violation, the testimony was improper and unfairly prejudicial because it contained new allegations against Harris that he was unprepared to defend against.

[3] The State's argument that the police report could have been written the way it was because "the officer poorly articulated the statement of the defendant in drafting his or her report" or because "the defendant gave a nonsensical statement in the first place to said officer." (Resp. Br. at 8.) The State confuses the facts about the police report, as the report was memorializing a statement by A.D. to the officer regarding what A.D. alleged Harris said to him. (48; 67:77-78; App.107-08.) This distinction is important because A.D. was the State's witness and the State should have taken the opportunity to clarify with A.D. what it was that A.D. alleged Harris said to him during its pretrial preparation, had it been properly exercising its due diligence.

II. THE TRIAL COURT ERRED BY NOT GRANTING HARRIS' MOTIONS FOR MISTRIAL

The trial court was correct to find each of the errors prejudicial to Harris, and the State's brief makes no argument to the contrary. A.D. accused Harris of being a thief in violation of the court's pretrial order. He then suggested 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.)

The State failed its duty to prepare its witnesses for their testimony by alerting them to relevant discovery rules and court orders, ensuring the witnesses had disclosed everything they intended to testify that Harris said, and disclosing any new information to the defense prior to trial. *See Sigarroa*, 2004 WI App 16, ¶¶ 29-31 (trial courts must be proactive in dealing with the "practice of flouting motion in limine orders"). The improper testimony occurred throughout the whole proceeding, and the cumulative effect was likely to have influenced the jury's decision; therefore, the court should have granted a mistrial. *Id.* at ¶ 24; *Oseman v. State*, 32 Wis. 2d 523, 528-29, 145 N.W.2d 766 (1975).

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 14th day of October, 2019.

Respectfully submitted,

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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 2846 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 14th day of October, 2019.

Signed:

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