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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2018AP1696-CR

AHMED FARAH HIRSI,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND ORDER
DENYING POST-CONVICTION MOTIONS, ENTERED IN
THE ST CROIX COUNTY CIRCUIT COURT, THE
HONORABLE JAMES PETERSON PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Cole Daniel Ruby
State Bar #1064819
Martinez & Ruby, LLP
144 4th Ave, Suite 2
Baraboo, WI 53913
(608) 355-2000

Albert T. Goins, Sr.
Minn. Atty. 0126159
301 4th Avenue South
378 Grain Exchange Building
Minneapolis, MN 55415
Admitted pro hac vice

Attorneys for Defendant-Appellant

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ISSUES PRESENTED FOR REVIEW

1. Whether Hirsi's due process rights were violated by (a) the State's failure to disclose co-defendant Guled Abdi's written proffer agreement to the defense; (b) the State's failure to inform the jury of the full and correct terms of Abdi's plea agreement, including the dismissal of *fifteen* criminal charges in exchange for his pleas; (c) the State's failure to correct Abdi's false testimony at trial claiming he hadn't received a "deal" before he told police Hirsi was the shooter; and (d) failure to instruct the jury on accomplice testimony.

The court concluded no due process violation occurred because the essence of Abdi's cooperation agreement was disclosed to the defense and the jury, Abdi's testimony was not "materially false," and the accomplice instruction wasn't requested.

2. Whether the court erroneously admitted other-acts evidence of an unrelated shooting from Saint Paul, Minnesota, for which Hirsi was acquitted, and compounded the error by failing to instruct the jury that Hirsi was acquitted of that conduct, as required by *State v. Landrum*?

The court concluded that the other-acts evidence was properly admitted on the purpose of identity, and declined to reconsider during post-conviction proceedings. The court ruled that instructing the jury on Hirsi's acquittal for the other-acts incident would have confused the jury.

3. Whether the court erred by admitting lay opinion testimony from two detectives identifying Hirsi as the individual holding a gun in the Saint Paul photographs, considering the testifying detective had no foundation for such testimony, and the court's restrictions on the Saint

Paul evidence precluded Hirsi from impeaching another detective on her bias?

The court concluded that the lay opinion witnesses had foundation, and there was no error in admitting the testimony.

4. Whether plain error occurred when the State offered irrelevant, inflammatory “expert” testimony claiming Somalis were uncooperative with law enforcement and had a “tendency to fabricate events,” and made arguments attempting to discredit witnesses favorable to the defense based on this alleged “cultural bias”?

The court acknowledged this was a “difficult” issue, and would have sustained an objection to some of the testimony, but believed the State wasn’t intending to malign Somali culture. The court concluded any error wasn’t sufficient to warrant reversal.

5. Whether a new trial was required in the interest of justice because the real controversy was not fully tried, considering the jury did not hear crucial evidence supporting the defense, heard substantial improper evidence, and was not adequately instructed?

The court held the real controversy was fully tried.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate and requested in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Publication likely is justified under Wis. Stat. (Rule) 809.23. Several of the issues present questions of first impression. No Wisconsin case directly addresses whether the State, as the proponent of accomplice testimony, is required to inform the jury of the full details of the accomplice's cooperation agreement, or if that burden falls on the defense through cross-examination.

As the trial court noted, there are no published Wisconsin cases addressing the propriety of lay opinion witnesses offering opinions on the identity of a suspect in photographs or videos.

Finally, while there are federal and out-of-state cases finding plain error when the State presents prejudicial testimony and argument regarding racial or ethnic minorities, no published Wisconsin cases address this important issue directly.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2018AP1696-CR

AHMED FARAH HIRSI,

Defendant-Appellant.

STATEMENT OF FACTS

A. Summary

Ahmed Hirsi was convicted at jury trial in connection with a shooting in a liquor store parking lot in Hudson, Wisconsin. The shooter fired several shots into a parked car occupied by six individuals. Bullets struck three of the occupants—M.H., F.A. and A.H.—while the other three occupants (F.M., M.M. and S.N.) were unharmed.¹

The State charged Hirsi with six counts of attempted 1st degree intentional homicide, three counts of 1st degree reckless injury (for each victim wounded during the shooting), six counts of 1st degree recklessly endangering safety, and possession of a firearm by a felon. Hirsi, appearing *pro se*, argued the evidence was insufficient to prove he was the shooter, and averred that his testifying co-defendant, Guled Abdi, committed the crime. The jury acquitted Hirsi of the attempted homicide charges for the

¹ The appellant's brief will identify the victims by initials only, consistent with Wis. Stat. sec. 809.86(4).

victims not struck during the shooting, but convicted on all remaining charges.² Following the denial of his post-conviction motions for a new trial, Hirsi raises numerous evidentiary and legal challenges on appeal.

B. Jury Trial

The shooting occurred in the parking lot of Spirit Seller, a liquor store, on January 17, 2014 (R253:173). A Spirit Seller worker, Ethan Siam, observed two vehicles parked together facing opposite directions—a tan Cadillac and a blue Kia (R253:174-75). Siam was watching the vehicles when the shooting began, between 9:15-9:30 am (R253:183-84). Siam heard about 8 gunshots, and then the Cadillac drove off (R253:176). Two of the victims entered his store, both of whom had suffered bullet wounds, so Siam called 911 (R253:177-81). Hudson police found a third victim, F.A., outside in the blue Kia with a gunshot wound to the abdomen (R253:127-29).

A second witness, Barry Lundeen, heard gunshots around 9:20 am, and saw a Cadillac with Minnesota plates driving away (R253:192). Minnesota officers subsequently observed a gold Cadillac DeVille with Minnesota plates occupied by two Somali males—Abdi and Hirsi (R264:23-24). Abdi was the Cadillac’s registered owner (R253:113; R264:40-41). When the vehicle stopped at a Hampton Inn in Bloomington, Minnesota, officers arrested Abdi and Hirsi walking nearby (R265:43-47).

At trial, the only person who affirmatively identified Hirsi as the shooter was co-defendant Abdi (R263:11). None of the witnesses on scene identified a shooter. Ethan Siam didn’t see the shooter (R253:183-84). Barry Lundeen couldn’t

² On the defendant’s post-conviction motion, the circuit court vacated the three reckless endangerment convictions corresponding to the three victims struck during the shooting, because those convictions violated double jeopardy. That issue is not raised on appeal.

describe any suspects (R253:192-94). Tania and Greg Dowd, two shoppers at the Spirit Seller, heard the shots and witnessed the aftermath, but did not see the shooter (R253:222,233).

None of victims from the Kia identified Hirsi as the shooter. The State represented in opening arguments that the shooting occurred because Hirsi exchanged derogatory names in Somali with a girl he recognized—F.A.—and that Hirsi shot the victims over “name calling” (R253:112). However, F.A. testified she didn’t know anyone in the other car (R264:9). While she heard people saying the derogatory Somali-language term (“nyah”), F.A. said the shooting did not occur immediately afterward (R264:11). F.A. believed the shooter was in the front passenger seat, but could not identify who (R264:14,20). When shown a photo array containing Hirsi’s photo, F.A. did not identify Hirsi as the shooter (R265:244, 247-48).

According to Hudson Sgt. Schultz, victim S.N. was unable to identify the shooter (R260:38). Two victims—M.M. and M.H.—wouldn’t cooperate with police (R253:143; R260:237-38).

One victim affirmatively testified Hirsi was not the shooter. The Kia’s driver, A.H., who was shot in the shoulder, testified he knew who the shooter was, and it was not Hirsi (R260:67). Before trial, A.H. told police they had the wrong man in custody (R260:70). On cross-exam, A.H. was impeached with whether he’d told police the passenger shot him (R260:105). However, A.H. maintained Hirsi was not the shooter (R260:106,111).

The State attempted to discredit the importance of the victims’ inability to identify Hirsi through the testimony of Detective Tracy Henry, an “expert” on Somali culture. Henry testified Somalis usually “settle matters among themselves,”

and as a result only about 1/4 of Somali-on-Somali homicides in Minneapolis-St. Paul had been successfully prosecuted (R265:77-80). Further, Henry testified victims of Somali-on-Somali crime had a “tendency to fabricate” facts to avoid retribution (R265:80). In closing arguments, the prosecutor argued A.H. lied due to “cultural bias” and Somalian culture’s lack of cooperation with law enforcement, as previously explained by Henry (R266:41,49,58). The prosecutor further argued—falsely—that only two of six victims made any statement to police (R266:41).³

The State attempted to prove the shooter’s identity based on positioning within the Cadillac, but evidence on this point was conflicting. Two victims (F.A. and A.H.) made pre-trial statements indicating the passenger was the shooter, while Ethan Siem testified the bullets came from the driver’s side (R253:183-84). Abdi was the passenger when observed by law enforcement, but Abdi also testified he drove the vehicle to the Spirit Seller (R263:49-50). Abdi acknowledged the shots discharged through the driver’s side window, where he claimed to be sitting (R262:5). Abdi further testified Hirsi made him switch seats after the shooting, such that Hirsi was the driver and Abdi was the passenger when they reached the Hampton Inn (R261:13,16). But no other witnesses corroborated Abdi’s claim about switching seats.

Abdi further claimed Hirsi put evidence from the shooting in a white plastic bag and attempted to hide it at the Hampton Inn before police located the suspects (R261:16-19). That bag found by law enforcement contained 9 mm Luger shells, consistent with the type of bullet used in the shooting (R265:17-18;171-77). However, Officer Sean Sweeney, who first observed the two Somali males exiting the Cadillac at the Hampton Inn, observed the passenger—not

³ As will be discussed *supra*, in addition to being legally improper, this argument is factually false, as four of the six victims gave statements to police.

the driver—to be carrying the white bag with the 9 mm shells (R265:196-98).

Available physical evidence couldn't distinguish whether either Hirsi or Abdi was the shooter. The gun used in the shooting was never recovered, and was therefore not subject to testing for DNA or fingerprints (*See, generally*, R265:212). Bullets and shell casings were recovered, and the State presented testimony from fingerprint examiners and a DNA analyst. None testified that any of the bullets or shell casings was linked to Hirsi. And although both Hirsi and Abdi were swabbed for gunshot residue, no testing was conducted (R265:109-12).

The prosecution attempted to shore up these deficiencies by presenting other-acts evidence of a Saint Paul, Minnesota shooting allegedly committed by Hirsi on January 17, 2014, two days before the Hudson shooting. The State offered photographic evidence from the Minnesota case as well as a ballistics expert who testified one bullet recovered from the Saint Paul incident appeared to be fired from the same model firearm as the Hudson shooting. The trial court, over Hirsi's objection and motion to exclude, admitted this evidence (R256:73-79).

The court also denied Hirsi's request to inform the jury he was acquitted of the Saint Paul allegations following a jury trial in District Court of Ramsey County, Minnesota, and granted the State's motion to exclude any reference to the acquittal (R258:50-53). The cautionary instruction given to the jury made no mention of Hirsi's acquittal (R266:24-25). Yet in closing arguments, the State argued Hirsi fired the same gun in both Hudson and the Saint Paul incident (for which he stood acquitted) (R266:75-77). Hirsi was precluded from arguing his acquittal.

Since no firearm was recovered from Saint Paul, the State could not present any forensic evidence directly linking Hirsi to that shooting, such as DNA, blood, or fingerprints. Nor did the State present any witnesses who actually observed the shooting, nor any witnesses to say they personally observed Hirsi at the scene. Instead, the State presented lay opinion testimony from Guled Abdi,⁴ Det. Henry, and Det. Willems purporting to identify Hirsi as the suspect in the surveillance video and photographs from the Saint Paul apartment complex (R261:27-30; R265:83-89,225-227). This testimony was also presented over Hirsi's pretrial motion to exclude witnesses from identifying him from video and photographs (R256:61-68; R258:12-17).

The primary evidence against Hirsi came from Abdi, who described driving Hirsi to the Spirit Seller and running into people Hirsi knew from the Kia (R263:49-50; R261:1-4). Abdi claimed the Kia pulled alongside Abdi's Cadillac, and a female driver rolled down her window, asking if she knew Abdi (R261:5-6). According to Abdi, Hirsi began saying "nyah, nyah, nyah," and the woman repeated the phrase back to Hirsi, who then "pulled out a handgun out of nowhere and started shooting" (R261:11). Abdi claimed Hirsi fired between 8-14 times, before putting the gun to Abdi's head and threatening to shoot him if he didn't drive away (R261:11-13).

Abdi drove the Cadillac on I-94 toward Minneapolis, stopping at Hirsi's mother's house (R261:12-15). While Hirsi went inside and changed clothes, Abdi made several phone calls (R261:15-16). Abdi testified they switched so Hirsi was driving, and Hirsi intended to drive back to the La Quinta hotel to meet some girls before noticing a police officer following them (R261:16-18). They pulled over at the Bloomington Hampton Inn, and Abdi claimed Hirsi carried

⁴ There was no evidence Guled Abdi was at the St. Paul scene or incident at which Hirsi was acquitted.

out a white bag, which he proceeded to hide inside the hotel (R261:18-19).

Through direct examination, the State informed the jury that Abdi's plea agreement was as follows: (1) he agreed to plead to two felony charges; (2) the agreement required him to testify truthfully; and (3) if he testified truthfully at Hirsi's trial, the State would recommend a period of two years' incarceration (R261:39).

On cross-exam, Abdi acknowledged he was previously charged with the same counts as Hirsi (R262:8-9). Abdi denied receiving a deal before telling Hudson police Hirsi was the shooter (R262:7). Abdi testified he didn't receive a deal to say Hirsi was the shooter, but to tell the truth (R262:8). When asked if he'd only received 2 years as part of his deal, Abdi claimed he "didn't receive anything yet" (R262:8). Abdi was impeached with false statements to police during his initial questioning, where he claimed the Cadillac wasn't his vehicle, and he'd only been picked up 20-30 minutes before his arrest (R262:11-18). Further, Abdi acknowledged the shots were fired through the driver's window, and he was in the driver's seat (R262:5).

Abdi's testimony identifying Hirsi as the shooter was crucial because no one else identified a shooter and the other evidence was equivocal. In closing arguments, Hirsi argued Abdi was lying in exchange for a deal, and suggested Abdi was the shooter (R266:67-68). The State argued Abdi's credibility is "what this case really comes down to," and urged the jury to find Abdi was telling the truth (R266:39,42-47). Further, the prosecution repeatedly emphasized the ability of Abdi, Det. Willems, and Det. Henry to identify Hirsi from the Saint Paul shooting photographs, supposedly linking Hirsi to that shooting (R266:53-57;59-60,76-77,83).

The jury convicted Hirsi of all charges, except the three attempted homicide charges regarding the victims who were not wounded in the shooting (R266:106-13).

The court sentenced Hirsi to an aggregate sentence of 50 years initial confinement and 35 years extended supervision (R254:23,29).

C. Post-Conviction Litigation

Hirsi filed post-conviction motions seeking a new trial based on the following errors: (1) due process and discovery violations for the State's failure to inform the jury of Abdi's full plea agreement and correct his false testimony, and for the jury not being properly instructed on accomplice testimony; (2) erroneous admission of other-acts evidence from the Saint Paul shooting, while precluding the jury from learning of Hirsi's acquittal; (3) improper testimony identifying Hirsi from photographs from the Saint Paul incident; (4) inflammatory and prejudicial "expert" testimony characterizing Somalis as having a "tendency to fabricate" and discussing irrelevant Somali-on-Somali crime statistics; (5) improper closing arguments from the prosecutor; and (6) the real controversy was not fully tried based on these errors, as well as the jury not hearing testimony from witness Maryann Hurshe establishing that Abdi carried a gun the morning of the shooting, and made statements establishing Guled Abdi's stated motive (revenge) to commit the shooting (R189).

After the parties submitted briefs (R200, R204), the court held two motion hearings. The first hearing focused on oral arguments for and against the motions (R277). The second was an evidentiary hearing where the court heard testimony from Maryann Hurshe and oral arguments about the real controversy motion (R276:10-58), before orally denying the motions (R276:58-73). The court issued a written

order denying the motions based on the reasons given during its oral ruling (R247).

Hirsi timely filed a notice of appeal from the judgment of conviction and the order denying post-conviction motions (R248). Additional facts, including the court's specific reasoning for denying the post-conviction motions, will be provided where appropriate.

ARGUMENT

I. HIRSI'S DUE PROCESS RIGHTS WERE VIOLATED BY THE FAILURE TO DISCLOSE ABDI'S FULL PLEA AGREEMENT TO BOTH THE DEFENSE AND THE JURY, THE FAILURE TO CORRECT ABDI'S FALSE TESTIMONY, AND THE FAILURE TO PROPERLY INSTRUCT THE JURY ON ACCOMPLICE TESTIMONY

A. Standard of Review

An accomplice's confession implicating the accused is "presumptively unreliable." *Lilly v. Virginia*, 527 U.S. 116, 131 (1999). Accordingly, when the State grants concessions in exchange for testimony by accomplices implicating a defendant, the defendant's right to a fair trial is safeguarded by (1) full disclosure to both the defendant and the jury of the terms of the agreements struck with the witnesses; (2) the opportunity for full cross-examination of those witnesses concerning the agreements; and (3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses. *See State v. Nerison*, 136 Wis.2d 37, 46, 401 N.W.2d 1 (1987); *Hoffa v. United States*, 385 U.S. 293, 311-12 (1966).

Further, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Due process further prevents a prosecutor from relying on testimony the district attorney knows to be false, or later learns to be false. See *Nerison*, 136 Wis.2d 54; *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). The Supreme Court has held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). A new trial is required if a petitioner establishes (1) the prosecution failed to disclose that false testimony was used to convict, (2) the prosecution knew or should have known that the testimony was false, and (3) there is a reasonable likelihood that the testimony could have affected the jury's judgment. *Id.*

Reviewing courts independently determine whether a due process violation occurred, but accept the trial court's findings of historical fact unless clearly erroneous. *State v. Sturgeon*, 231 Wis.2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999).

B. Factual Background

The State presented evidence that Guled Abdi entered a plea agreement whereby he pleaded guilty to two felony charges (R261:39). The agreement required Abdi to testify truthfully at Hirsi's trial, and in exchange the State would recommend a period of two years' incarceration (R261:39).

However, this did not adequately inform the jury of the full terms of Abdi's agreement. First, the jury was not informed that in exchange for these pleas, Abdi had fifteen charges dismissed, including six counts of attempted 1st degree intentional homicide. Second, the jury was not informed Abdi received qualified immunity for his statement

to police on 9/4/2014. Third, the jury wasn't informed that the prosecutor determined what was "true," and the prosecutor had specifically told Abdi during the recorded interview that "untruthful" meant "differently than what he said today" (R113 Exhibit 103: 48:12-48:28).⁵

Thus Abdi was instructed specifically that if he said something different than what he'd said on 9/4/14 (when he claimed Hirsi was the shooter), his leniency agreement would have been void. That is different than simply requiring the truth; it is requiring the truth as it was believed by the prosecutor. See, e.g., *United States v. Peters*, 791 F.2d 1270, 1300-01 (7th Cir. 1986) (favorable agreements with accomplices which required "truthful" testimony, a determination to be made by government attorneys, were not unreliable as a matter of law when the jury learned full details of agreements).

Abdi also lied to the jury about the timing of his agreement during cross-examination:

Defendant: You have told the Hudson officers that I was the shooter after you had been handed down a deal, yes or no?

Abdi: After I'd been handed out a deal, no. I told them during the interview with my lawyer and the prosecutor and the detective.

(R262:7) (Emphasis added).

While the second part of Abdi's answer was accurate, the underlined portion was false. As discussed *supra*, that interview with the prosecutor and detective occurred on 9/4/14. However, the prosecutor sent a proffer letter to Abdi's

⁵ Neither this exhibit, nor the recording of Abdi's statement from 1/19/14 (Exhibit 102), is included on the exhibit list. However, since no comprehensive exhibit list was ever generated, the defense will cite to this when referencing either of these recordings.

attorney describing the exact agreement discussed herein on 7/15/14 (R188:3). The agreement proposed in that letter is what prompted the 9/4/14 interview. Abdi lied to the jury.

The prosecutor did not correct Abdi's false testimony, despite a clear obligation to do so. *See Napue*, 360 U.S. at 269. And the defense was not in a position to prove Abdi was lying, because a copy of the proffer letter was not provided before trial.

Finally, while the jury was given the general instructions on witness credibility and witnesses with prior convictions, the jury received no cautionary instruction regarding accomplice testimony.

C. The Non-Disclosure Of The Proffer Letter And The Full Terms Of Abdi's Agreement, Failure To Correct Abdi's False Testimony, And Failure To Caution The Jury On Accomplice Testimony Violated Hirsi's Due Process Rights

The United States Supreme Court has emphasized the responsibility imposed on the government to make proper *Brady* disclosures: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed... As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred." *Banks v. Dretke*, 540 U.S. 668, 695-96 (2004).

The procedural safeguards required by *Nerison* to satisfy an accused's due process rights were violated in numerous ways. First, the failure to disclose the proffer letter from 7/15/14 to the defense violates the requirement of "full disclosure of the terms of the agreements struck with the witnesses." *Id.*, 136 Wis.2d at 46.

Second, the government did not inform the jury of (1) the proffer letter extending Abdi qualified witness immunity; (2) the fact that the prosecutor unilaterally decided whether or not Abdi was being “truthful;” (3) the prosecutor had specifically advised Abdi that “truthful” meant consistent with his statements on 9/4/14, i.e. identifying Hirsi as the shooter; and (4) in exchange for Abdi’s proffer and pleas to two felony charges, the government agreed to dismiss 15 other felony charges, including 6 counts of attempted 1st degree intentional homicide. Failure to inform the jury of these aspects of Abdi’s agreement violated the “full disclosure” requirement of *Nerison*, *supra*.

Third, the prosecutor’s failure to correct Abdi’s false testimony denying that he told Hudson police Hirsi was the shooter after being handed out a deal violates *Napue*, because the prosecutor knew this testimony was false and failed to correct it. *Id.*, 360 U.S. at 269.

Fourth, the failure to give a cautionary instruction on accomplice testimony violated the third prong of *Nerison*. The general instructions on witness credibility and criminal convictions were insufficient, as demonstrated by the instructions given in *Nerison* instructing the jury not to base its verdict upon accomplice testimony alone unless, after scrutinizing it “with the utmost care and caution,” it satisfies the jury of the defendant’s guilt beyond a reasonable doubt. *Id.* at 52. The court in *Nerison* found such an instruction “critical” in protecting the defendant’s rights to a fair trial. *Id.*; *see also Hoffa*, 385 U.S. at 312.

The circuit court denied the post-conviction motion on the following grounds: (1) Hirsi’s failure to request the accomplice instruction waived the issue (R276:62); (2) the State had adequately disclosed “the essence and substance of the agreement that the State had with Mr. Abdi,” and there was no requirement to disclose the actual proffer letter

(R276:62-63); (3) Abdi was subject to cross-examination, and it was clear to the jury that he received consideration for his cooperation (R276:63-64); and (4) Abdi's testimony wasn't "materially false," because it involved semantics over whether or not he got a "deal" (R276:63-64).

With regards to waiver, the defense submits either the State was required to request the instruction to comply with *Nerison*, or the court was required to give this instruction *sua sponte*. *Nerison* makes the cautionary instruction a requirement of due process ("If the jury is informed as to arrangements for testimony with an accomplice or co-conspirator and proper instructions are given as to the value of such testimony, then such testimony may be presented and considered." *Id.*, 136 Wis.2d at 46 (emphasis added)). Subsequent cases have also labelled such instructions as mandatory, at least when the State presents the accomplice as its witness. *See State v. Miller*, 231 Wis.2d 447, ¶32, 605 N.W.2d 567 (Ct. App. 1999) ("*Nerison* only commands a cautionary instruction where the witness agrees with the State "to testify against the defendant").

Abdi was the State's witness against Hirsi. Since the State granted significant concessions to Abdi, the State was obligated to comply with *Nerison's* procedural safeguards to ensure a fair trial to the defendant.

For the same reasons, if the court finds waiver can apply, the court should exercise its discretion not to apply waiver. Waiver is merely a rule of judicial administration. *State v. Long*, 2009 WI 36, ¶44, 317 Wis.2d 92, 765 N.W.2d 557.

The defense also disputes the court's conclusion that the State fulfilled its disclosure requirements. Whether or not it was required to disclose the actual proffer letter is immaterial. The key fact is the timing of the proffer, because

it discredits Abdi's testimony that he hadn't been handed a "deal" before speaking with police about the shooting, showing he'd been offered that deal six weeks beforehand (R262:7).

Further, disclosing the "essence" of the agreement and providing cross-examination is insufficient; *Nerison* requires "full disclosure of the terms of the plea agreements to the jury." *Id.* 136 Wis.2d at 51. That duty falls upon the State, not the defense. *Id.* at 46. The State unquestionably did not fulfill its responsibility to fully inform the jury about the details of its agreement with Abdi, considering it never told the jury the State had dismissed 15 charges in exchange for his pleas.

This proved significant because Abdi was able to portray the leniency agreement as though he hadn't received any benefits yet. Specifically, when the defense questioned Abdi about the proffer of two years "instead of a whole lot," Abdi answered, "No, I didn't receive nothing yet. I'm waiting to get sentenced" (R262:8). In fact, when Abdi entered his pleas in October 2014, the State dismissed counts 1-15. Thus when Abdi testified at Hirs's trial in April 2015, Abdi was facing a maximum exposure of only 6 years on the two felonies, rather than an extra 510 years exposure on the 15 dismissed charges. Abdi's testimony on this point was materially misleading, and the State's failure to inform the jury of the dismissal of those 15 charges constituted a material omission.

D. The Errors Were Material

The standard for a new trial based on due process violations is whether the errors were material, i.e. whether there is a "reasonable likelihood" the error had an impact on the trial. See *Giglio, id.* at 154; *Napue, supra*, at 271 (A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the

jury”). “When the ‘reliability of a given witness may well be determinative of guilt or innocence,” nondisclosure of evidence affecting credibility falls within this general rule. *See Napue, supra*, at 269; *Giglio*, 405 U.S. at 154.

Abdi was the State’s key and only percipient witness; guilt or innocence depended primarily upon whether the jury credited his testimony. Had the evidence sufficiently challenged his reliability, a reasonable likelihood exists the jury would have believed Abdi was the shooter, motivated to lie to shift the blame onto Hirsi. As discussed *supra*, none of the other witnesses testified that Hirsi was the shooter.

Abdi’s importance to the State’s case is also evident by the fact that of the three witnesses who identified Hirsi in the photographs from the Saint Paul shooting, only Abdi’s testimony was properly admitted. *See arguments infra*.

Thus Abdi’s testimony identifying Hirsi as the shooter was crucial because no one else identified a shooter and the other evidence was equivocal at best. In closing arguments, the State emphasized Abdi’s credibility, while Hirsi argued Abdi was lying in exchange for a deal, and suggested Abdi was the shooter (R266:39,42-47,67-68). Given the importance of Abdi to the State’s case, and the fact that Abdi was the obvious alternative suspect, any evidence of his cooperation and motive to lie was material and should have been disclosed.

A reasonable jury could have legitimately questioned Abdi’s truthfulness had it learned all of the information the State failed to disclose, and that Abdi perjured himself by falsely denying he told the Hudson police Hirsi was the shooter after he’d been offered a deal. Further, failure to instruct the jury on accomplice testimony left the jury without the proper legal framework to effectively evaluate Abdi’s

motives. The cumulative impact of these errors violated Hirsi's due process rights and warrants a new trial.

II. THE COURT IMPROPERLY ALLOWED OTHER-ACTS EVIDENCE WHILE FAILING TO PROPERLY INSTRUCT THE JURY THAT HIRSI WAS ACQUITTED OF THAT SAME CONDUCT

A. Standard of Review

Appellate courts “review a circuit court's admission of other-acts evidence for an erroneous exercise of discretion.” *State v. Marinez*, 2011 WI 12, ¶17, 331 Wis.2d 568, 797 N.W.2d 399. A reviewing court will uphold a circuit court's evidentiary ruling if it “‘examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach.’” *Id.*

“When reviewing a circuit court's determination for erroneous exercise of discretion an appellate court may consider acceptable purposes for the admission of evidence other than those contemplated by the circuit court, and may affirm the circuit court's decision for reasons not stated by the circuit court.” *State v. Hunt*, 2003 WI 81, ¶52, 263 Wis.2d 1, 666 N.W.2d 771). “‘Regardless of the extent of the trial court's reasoning, [a reviewing court] will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion.’” *Id.*

B. Factual Background

The State submitted allegations from a Saint Paul shooting two days earlier as other-acts evidence to prove Hirsi possessed a firearm for the purported purpose of

proving “identity.” Hirsi had been acquitted by a Ramsey County jury before at trial on the two charged Minnesota offenses: Prohibited Person in Possession of a Firearm and Reckless Discharge of a Firearm (R256:68).

The State offered three separate categories of evidence from the Saint Paul shooting; (1) a single bullet found in an apartment wall (R265:62-63); (2) testimony from the apartment manager where the bullet was found, including photos from surveillance footage depicting a man holding a black object (R265:59-68); and (3) testimony from Guled Abdi (R261:27-30), Saint Paul Detective Tracy Henry (R265:83-87), and St. Croix Detective Geoff Williams (R265:225) identifying Hirsi as the suspect allegedly holding the gun in those photos. Purportedly linking this evidence together was a ballistics expert, William Newhouse, who testified one bullet recovered from that Minnesota incident appeared to be fired from the same model firearm as the Hudson shooting (R265:164-66,179). However, no gun from either incident was found or submitted for testing. Nor was any forensic or scientific evidence offered linking Hirsi.

Pre-trial, Hirsi filed motions to exclude any discussion of the Saint Paul shooting, and to preclude anyone from identifying him from photographs (R103:1). At a motion hearing, Hirsi raised numerous objections to the other-acts evidence, challenging the purpose, relevance, foundation for witnesses to identify him, and undue prejudice, placing significant emphasis on his acquittal (R256:58-68). Hirsi also challenged the limitations of the ballistics testimony, arguing the expert couldn’t testify as to who fired the bullet in Saint Paul, or when it was fired (R256:65).

The trial court noted that an acquittal doesn’t bar admission of other-acts evidence, as the standard for admissibility is lower than for conviction, citing *State v. Landrum, infra* (R256:70-72). The trial court concluded the

evidence was properly admitted for the purpose of identity (R256:73). The court found the evidence relevant and not unduly prejudicial because, “if a jury believes that you were the person that fired the gun in St. Paul and that it's the same gun that was fired in Hudson, then it's highly probative” (R256:75). The court indicated its intent to draft a cautionary jury instruction (R256:80).

The State subsequently moved to exclude any reference to Hirsi’s acquittal on the conduct underlying the other-acts (R97:2-3). Hirsi objected, arguing the State couldn’t have it both ways (R258:48-49). The court held any reference to the acquittal would be “distracting[,] misleading, [and] confusing to the jury,” and excluded any reference to the Ramsey County acquittal (R258:50-53).

The court’s cautionary other-acts instruction made no reference to Hirsi’s acquittal (R266:24-25). The State, in closing argument, claimed Hirsi had fired the same gun in the Minnesota incident in which he stood acquitted (R266:75-77).

C. Admission Of The Other-Acts Evidence Constituted An Erroneous Exercise Of Discretion

“Evidence fitting a sec. 904.04(2), Stats., exception is inadmissible if the point to be proven is not at issue.” *State v. Harris*, 123 Wis.2d 231, 235, 365 N.W.2d 922 (Ct. App. 1985) (other-acts evidence relevant to identity inadmissible when identity not challenged). In this case, the State presented two witnesses, Guled Abdi, and Eagan Police Department officer Sean Sweeney, who placed Hirsi at the Hudson scene with Abdi and traveling on I-94 Westbound and then exiting the vehicle. At trial, multiple witnesses claimed the vehicle sped from the Spirit Seller location in Hudson (R264:23-25,40-41). Accordingly, Hirsi’s identity

was never truly at issue, and the other-acts evidence should have been inadmissible.

For example, see *State v. Balistreri*, where the Wisconsin Supreme Court affirmed the trial court's ruling precluding the defense from presenting evidence that a third party committed a shooting with the murder weapon one day earlier in an attempt to prove that the third party had shot the victim. *Id.*, 106 Wis.2d 741, 754-57, 317 N.W.2d 493 (1982). Under similar factual circumstances, where all parties in the vehicle were consistently identified and the only contested issue was who fired the gun, the court asserted, "Identity was not an issue at defendant's trial." *Id.* at 756.

Moreover, the other-acts evidence lacked relevance and probative value because it relied on a series of faulty assumptions and speculation, unsupported by a factual nexus. "[B]uilding an inference upon an inference" is speculation. See *Home Savings Bank v. Gertenbach*, 270 Wis. 386, 404, 71 N.W.2d 347 (1955). Verdicts cannot be premised upon "groundless conjecture." *Owens v. Duncan*, 781 F.3d 360, 365 (7th Cir. 2015).

Only one witness—Det. Henry—identified the black object held by the suspect in the photos as a firearm (R265:87,91). She testified to that based purely on what she saw in the photos, not based on first-hand knowledge or presence at the scene. Further, she characterized the clarity of the images as "somewhat" clear, and acknowledged it was only her opinion that the item was a firearm (R265:91). Significantly, the State offered no evidence to the jury that Henry had the foundation necessary to identify that item as a firearm. Nor was Henry's opinion ever confirmed, because law enforcement never recovered the object in the photos.

No witnesses testified to seeing a gun fired, when it was fired, or who fired it. The videos and photos didn't show muzzle flash to indicate a gun being fired. Therefore, even

assuming *arguendo* that was a firearm, the State presented no evidence of the following which could have supported a factual nexus:

- The type of gun observed in the images
- Whether the gun in the images fired the same type of bullet recovered in the Saint Paul apartment
- Assuming it fired the same type of bullets, whether that gun was the particular gun that fired the bullet recovered; and
- Assuming the gun observed in the images fired the bullet recovered, whether the man in the photos was the one that fired the gun.

Without the actual firearm being located, without any forensic evidence linking the firearm to Hirsi, without any witnesses indicating the man in the photos fired it, and without any evidence that the bullet in the apartment wall came from the object in the photos, the other acts-evidence and ballistics testimony was speculative and irrelevant, and should have been excluded.

Post-conviction, the court affirmed its pretrial ruling, indicating the burden of proof for admissibility of other-acts evidence is lower (R276:64). However, the court never addressed Hirsi's challenges regarding the factual nexus of the other-acts, and how the State had to stack inference upon inference—i.e. speculate—in order to establish any relevance.

D. The Court Committed Reversible Error By Not Instructing The Jury On The Minnesota Acquittal

The trial court's failure to instruct the jury or to permit argument on Hirsi's acquittal constituted erroneous exercise of discretion, and violated Hirsi's right to present a full defense in light of its admission of other-acts evidence.

The United States Supreme Court has held that evidence of conduct for which defendant was acquitted was deemed admissible for limited purpose of establishing identity. *Dowling v. United States*, 493 U.S. 342 (1990). Other-acts evidence is relevant if a jury could find by a preponderance of the evidence that the defendant committed the other act; an acquittal does not prevent offering evidence of a prior crime as other-acts. *State v. Landrum*, 191 Wis.2d 107, 528 N.W.2d 36 (1995).

However, proper and complete limiting instructions to the jury are required in this context. In *Dowling*, the jury was instructed “that petitioner had been acquitted of robbing Henry, and thereby emphasized the limited purpose for which Henry's testimony was being offered.” *Id.*, 493 U.S. at 345-46. Similarly, in *Landrum*, the court “recognized the potential for prejudice and instructed the jury that Landrum had been acquitted ... The delivery of a limiting instruction serves to eliminate or minimize the risk of unfair prejudice.” *Id.*, 191 Wis.2d at 122.

Reversal is required because the trial court failed to follow the dictates of both *Dowling* and *Landrum* by failing to instruct the jury about Hirsi's acquittal in its limiting instruction. Both *Landrum* and *Dowling* indicate this is a key to reducing potential prejudice inherent in other-acts evidence. The trial judge explicitly based his ruling on *Landrum* (R256:70) yet acted in a plainly erroneous fashion by the failure to include Hirsi's prior acquittal in Minnesota.

Post-conviction, the court explained its failure to instruct the jury on the fact of Hirsi's acquittal by claiming the defense didn't request an instruction on the acquittal, and asserting its belief that such an instruction would be confusing to the jury, and the court didn't want to invite speculation (R276:64-65). The court's claim that the defense

never requested such an instruction misses the mark for obvious reasons. The court admitted the other-acts over Hirsi's strenuous objection.

Further, after the court's decision to allow other-acts, Hirsi argued that the jury should be informed about the acquittal, stating, "I should be allowed to discuss I was acquitted of the—if the jury is allowed to hear any portion of the St. Paul case, the jury should be able to hear the outcome of the St. Paul case" (R258:48-49). The court then granted the State's motion to preclude reference to the acquittal, indicating it had prepared a cautionary jury instruction stating only the purpose of the evidence (R258:51-52).

Given the authority relied upon by the court (*Landrum*) requires an instruction on the acquittal to limit prejudice, Hirsi clearly argued he should be able to inform the jury of his acquittal, and the court explicitly rejected that request, there can be no viable claim of forfeiture as to the cautionary instruction.

E. The Errors Were Not Harmless

When a court determines other-acts evidence was improperly admitted, the court must determine whether the error was harmless. *State v. McGowan*, 2006 WI App 80, ¶25, 291 Wis.2d 212, 715 N.W.2d 631. An error is harmless only if the beneficiary of the error—in this case, the State—proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' See *McGowan*, *id.* In determining whether an error is harmless, the court may consider the frequency of the error, the importance of the erroneously admitted evidence, and the overall strength of the State's case. *Id.*

The errors that occurred here were not "harmless" beyond a reasonable doubt. Where the government's case is

of marginal sufficiency, even otherwise minor errors can have a great impact on the jury. *United States v. Agurs*, 427 U.S. 97, 113 (1976). As discussed *supra*, the State's case had substantial weaknesses, as the only witness who identified Hirsi as the shooter was his co-defendant, Abdi, had was motivated to lie to shift the blame away from himself. F.A., the victim who allegedly argued with the shooter, couldn't identify Hirsi in a photo lineup, and did not identify him at trial (R260:38). Another victim, A.H, affirmatively testified Hirsi wasn't the shooter. There was no DNA, fingerprints, blood, or gunshot residue linking Hirsi to the firearm. No firearm was discovered during the search of Hirsi's mother's house, where Abdi claimed Hirsi left it (R265:103-06).

The State attempted to fortify its otherwise marginal case by relying heavily on other-acts evidence, claiming the bullets from the Hudson shooting came from the same gun fired in Saint Paul (R265:166,174-75). Despite the lack of any factual nexus, the State argued the "same gun" allegedly in Hirsi's hand in the Saint Paul images fired the bullets in the Hudson case (R266:54). In response, Hirsi pointed out the evidentiary deficiencies, noting, "No weapon has ever been analyzed for facts in determining as to say who was in possession—who was in possession and who discharged that" (R266:64).

In rebuttal, the prosecutor again crossed the line, arguing the individual in the picture "fired the same gun" and the "same bullet" as in Hudson, to which Hirsi objected (R266:75-76). The court sustained due to lack of evidence (R266:75-76). Despite the court sustaining this objection, the prosecutor again argued, "And that gun is the same gun used in Hudson" (R266:77). As discussed *supra*, these arguments were unsupported speculation.

These errors, combined with the court's failure to minimize the prejudice by through instructing the jury Hirsi

had been acquitted of the Saint Paul shooting, were extremely damaging given the critical nature of this evidence to the State's case-in-chief.

III. THE COURT ERRED BY ADMITTING LAY OPINION TESTIMONY IDENTIFYING HIRSI AS THE INDIVIDUAL IN CERTAIN PHOTOGRAPHS

A. Standard of Review

When a trial court's evidentiary decisions are challenged, the reviewing court assesses the trial court's admission of evidence for an erroneous exercise of discretion. *State v. Sorenson*, 143 Wis.2d 226, 240, 421 N.W.2d 77 (1988). An erroneous exercise of discretion occurs when the trial court's determination lacks a reasonable basis. *Id.* Therefore, to uphold the ruling, there must be a reasonable basis for it. *Id.*

B. Factual Background

The primary evidence linking Hirsi to the Saint Paul shooting was lay opinion testimony identifying Hirsi as the suspect in the surveillance photos. This testimony came from Guled Abdi, Det. Tracy Henry, and Det. Geoff Willems—none of whom were present for the incident in Saint Paul.

In addition to making general objections to the other-acts evidence, Hirsi made specific objections to any witnesses identifying him from photos or videos. At the motion hearing, after mentioning no witnesses identified him at the Ramsey County, Minnesota trial, Hirsi argued, “how can they [be] able to identify me as the suspect when they don't have sufficient lay opinion?” (R256:61). Hirsi further argued the testimony of the officers “would not be based on any firsthand knowledge of the incident,” and argued “their opinion testimony would invade the province of the jury by

opinion not only on the ultimate issue at trial but attempting to tell the jury what decision to reach” (R256:67-68).

While the court admitted the other-acts, the court left open the question of whether anyone could testify as to his identity, indicating that was a question for trial (R256:73-74). When the issue arose at the next motion hearing, the court identified two preconditions for admitting such evidence: (1) adequate foundation, and (2) cross-examination (R258:12,17).

C. Lay Opinion Testimony Identifying Hirsi From The Photographs Violated Sec. 907.01, Lacked Foundation And Violated Hirsi’s Right To Confrontation

1. Admissibility of lay opinion testimony identifying suspects from photos

Lay witnesses are allowed to give opinion rationally based on the perception of the testimony when that testimony is (1) helpful to a clear understanding of the witness's testimony or the witness, (2) determination of a fact in issue, and (3) not based on scientific, technical, or other specialized knowledge within the scope of an expert witness. *See* Wis. Stat. sec. 907.01.

While the defense located no published Wisconsin cases on the subject, federal cases hold a witness's opinion concerning the identity of a person depicted in a photograph is admissible if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury. *See, e.g., United States v. Barrett*, 703 F.2d 1076, 1086 (9th Cir.1983).

However, "the use of lay opinion identification by policemen ... is not to be encouraged, and should be used

only if no other adequate identification testimony is available to the prosecution.” *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993). *LaPierre* found only two situations that justified the admission of such testimony—(1) where the witness had “substantial and sustained contact” with the person in the photograph, or (2) when the defendant’s physical appearance in the photograph is different from the defendant’s appearance before the jury and the witness is familiar with how the defendant looked at the time of the photograph. *Id.*

2. Det. Willems lacked foundation to identify Hirsi

If the witness didn’t have sustained contact with the person beforehand, there is an arguable lack of foundation to provide such an opinion on identity. *LaPierre, id.* The trial court recognized the need for adequate foundation (R258:12,17). However, despite Hirsi’s pre-trial objections, no opportunity was provided to voir dire the witnesses. And trial testimony demonstrated unequivocally that Detective Willems plainly lacked foundation for his identification testimony. The State presented no evidence suggesting Willems knew Hirsi beforehand. And on cross-examination, Willems admitted he didn’t know Hirsi at all (R260:16-17). Thus, his lay opinion testimony was inadmissible.

Post-conviction, the court concluded there was adequate foundation, asserting, “All the witnesses that testified had identified him out of the imagines [sic]. They had an opportunity to see him and know what he looks like” (R276:65). However, as demonstrated *supra*, there was no evidence that Det. Willems had foundation.

3. Det. Henry should not have been permitted to identify Hirsi because exclusion of evidence regarding the Minnesota case

**precluded Hirsi from confronting Det.
Henry's bias**

Saint Paul Detective Henry arguably had foundation to identify Hirsi based on her prior contacts with Hirsi (R265:80-82). However, her testimony suffered from a different problem—it violated Hirsi's confrontation rights because Hirsi wasn't permitted to fully confront and cross-examine her about possible bias.

When the lay witness identifying a suspect from a photograph is a police officer, courts have concerns about limiting the defendant's opportunity to cross-examine for bias without getting into prejudicial information. *See United States v. Calhoun*, 544 F.2d 291, 295 (6th Cir.1976) (court abused its discretion admitting a parole officer's identification of defendant in a surveillance photograph because "his broad assertion could not be tempered or probed by cross-examination").

The trial court unequivocally barred Hirsi from making any reference to the Saint Paul trial (R258:50-52). Detective Henry presented herself as an expert on Somalian culture; she did not wear a police uniform and was not identified as a police officer. Accordingly, Hirsi was prevented from exploring Henry's bias through cross-examination about the fact that she was his arresting officer in the Saint Paul case where Hirsi was acquitted.

Detective Henry's bias against Hirsi was evident at his Ramsey County trial, when Det. Henry was directed by the presiding judge not to refer to the fact that a photograph the State attempted to offer was a booking photo, and she still blurted out that it was a booking photo, prompting a motion for mistrial (R188:4-6). Further, Hirsi's acquittal arguably increased Detective Henry's bias against Hirsi, because she likely felt Hirsi escaped justice in that case.

The court's post-conviction ruling addressed this argument only in passing, asserting, "it is what it is" (R276:66). With respect, what "it is" is a violation of Hirsi's confrontation rights. The trial court's ruling prohibiting any reference to the Ramsey County case hamstrung Hirsi's ability to cross-examine Henry about her bias. Accordingly, her lay opinion testimony identifying him from photographs was impermissible.

D. The Errors Were Not Harmless

Hirsi hereby incorporates his arguments *supra* regarding the standard of review for harmless error, the overall strength of the State's case, and the importance of the Saint Paul shooting evidence. The errors regarding identification were particularly important because the lay opinion testimony provided the only other evidence linking Hirsi to that other shooting.

While co-defendant Abdi also identified Hirsi in the photos, his testimony was subject to challenge for bias since he was the alternative suspect, cooperating with the State, and had an obvious motive to lie. By contrast, the State highlighted the identification testimony of both Det. Willems and Tracy Henry, arguing the lack of any bias or (R266:59)—and therefore no reason to disbelieve them. However, the testimony of Det. Willems lacked foundation and never should have been admitted, and the court's erroneous ruling precluded Hirsi from challenging Det. Henry's bias.

The Saint Paul shooting was crucial evidence, and the lay opinion testimony of these two witnesses was crucial to prove that evidence. Accordingly, the erroneous admission of this evidence was not harmless beyond a reasonable doubt.

IV. HIGHLY PREJUDICIAL AND IRRELEVANT “EXPERT” TESTIMONY AND ARGUMENTS REGARDING SOMALI CULTURE VIOLATED HIRSI’S DUE PROCESS RIGHTS, AND CONSTITUTES PLAIN ERROR

A. Standard of Review

The decision to admit evidence is a discretionary decision that will be upheld if the trial court examined the relevant facts, applied the proper legal standard, and reached a reasonable conclusion using a demonstrated rational process. See *State v. Mayo*, 2007 WI 78, ¶31, 301 Wis.2d 642, 734 N.W.2d 115.

Wisconsin Statute sec. 901.03(4) codifies the “plain error” doctrine, which permits appellate courts to review errors that were otherwise forfeited by a party’s failure to object. *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis.2d 138, 754 N.W.2d 77. An error must be fundamental, obvious, and substantial to constitute plain error. *Id.* There is no bright-line rule to determine whether reversal is warranted, and the existence of plain error turns on the facts of the particular case. *Id.*, ¶22. If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless. *Id.*, ¶23.

B. Factual Background

The State offered Tracy Henry as an expert witness on “Somalian culture and Somalian gangs” in relation to the justice system (R80:2). Hirsi objected to anything “gang-related,” and ultimately the State agreed Henry would be instructed not to mention gangs (R265:70-72).

While Det. Henry never specifically used the word “gangs,” she did testify to “Somalian-on-Somalian” crime (R265:75). Det. Henry also testified that Somalians tended to settle disputes themselves rather than involving law enforcement (R265:78-79). The State requested statistics to support that claim, and the following exchange occurred:

Det. Henry: In the Twin Cities there was over 20 homicides since about 2007, 2008. And only about--or less than five of them have been successfully prosecuted.

The State: Would these be--if you know, these 20 or so homicides, are these cases involving Somalian-on-Somalian crime?

Det. Henry: Yes. I should have clarified. All 20 of them--or over 20 of them would be Somali on Somali.

(R265:80).

The State then inquired as to the reason for this, soliciting an “expert” opinion that Somalians had a “tendency to fabricate” events:

The State: And based upon your training and experience, would it be an accurate statement that victims or witnesses of Somalian-on-Somalian crime could have a tendency to fabricate certain events so as to avoid retribution within their community?

Det. Henry: Yes.

The State: And why is that?

Det. Henry: For fear of retaliation, for not wanting to get the courts or the government, law enforcement involved that they already distrust.

(R265:80).

In closing arguments, the prosecutor used this evidence to discredit A.H.'s testimony that Hirsi was not the shooter, and to imply the reason other witnesses from the victim's vehicle didn't identify Hirsi as the shooter was due to their Somali heritage:

So now you know that [A.H.] is not telling-- telling the truth. And you heard from Tracy Henry why that might be with the Somalian community. ... Two of them made any kind of statements to the police, two out of six.⁶ That's a reflection of Tracy Henry's summary to you about the Somalian culture and their lack of cooperation with law enforcement.

(R266:41)

The prosecutor argued A.H. was protecting Hirsi based on the "cultural bias" Det. Henry had testified about (R266:49).

C. This "Expert" Testimony Was Irrelevant And Inflammatory, Violated *Haseltine's* Prohibition On Commenting On Witness Credibility, And Violated Hirsi's Due Process Rights

Det. Henry's testimony, and the prosecutor's arguments exploiting that testimony, was improper on many levels. While Det. Henry avoided using the word "gangs," her testimony about "Somali-on-Somali" crime strongly implied she was discussing gang activity. This assumption was made clear by her testimony regarding twenty "Somali-on-Somali" homicides in the Twin Cities area over a two-year period (R265:80). Not only was this testimony inflammatory, it was also irrelevant and misleading. Henry's testimony implied the reason most of those Somali-on-Somali homicides were unsolved was because the Somali people were dishonest with law enforcement and preferred to take the law into their own

⁶ As will be discussed *infra*, in addition to being legally improper, this argument is factually false, as four of the six victims gave statements to police.

hands. That incredibly broad generalization was unsupported by any facts or data.

Perhaps more troubling was Det. Henry's general commentary about Somalian people being uncooperative with police, more likely to settle matters themselves, and having a "tendency to fabricate" events (R265:78-80). Testimony about the credibility of other witnesses encroaches upon the jury's role as "lie detector in the courtroom." *State v. Haseltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct.App.1984). "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *Id.*

This type of testimony is especially prejudicial when based on race or ethnicity, and admission of such evidence is widely condemned. *See, e.g., State v. Vue*, 606 N.W.2d 719 (Minn. 2000) (sexual assault and domestic violence convictions reversed based on improper admission of expert testimony that members of particular ethnic group have culture that condones domestic violence and discourages reporting, as such evidence is inherently prejudicial).

The Constitution prohibits a prosecutor from making race-conscious arguments because it draws the jury's attention to a characteristic that the Constitution generally demands that the jury ignore. Likewise, a witness may not testify that a certain race or ethnicity is more or less likely to be law-abiding or take the law into their own hands. By inference, the testimony devalues the credibility of any person who is a member of that ethnic or racial group. *See McFarland v. Smith*, 611 F.2d 414, 417 (2d Cir. 1979) (reversing conviction for delivery of heroin based on improper argument that the arresting officer was credible because both the officer and the defendant were black, and the officer was less likely to lie about a black person).

Det. Henry's testimony about "Somali-on-Somali" crime and statistics about unsolved homicides also suggested Somalis had a propensity for violence. The rest of her testimony suggested Somalis didn't cooperate with law enforcement, but when they did, they lied. Thus, the echo of these messages was that Hirsi was a member of an ethnic group and, therefore, a dangerous individual with a propensity for violence, and that any witness who expressed uncertainty as to whether Hirsi committed the crime was lying based on their ethnicity.

The prosecutor's closing argument exemplified how improper and misleading this "expert" evidence was, claiming witnesses favorable to Hirsi were lying based on "Somalian culture" (R266:41-42,47,49,58-59). Further, the prosecutor falsely claimed only two of six victims gave statements to police, which the prosecutor deemed a "reflection of Tracy Henry's summary to you about the Somalian culture and their lack of cooperation with law enforcement" (R266:41). This argument was patently false; in addition to A.H. and F.A., two other victims gave statements to police—F.M. told two officers he didn't know who did the shooting, and S.N. told Deputy Schultz she'd been asleep and didn't see the shooting (R188:7-8,10).

Falsely claiming that two witnesses didn't speak with police, and then falsely telling the jury that was because of their Somali heritage, is highly improper. *See, e.g., State v. Bvocik*, 2010 WI App 49, 781 N.W.2d 719 (conviction reversed because a prosecutor asked the jury to draw inferences the prosecutor knew were false).

The court's post-conviction ruling acknowledged that the testimony about Somalis having a tendency to fabricate may have been objectionable, but didn't believe it suggested "this particular race is untruthful" (R276:66). The court placed importance upon the lack of objection (R276:66-68).

The court asserted its belief that the State was not “attempting to malign an entire culture,” but was instead trying to deal with “uncooperative witnesses” (R276:66). The court claimed the State was under “some pressure to try to find a way to help the jury understand why” the witnesses were uncooperative (R276:67).

However, the court’s post-conviction ruling didn’t address the prosecutor’s false and misleading statement to the jury exaggerating how many victims were uncooperative. More importantly, the court never explained why it was necessary or appropriate to present any evidence on why certain victims didn’t cooperate, beyond the perfectly logical explanation: fear of the shooter. Why was it necessary to invoke ethnicity to explain reluctance of victims to provide information in a case where they’d been the targets of a shooting?

Moreover, the prosecutor went beyond using ethnicity to explaining the reluctance of the victims, into attributing dishonesty and the implication of violence based on ethnicity. Under no circumstance is that appropriate or permissible in an American trial.

D. Admission Of This Prejudicial And Irrelevant Evidence And Arguments Constitute Plain Error, And Was Not Harmless

The admission of this highly prejudicial and irrelevant evidence maligning the Somali culture as violent and dishonest, as well as the prosecutor’s arguments about this evidence, constitute plain error. *See, e.g., Jorgensen*, 2008 WI 60 *Id.*, ¶¶28-36; *see also United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990) (invoking federal plain error rule to reverse convictions for firearm and drug charges when evidence and arguments about the drug market being “taken

over basically by Jamaicans” constituted improper appeals to racial bias).

The plain error analysis is appropriate here. Like in *Jorgensen*, Hirsi represented himself *pro se*. Although Hirsi did not initially object to anything outside mention of gangs, Det. Henry’s testimony proved far more inflammatory than the State’s notice of expert testimony suggested. Had the testimony discussed only how Somalis tend to settle disputes within their clans, that might have been marginally permissible. But Det. Henry went far beyond that, claiming Somalis have a “tendency to fabricate” events due to fear or distrust of police, and discussing statistics on unsolved “Somali-on-Somali” homicides.

Key factors when assessing plain error are the significance, timing, repetition, and manner of the errors. *Jorgensen, id.*, ¶44. This testimony was significant because it was presented as “expert” testimony, seeking to explain why two of the victims—both Somalis—didn’t identify Hirsi as the shooter, as well as to fully speculate why other victims wouldn’t make statements. The prosecutor referenced it multiple times in summation, and placed particular emphasis on this supposed “cultural bias” when attempting to discredit A.H., who flat-out denied Hirsi was the shooter (R266:41-42,47,49,58-59).

Given the repeated references to this improper evidence within the trial of Mr. Hirsi—himself a Somali—and the circumstantial nature of the evidence, the admission of this evidence was not harmless.

V. THE REAL CONTROVERSY WAS NOT FULLY TRIED DUE TO NUMEROUS ERRORS AND THE ABSENCE OF MARYANNE HURSHÉ’S TESTIMONY

A. Standard of Review

The court of appeals has broad discretionary authority to reverse in the interest of justice pursuant to Wis. Stat. sec. 752.35. The court may exercise its discretionary reversal power where it appears from the record that the real controversy has not been fully tried. *Id.*; see also *State v. Davis*, 2011 WI App 147, ¶16, 337 Wis.2d 688, 808 N.W.2d 130. “[T]he real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case.” *Davis, id.*

Situations in which the controversy may not have been fully tried have arisen in three ways: (1) when the jury was not fully and fairly instructed; see *State v. Austin*, 2013 WI App 96, ¶¶16-18, 349 Wis.2d 744, 836 N.W.2d 833; (2) when the jury was not given the opportunity to hear crucial testimony bearing on an important issue; see *State v. Hicks*, 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996); and (3) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *Hicks, id.* The defendant need not make a showing of a substantial probability of a different result on retrial before the court may reverse when the real controversy has not been fully tried. *Id.*

B. Factual Background

1. The Jury Did Not Hear Significant Evidence Supporting The Defense

Courts are only to exercise their discretionary reversal power in exceptional cases. *State v. Armstrong*, 2005 WI 119, ¶114, 283 Wis.2d 639, 700 N.W.2d 98. This is an exceptional case because the jury didn’t hear testimony of a witness, Maryanne Hurshe, who strongly implicates Guled Abdi as the shooter, and provides his motive for the shooting

at Spirit Seller. At a post-conviction hearing, Ms. Hurshe testified as follows:

- She had been at the La Quinta Hotel in Bloomington, Minnesota the morning of the shooting with several Somalians, including one identified as “GMan” (Guled Abdi) and one identified as “MK” (Ahmed Hirsi) (R276:11-16);
- Abdi drove them to the La Quinta in a gold Cadillac, and they partied at the hotel, hanging out and drinking alcohol (R276:16-18);
- Hurshe saw four guns in the room, and specifically saw Abdi put a black gun in his jacket (R276:18-19);
- Abdi asked Hurshe to drive the Cadillac to Wisconsin to get liquor, but she refused (R276:19);
- Abdi had a cast on his hand from being shot, and Abdi said that he was going to drive to Wisconsin and “get revenge” (R276:19-21); and
- Before Abdi and Hirsi left to go to Hudson, Abdi told Hurshe “he got shot by some St. Paul niggers and he’s out to get revenge” (R276:22).

Hurshe’s testimony contradicts Abdi’s testimony in numerous ways, and inculpates him in others. For example, while Abdi acknowledged being at the La Quinta hotel, he testified he didn’t drink or party, and he didn’t see any guns (R262:10). Hurshe’s statements indicate Abdi himself was carrying a gun when he left for Wisconsin.

Further, Hurshe’s statements shine a new light on Abdi’s wounded hand, which came up at trial (R261:43-50; R262:1-4). Hirsi was not permitted to ask about Abdi’s prior shooting, other than establishing what hand was wounded (R262:4). Hurshe’s information would have provided grounds to explore Abdi’s obvious motive to commit the crime.

This also sheds light on Abdi's first interview with police, where Abdi falsely claimed that his hand had been wounded in a "very bad accident," specifically a car accident (R113 Exhibit 102: 0:53-1:10). If the New Year's Eve shooting provided motive for Abdi shooting at the victims in Hudson, it explains why Abdi lied to police about how his hand was wounded—to eliminate that inculpatory connection.

Additionally, as discussed *supra*, the jury did not hear the full details of Abdi's cooperation and deal with the prosecution, including (1) the proffer letter extending Abdi qualified immunity for his statements on 9/4/14; (2) the fact that the prosecutor unilaterally decided whether or not Abdi was being "truthful;" (3) the prosecutor had specifically advised Abdi that "truthful" meant consistent with his statements on 9/4/14, i.e. identifying Hirsi as the shooter; and (4) in exchange for Abdi's proffer and pleas to two felony charges, the government agreed to dismiss 15 other felony charges totaling 510 years of prison exposure.

2. Improper Evidence And Arguments The Jury Should Not Have Heard

The jury also heard substantial evidence and arguments that were improper, preventing the real controversy from being fully tried. As discussed *supra*, the jury heard the following:

- Testimony from Abdi falsely denying being given a deal before telling Hudson officers that Hirsi was the shooter;
- Testimony from Sgt. Willems identifying Hirsi on the photos from Ramsey County and Hudson, which should have been inadmissible because Willems lacked foundation;
- Testimony from Det. Henry identifying Hirsi on the Ramsey County photos, which should not have been

allowed because Hirsi couldn't confront Det. Henry with her bias;

- Improper evidence and arguments speculating that the alleged firearm in the Ramsey County videos and photos fired any bullet(s) found at the Saint Paul apartment, and speculating that Hirsi was the one that fired that gun;
- Testimony from Det. Henry suggesting Somalians were dishonest people who didn't cooperate with police, a veiled discussion of Somali gang violence including statistics about unsolved "Somali-on-Somali" homicides, all of which invoked ethnic bias against Somalis; and
- Arguments from the prosecutor invoking Det. Henry's improper testimony stereotyping Somalis as uncooperative and dishonest in order to discredit A.H.'s testimony that Hirsi wasn't the shooter.

3. The Jury Was Inadequately Instructed

The jury also did not receive two key instructions regarding how to properly assess the evidence in this case. Specifically, as discussed *supra*, the jury did not receive a *Nerison* instruction discussing how to properly evaluate an accomplice's testimony with caution. Likewise, the jury was not instructed that Hirsi was acquitted of possessing and discharging a firearm in Ramsey County, consistent with the requirements of *Landrum*, considering the State was using the acquitted conduct as other-acts evidence.

C. The Real Controversy Was Not Fully Tried

There is no exact standard for determining when the controversy has not been fully tried. The court of appeals has concluded the real controversy was not fully tried when the defense presents evidence which directly contradicted the State's theory of guilt, and because "[t]he jury never had an

opportunity to weigh these competing versions of the critical facts in the trial.” *Davis*, 2011 WI App 147, ¶29.

The evidence the jury didn’t hear in this case, as well as the improperly admitted evidence and arguments, are highly probative of critical issues in this case, namely co-defendant credibility and who shot at the victims. The reasons the real controversy were not fully tried were discussed in the sections *supra* discussing the materiality of the Abdi evidence not disclosed to the jury and discussing why the various errors at trial were not harmless. Hirsi hereby incorporates those arguments here.

The court’s post-conviction ruling discounted the importance of Maryanne Hurshe’s testimony based on the apparent conflict between Abdi’s purposes of going to Hudson to get liquor, and going to Hudson to get revenge on the people who shot him (R276:58-59). The court didn’t see a basis for Abdi to have known the victims would be in Hudson (R276:59). The court saw no evidence linking those people to Abdi’s New Year’s Eve shooting (R276:61). Further, the court indicated Hirsi had the ability to call Hurshe as a witness and failed to do so (R276:59).

However, caselaw has shown a defendant’s failure to call a witness does not preclude reversal in the interest of justice. *See, e.g., Garcia v. State*, 73 Wis.2d 651, 245 N.W.2d 654 (1976). And the court’s rationale substantially understates the importance of Hurshe’s information. She flatly contradicts Abdi’s claim about not having a gun. She heard him making statements before leaving about wanting to get revenge on the Saint Paul people who shot him, and the victims were from Saint Paul. Hurshe likely wasn’t privy to how Abdi knew they’d be in Hudson, but that doesn’t matter—Abdi’s own statements are enough to provide a link.

Hurshe's testimony provides powerful evidence against Abdi that the jury didn't hear—Abdi had both means (the gun) and motive (revenge) for the shooting. That, combined with all of the other errors that occurred, prevented the real controversy from being fully tried.

CONCLUSION

For the reasons discussed in this brief, Hirs respectfully requests that the court vacate the judgment of conviction and remand for a new trial.

Respectfully submitted: 30 January 2019



Cole Daniel Ruby
State Bar No. 1064819
Martinez & Ruby, LLP
144 4th Avenue, Suite 2
Baraboo, WI 53913
Telephone: (608) 355-2000
Fax: (608) 355-2009

Albert T. Goins, Sr.
Minn. Atty. 0126159
301 4th Avenue South
378 Grain Exchange Building
Minneapolis, MN 55415
Admitted pro hac vice

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,933 words.

Signed 30 January 2019



COLE DANIEL RUBY

Attorney at Law

State Bar #1064819

Martinez & Ruby, LLP

144 4th Ave, Suite 2

Baraboo, WI 53913

(608) 355-2000

Albert T. Goins, Sr.

Minn. Atty. 0126159

301 4th Avenue South

378 Grain Exchange Building

Minneapolis, MN 55415

Admitted pro hac vice

Attorneys for Defendant-Appellant

**CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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

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

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

Signed 30 January 2019:



COLE DANIEL RUBY

Attorney at Law

State Bar #1064819

Martinez & Ruby, LLP

144 4th Ave, Suite 2

Baraboo, WI 53913

(608) 355-2000

Albert T. Goins, Sr.

Minn. Atty. 0126159

301 4th Avenue South

378 Grain Exchange Building

Minneapolis, MN 55415

Admitted pro hac vice

Attorneys for Defendant-Appellant