STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1696-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AHMED FARAH HIRSI,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF
CONVICTION AND AN ORDER DENYING
MOTIONS FOR POSTCONVICTION RELIEF,
ENTERED IN ST. CROIX COUNTY CIRCUIT COURT,
THE HONORABLE JAMES M. PETERSON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

Page

Other Authorities

ISSUES PRESENTED

1. Ahmed Farah Hirsi raises three due process claims. Did the State violate Ahmed Farah Hirsi's due process rights when (1) the State failed to disclose to Hirsi and the jury the co-defendant's proffer with the State to testify truthfully; and (2) the State failed to correct the co-defendant's false testimony? Were Hirsi's due process rights violated when the trial court failed to instruct the jury on accomplice testimony?

2. Did the trial court improperly admit other-acts evidence regarding a St. Paul, Minnesota shooting that occurred two days before the Wisconsin shooting for which Hirsi was being tried?

3. Did the trial court erroneously admit lay opinion testimony regarding the identification of Hirsi as the shooter in the St. Paul shooting?

4. Was trial court's admission of expert testimony regarding the Somali culture plain error?

5. Is a new trial warranted in the interest of justice because the real controversy was not fully tried?

The postconviction court denied all of Hirsi's claims, denying his request for a new trial.

This Court should affirm all issues.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that the parties' briefs adequately address all issues, and therefore oral argument is not requested. Publication is not requested because the issues can be decided by applying waiver or other well-established legal principles.

INTRODUCTION

This Court should affirm Hirsi's judgment of conviction and order denying postconviction relief. Hirsi chose to represent himself at trial, giving up the benefits associated with the Sixth Amendment right to counsel. Consequently, most of the issues that Hirsi raises on appeal could have been avoided or addressed at trial. Further, Hirsi must be held to the same rules and standards as a reasonably competent lawyer. In this case, despite a patient and conscientious trial judge, Hirsi made several mistakes. He failed to object to expert and lay testimony, adequately cross-examine witnesses, and request additional jury instructions. Those failures mean that he has waived his claims for relief.

Importantly, the jury convicted Hirsi on the relevant counts as a party to a crime (PTAC). So regardless of Hirsi's overarching argument that the "[a]vailable physical evidence couldn't distinguish whether either Hirsi or [the co-defendant] was the shooter" (Hirsi's Br. 15), the jury could still find Hirsi guilty of the counts charged as a PTAC.

Accordingly, Hirsi is not entitled to a new trial on any claim that he raises. This Court should affirm.

STATEMENT OF THE CASE

Complaint and arrest

The State charged Hirsi with six counts of attempted first-degree intentional homicide, three counts of first-degree reckless injury (for each victim wounded during the shooting), six counts of first-degree recklessly endangering safety, and possession of a firearm by a felon. (R. 1; 83.) All charges except possession of a firearm by a felon were charged as PTAC. (R. 1; 83.)

The case involves a Sunday morning shooting in a Hudson, Wisconsin liquor-store parking lot. (R. 1:8.) On January 19, 2014, the shooter, who was a passenger in a

Cadillac, fired several shots into a parked car, a Kia, occupied by six individuals. (R. 1:8–9.) Bullets struck and injured three of the occupants in the Kia—M.H., F.A., and A.H.—while the other three occupants (F.M., M.M., and S.N.) were unharmed. (R. 1:8–9.)

Hirsi was arrested later that morning in Minneapolis, and he pled not guilty. (R. 18.) At trial, Hirsi chose to represent himself. (R. 28.) His defense was that he was not the shooter, but that co-defendant Guled Abdi, who testified against Hirsi, committed the crimes. (R. 266:65–70.)

Jury trial

Eyewitness testimony. At trial, Ethan Siem, an employee at the liquor store, said that he observed the Cadillac and the Kia parked outside around 9:25 a.m., facing opposite directions.[1] (R. 253:173–75.) Siem saw a person walking from the Cadillac get inside the Kia. (R. 253:175.) "And then there were the smoke flying out of the window of the Cadillac." (R. 253:175.) Siem heard about eight gunshots, and then the Cadillac "sped off." (R. 253:176.) Two victims, M.H. and A.H., entered his store, both suffering bullet wounds; Siem called 911. (R. 253:177–81.) Hudson police found the third victim, F.A., in the Kia with a gunshot wound to the abdomen. (R. 253:127–29.)

A second witness, Barry Lundeen, whose office was across the street from the liquor store, heard "a series of rapid-fire gunshots" around 9:20 a.m., and he saw a Cadillac with Minnesota plates speed away. (R. 253:192.) Lundeen saw two people in the front seats of the car, "both black people." (R. 253:193.) However, he could not identify either person in the Cadillac. (R. 253:194.)

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[1] The vehicles were so close in proximity that "you could just reach out and touch the other car." (R. 262:49.)

Tania Knowd testified that she was inside the liquor store on the day of the shooting. (R. 253:220.) She saw two men run into the store, saying, "Call 911." (R. 253:220–21.) She did not, however, see anything happen in the parking lot. (R. 253:222.) Tania's husband, Greg, testified that he was in the liquor-store parking lot when he heard the gunfire. (R. 253:226.) He saw the Cadillac and a blue SUV parked together facing the opposite direction ("driver to driver"). (R. 253:227–28.) After the gunfire, Greg saw the Cadillac drive away. (R. 253:228.)

Abdi's testimony. Abdi testified that on the morning of the shooting, he drove his Cadillac with Hirsi in the front passenger seat and parked at the liquor store. (R. 261:1; 263:49–50.) Once at the liquor store, M.H., who knew Abdi, entered the back seat of the Cadillac for about 15 minutes. (R. 261:5.) The Kia then pulled up next to Abdi's Cadillac. (R. 261:5.) Abdi recognized A.H. as the driver of the Kia. (R. 261:6.) M.H. remained in the Cadillac for a while as Abdi talked to A.H. (R. 261:6.)

Abdi also saw a girl in the back seat of the Kia, and they struck up a conversation. (R. 261:7.) Then, "out of nowhere," Abdi testified, Hirsi said to the girl, "nyah, nyah, nyah." (R. 261:7–8.) According to Abdi, "nyah" is "equivalent to calling a female ho, slut," and that "in our [Somali] culture it's like very demeaning." (R. 261:8.) The girl "got very, very agitated and angry." (R. 261:9.) At this point M.H. got out of the backseat of the Cadillac and into the Kia to calm the girl down. (R. 261:10–11.) But the girl retorted by calling Hirsi "nyah, nyah." (R. 261:10.) Hirsi became "very, very frustrated and angry." (R. 261:10.)

Hirsi then "stiff-armed" Abdi in the face and "pulled out a handgun out of nowhere and started shooting." (R. 261:11.) Hirsi fired about 8 to 12 shots. (R. 261:11.) He then put the gun to Abdi's head and said, "Drive, mother fucker, or you're next." (R. 261:12.)

Abdi drove to Minneapolis. (R. 261:12.) He pulled over at an exit, got into the passenger seat, and then Hirsi drove to his mother's house. (R. 261:13–14.) After stopping at his mother's house for five to ten minutes, Hirsi drove towards a hotel to meet some girls when Hirsi noticed a police officer following. (R. 261:16–18.) Hirsi pulled over at a Bloomington hotel, carried out a white bag, and attempted to hide the bag inside the hotel. (R. 261:18–19.)

When Abdi and Hirsi left the hotel, "[a] whole lot of police officers appeared with guns out" and arrested both men. (R. 261:20.)

When the State asked Abdi, "were you afraid of being retaliated against if you told the officers what happened when you were arrested?" Abdi answered that he was afraid of being retaliated by Hirsi "and the people he hang[s] around with." (R. 262:49.) Through direct examination, the State asked Abdi about his decision to testify truthfully at trial:

> [The State]: And you - - and the State's recommendation, should you testify truthfully at this hearing, is to recommend a period of two years incarceration, correct?
>
> [Abdi]: Yes, sir.

(R. 261:38–39.) On cross-examination, Hirsi was given free rein to question Abdi. Hirsi inquired:

> [Hirsi]: Did you get a deal for - - for your testimony to state I was the shooter?
>
> [Abdi]: I didn't get a deal to state you was the shooter. The prosecutor said, this is what I'm going to recommend if you tell the truth. That's what I agreed to. I didn't agree to saying anything about you being the shooter. Now I'm telling the truth as it is.

(R. 262:8.)

Other police testimony. Minnesota officers testified that after the shooting, they observed the Cadillac occupied

by two males—Abdi and Hirsi. (R. 264:23–26.) Abdi was the Cadillac's registered owner. (R. 253:113; 264:40–41.) They followed the Cadillac to a hotel and arrested Hirsi and Abdi on foot. (R. 265:43–47.) Officers also found the white bag that Hirsi attempted to hide in the hotel; it contained 9mm shells that were consistent with the type of bullet used in the shooting. (R. 264:46, 50; 265:17–18, 171–77.)

Detective Geoff Willems testified at trial that Abdi assisted him when he conducted a search warrant on Hirsi's mother's house on January 30, 2014. (R. 265:102.) And, Willems testified, Abdi's cooperation occurred before Abdi had any agreement regarding the disposition of the case with the district attorney's office. (R. 265:103.)

Other-acts evidence. The State also moved to admit evidence of a St. Paul, Minnesota shooting that occurred two days before the Hudson shooting. (R. 81.) The State believed that the evidence identified Hirsi as the individual involved in the St. Paul shooting. (R. 81:6.) The shooting occurred at an apartment complex, and Hirsi was ultimately charged, tried, and acquitted in Ramsey County, Minnesota. (R. 81:3.) The other-acts evidence included: (1) a bullet found in an apartment wall (R. 265:62–63); (2) testimony from the apartment manager where the bullet was found, including photos from surveillance footage depicting a man holding a black object (R. 265:59–68); and (3) testimony from three people—Abdi (R. 261:27–30), St. Paul Detective Tracy Henry[2] (R. 265:83–87), and Detective Williams (R. 265:225)—all who identified Hirsi as the suspect holding the gun in the surveillance footage (R. 81:2–3). The State also offered a ballistics expert who testified that the bullet recovered from the St. Paul shooting appeared to be fired from the same

[2] Henry testified that she met Hirsi around 2010, and that she had face-to-face contact with Hirsi five to ten times. (R. 265:82.)

model firearm as the one used in the Hudson shooting. (R. 81:4; 265:166, 179.)

The State subsequently moved to exclude any reference to Hirsi's *acquittal* in the St. Paul case. (R. 97:2–3.) Hirsi, in turn, moved the court to prohibit the State from mentioning the St. Paul shooting entirely. (R. 103.) The court, after applying the *Sullivan*[3] test, granted the State's motion for the admission of other-acts evidence. (R. 256:72–80.) The court informed Hirsi that the allegations of the St. Paul shooting "goes to just identity," and that the jury would not hear about the trial. (R. 258:50.) The court also granted the State's request to exclude any reference to Hirsi's acquittal. (R. 258:50.)

Expert testimony. The State also elicited expert testimony through Detective Henry, who was listed by the State "as an expert to testify to certain aspects involving the Somali[ ] culture and criminal justice system," to testify about the Somali community.[4] (R. 265:70; 80:2.) Hirsi informed the court that he received notice of Henry's proposed testimony, and he did not object. (R. 80; 265:70–71.)

Henry testified that based upon her training and experience, Somalis "[o]ften . . . handled [disputes] within - - between clans or between - - using elders or other people in the community to help them settle disputes." (R. 265:78.) She testified that often Somalis "don't trust the police or the courts to resolve things. And they would rather have it handled amongst themselves." (R. 265:79.) She also testified that victims are afraid of potential retaliation if they seek

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[3] *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

[4] The State explained that Henry would "testify that part of her training that gives her this qualification is that she serves as instructor to law enforcement on how to appropriately handle gang or Somalian crime activity in the Twin Cities." (R. 265:72.) Again, Hirsi did not object. (*Id.*)

American law enforcement. (R. 265:79.) And, that between 2007 and 2008 in the Twin Cities, there were over 20 Somali-on-Somali homicides, and that less than five of those cases were successfully prosecuted. (R. 265:80.) Finally, Henry testified that based upon her training and experience, it was 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." (R. 265:80.)

Hirsi's defense. In addition to failing to object to Henry, Hirsi did not object to any of the above-described testimony. (R. 265:78–80.) Nor did he present his own expert witness.

In closing arguments, Hirsi argued that Abdi was lying in exchange for a deal with the State, that he (Hirsi) had no involvement in the crimes, and that Abdi was the shooter. (R. 266:66–68.)

Jury instructions and verdict. The court instructed the jury on PTAC: "Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it." (R. 266:20.) The court further instructed the jury:

> *If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.* A person intentionally aids and abets the commission of the crime when acting with knowledge or belief that another person is committing or intends to commit a crime he knowingly either assists the person who commits the crime or is ready and willing to assist, and the person who commits the crime knows of the willingness to assist.

(R. 266:20 (emphasis added).) And, "a person does not aid and abet if he is only a bystander or spectator and does nothing to assist in the commission - - or nothing to assist the

commission of a crime." (R. 266:21.) Finally, the court instructed the jury that "[a]ll 12 jurors do not have to agree whether the Defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the Defendant was concerned in the commission of the crime in one of those ways." (R. 266:21.)

At the jury instruction conference, Hirsi did not request, and so the court did not provide, an instruction on accomplice testimony. (R. 260:165–87.) Rather, when the court asked both parties if they wanted any other instructions, Hirsi indicated he did not. (R. 260:186.)

The jury convicted Hirsi of three counts of first-degree attempted intentional homicide, three counts of first-degree recklessly causing injury, six counts of recklessly endangering safety, and one count of felon in possession of a firearm.[5] (R. 266:106–13.) The court sentenced Hirsi to an aggregate sentence of 50 years' initial confinement and 35 years' extended supervision. (R. 254:23–29.)

Postconviction proceedings

Represented by counsel, Hirsi moved for postconviction relief seeking a new trial, raising the following issues: (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 St. Paul shooting, and precluding the jury from learning Hirsi was acquitted; (3) improper

[5] The jury acquitted Hirsi on three counts of attempted homicide related to victims who were not shot in the shooting. (R. 266:106–13.) The postconviction court also vacated three reckless-endangerment convictions that were lesser-included offenses of the first-degree attempted intentional homicide convictions. (R. 200:2; 224.)

testimony from lay witnesses who were allowed to identify Hirsi from photographs from the St. Paul shooting; (4) prejudicial expert testimony from Detective Henry; (5) improper closing arguments; and (6) the real controversy was not fully tried. (R. 189.)

The court held two motion hearings (R. 276, 277) and orally denied Hirsi's motion (R. 276:58–73). It issued a written order denying the motion based on the reasons articulated in its oral ruling. (R. 247.)

Hirsi appeals.

ARGUMENT

I. There were no due process violations based on the State's proffer with Abdi, Abdi's testimony, or the jury instructions.

Hirsi claims that his due process rights were violated because the State committed *Brady*[6] violations when it (1) failed to disclose its proffer with Abdi, and (2) failed to correct Abdi's "false" testimony. (Hirsi's Br. 19.) Finally, Hirsi claims that his due process rights were violated when the court failed to properly instruct the jury on accomplice testimony. (*Id.*) Hirsi's first two claims are without merit. His final claim is waived, not reviewable by this Court, and harmless.

A. There was no *Brady* violation with regard to disclosing the proffer to Hirsi.

1. Legal standards

Hirsi represented himself at trial; therefore, he is held to the same standards as an attorney. *See Waushara Cty. v. Graf,* 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). In *Graf*, the supreme court recognized, "[t]he right to self-representation is '[not] a license not to comply with relevant rules of

[6] *Brady v. Maryland,* 373 U.S. 83 (1963).

procedural and substantive law.'" *Id.* (citing *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975)).

Due process requires that the prosecution turn over material exculpatory evidence. *Arizona v. Youngblood,* 488 U.S. 51, 57 (1988). "[T]he 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). The prosecutor has a duty to disclose this evidence although there has been no formal request by the accused. *Strickler v. Greene,* 527 U.S. 263, 280 (1999).

"A *Brady* violation has three components: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material." *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 922 N.W.2d 468. "The materiality requirement of *Brady* is the same as the prejudice prong of the *Strickland*[7] analysis." *Id.* ¶ 36. "Evidence is not material under *Brady* unless the nondisclosure 'was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" *Id.* (citation omitted). This Court determines de novo whether a *Brady* violation occurred. *State v. Lock*, 2012 WI App 99, ¶ 94, 344 Wis. 2d 166, 823 N.W.2d 378.

2. The State did not suppress the evidence of its proffer with Abdi to testify truthfully.

Hirsi argues that the State violated his due process rights when it failed to disclose to both Hirsi and the jury its

[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

proffer with Abdi about testifying truthfully. (Hirsi's Br. 19–20.) While the evidence of the State's proffer was favorable impeachment evidence, Hirsi cannot demonstrate that the State suppressed it or that it was material. Further, the record indicates that the State made Hirsi aware of the proffer and that Hirsi elicited testimony about it on cross-examination. The State did not violate its *Brady* obligations.

The trial court asked the State whether it had conveyed information regarding the proffer (R. 188:3) to Hirsi, to which the State responded, "Yes" (R. 263:7). Hirsi did not dispute this. (*Id.*) Further, Hirsi asked the court whether he could question Abdi on the parameters of the proffer. (*Id.*) The court replied, "Well, to the extent it goes to any consideration or something [Abdi] received in exchange for his testimony, then I think you can go into that. I'm going to allow you to go into that." (*Id.*) Hirsi was made aware of the terms of the proffer. As the postconviction court opined, "the essence and substance of the agreement that the State had with Mr. Abdi was disclosed." (R. 276:62.) The State did not "suppress" the proffer. *See Wayerski*, 385 Wis. 2d 344, ¶ 35.

Further, Hirsi insists that the State had to turn over a copy of the actual proffer letter (Hirsi's Br. 22–23), but he does not cite any case law supporting that notion.[8] To the contrary, *Lock* also involved issues of proffers and their disclosure to the defense. 344 Wis. 2d 166, ¶¶ 91–119. Like this case, in *Lock* the trial court found that the defense "was aware of the actual proffer" and that the defendant had the opportunity to cross examine "on all aspects of the proffer." *Id.* ¶ 101. This Court stated, "[t]he fact that the terms of his agreement with the State were memorialized in a letter is irrelevant." *Id.* ¶ 106.

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[8] Also, later in his brief, Hirsi writes, "Whether or not [the State] was required to disclose the actual proffer letter is immaterial." (Hirsi's Br. 24.)

Further, like in *Lock*, the proffer in this case was not "material," which is required to establish a *Brady* violation. *Id.* ¶ 94. A copy of the proffer is not material because it was not "so serious that there is a reasonable probability that the suppressed evidence[9] would have produced a different verdict." *Wayerski*, 385 Wis. 2d 344, ¶ 36. As the postconviction court concluded, there is no due process violation and the proffer letter is not something "that would require a new trial." (R. 276:63–64.) The jury was aware of the contents of the proffer.

Also, Abdi's testimony did not supply the only evidence linking Hirsi to the shootings. The jury had before it other evidence implicating Hirsi as a participant, including that the bullet from the shooting in Hudson was the same kind of bullet from the same kind of gun that was used in the St. Paul shooting only two days earlier. Further, whether Hirsi had a copy of the proffer would not have impacted Abdi's credibility in such a way as to undermine critical elements of the State's case. *See State v. Rockette*, 2006 WI App 103, ¶ 41, 294 Wis. 2d 611, 718 N.W.2d 269 ("Generally, where impeachment evidence is merely cumulative and thereby has no reasonable probability of affecting the result of trial, it does not violate the *Brady* requirement.") (citation omitted). Hirsi's challenge premised upon a purported *Brady* violation fails.

3. The State has no duty under *Brady* to disclose the proffer to the jury.

As for Hirsi's argument that "the jury was not informed" of the proffer (Hirsi's Br. 20), the issue is whether the State *disclosed* the contents of the proffer to Hirsi, *Wayerski*, 385 Wis. 2d 344, ¶ 35, which it did (R. 263:7). It was then up to Hirsi to inform the jury of the proffer by

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[9] Again, the State disputes that this evidence was suppressed.

questioning Abdi and up to the jury to decide how to use that evidence.

And contrary to Hirsi's unsupported argument, the State has no burden to disclose the terms of the proffer to the jury. (Hirsi's Br. 23.) As indicated above, the court expressly told Hirsi that he could question Abdi about his agreement with the State. (R. 263:7.) Hirsi simply failed to elicit on cross-examination everything that he now wishes that he would have. As the circuit court opined, Abdi "was cross-examined on it, although, again, not very effectively." (R. 276:62.) "[A] little bit more careful cross-examination might have been a little bit more effective." (R. 276:63.)

Next, Hirsi's argument that it was the State's burden to inform the jury of the dismissed charges against Abdi (Hirsi's Br. 20, 25), lacks merit. Hirsi specifically asked Abdi on cross-examination about the counts that were dismissed:

> [Hirsi]: Previously you have been charged with the same counts as me, yes or no.
>
> [Abdi]: Yeah. That's what I was brought to Hennepin County for, yeah.

(R. 262:8–9.)[10] And, as the postconviction court opined, "It was clear to the jury, in the Court's opinion, that Mr. Abdi was getting consideration for his testimony, that he's getting a deal; probably would get two years, he had to tell the truth, so they covered that." (R. 276:63.)

Hirsi next alleges that the State's explanation of "truthfulness" to Abdi depended upon what the State believed to be true. (Hirsi's Br. 21.) Again, Hirsi chose to represent himself, and the court informed Hirsi that he could question Abdi about the proffer. (R. 263:7.) If Hirsi had an issue about

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[10] (*See also* Hirsi's Br. 17 ("On cross-exam, Abdi acknowledged he was previously charged with the same counts as Hirsi.").)

"truthfulness," he could have questioned Abdi about it. This is something that a reasonably competent trial lawyer could have asked on cross-examination.

Regardless, Abdi was asked multiple times—by both parties—if his testimony was truthful:

> [The State]: You're in custody in St. Croix County jail?
>
> [Abdi]: Yes, sir.
>
> [The State]: And you have made a - - an agreement to testify on this matter, haven't you?
>
> [Abdi]: Yes, sir.
>
> [The State]: And that's - - and if you testify truthfully, an agreement for your testimony and testifying truthfully. You have pled guilty to two felony charges, correct?
>
> [Abdi]: Yes, sir.
>
> [The State]: And you're awaiting sentencing on that matter.
>
> [Abdi]: Yes, sir.
>
> [The State]: And you - - and the State's recommendation, should you testify truthfully at this hearing, is to recommend a period of two years incarceration, correct?
>
> [Abdi]: Yes, sir.

(R. 261:38–39.)

On cross-examination, Hirsi was given free rein to question Abdi. Hirsi inquired:

> [Hirsi]: 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.

. . . .

> [Hirsi]: Did you get a deal for - - for your testimony to state I was the shooter?
>
> [Abdi]: I didn't get a deal to state you was the shooter. The prosecutor said, this is what I'm going to recommend if you tell the truth. That's what I agreed to. I didn't agree to saying anything about you being the shooter. Now I'm telling the truth as it is.

(R. 262:7–8.)

. . . .

> [Hirsi]: In that proffer, you received two years instead of a whole lot, yes or - -
>
> [Abdi]: No, I didn't receive nothing yet. I'm waiting to get sentenced.
>
> [Hirsi]: But the offer was two years, yes or no?
>
> [Abdi]: That's what the prosecutor is recommending. That don't mean he's the judge.

(*Id*.)

4. Even if the State had a duty to correct a witness's allegedly false testimony, there was no false testimony here.

Hirsi's next argument is that the State knowingly failed to correct Abdi's "false testimony." (Hirsi's Br. 23.) Hirsi argues that Abdi perjured himself when he denied that he first told the Hudson police that Hirsi was the shooter only after he'd been offered the proffer. (Hirsi's Br. 21, 23, 26.) His argument fails for three reasons.

First, as the postconviction court determined, Abdi's testimony was not false. (R. 276:63.) The postconviction court described Hirsi's false-testimony argument as "spun" and not "a fair characterization." (R. 277:26.)

Second, Detective Willems corroborated Abdi's testimony. Willems testified that Abdi had been cooperating with law enforcement before Abdi's reaching a deal with the State. (R. 265:103.) The State had no obligation to object to this testimony.

Finally, if Hirsi believed that Abdi's testimony was false, he could have cross-examined Abdi about it, especially since Hirsi did not dispute that the State had disclosed to him the details of the proffer. (R. 263:7.)

B. Hirsi failed to request an instruction on accomplice testimony. This issue is waived.

"The failure to request an instruction or to object effectively waives any right to review." *State v. Roth*, 115 Wis. 2d 163, 167–68, 339 N.W.2d 807 (Ct. App. 1983); s*ee also* Wis. Stat. § 805.13(3). The waiver rule operates "even where a federal constitutional right is at stake." *State v. Schumacher*, 144 Wis. 2d 388, 397, 424 N.W.2d 672 (1988). And the supreme court in *Schumacher* explained that "[t]he court of appeals does not have the power to find that unobjected-to errors go to the integrity of the fact-finding process, and therefore may properly be reviewed by the court of appeals." *Id.* at 409. Rather, the *Schumacher* court explained, only the supreme court may address unobjected-to jury instruction errors. *See id.* at 409–10.

Following the close of evidence, the trial court conducted a jury instruction conference. (R. 260:165–87.) The parties discussed each proposed instruction, and both the State and Hirsi noted their objections. However, when the Court asked if either party was requesting an additional instruction, both the State and Hirsi indicated they were not. (R. 260:186.) Hirsi now argues that the court should have instructed the jury on accomplice testimony. (Hirsi's Br. 23.)

Hirsi has waived the issue.

But even on the merits, Hirsi loses. Hirsi argues that he suffered a due process violation based on *State v. Nerison*, 136 Wis. 2d 37, 401 N.W.2d 1 (1987), and *State v. Miller*, 231 Wis. 2d 447, 605 N.W.2d 567 (Ct. App. 1999). (Hirsi's Br. 22–25.) In *Nerison*, the Wisconsin Supreme Court held that when an accomplice or co-conspirator of a defendant testifies against the defendant in exchange for prosecutorial concessions in his favor, the jury must be instructed "to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the state to testify against the defendant." 136 Wis. 2d at 46.

To start, even if Hirsi had not waived this claim and this Court considers it, the jury here was informed of the State's proffer, both through direct examination and Hirsi's cross-examination. Moreover, *Nerison* is inapposite. As Hirsi notes in his brief (Hirsi's Br. 24), "*Nerison* only commands a cautionary instruction where the witness agrees with the State 'to testify against the defendant.'" *See Miller*, 231 Wis. 2d at 465 (citation omitted). Accordingly, here, no cautionary instruction was necessary because Abdi's agreement with the State was to testify truthfully, not to testify against Hirsi. (R. 261:38–39; 262:8; 277:29–30.)

Hirsi also argues that the court's instruction on the credibility of witnesses was insufficient[11] (Hirsi's Br. 23), but the verdict was not based on Abdi's "accomplice" testimony alone. The jury also heard evidence from a ballistics expert who testified that a bullet recovered from the St. Paul shooting appeared to be fired from the same model firearm as the Hudson shooting, as well as testimony from Detectives

[11] The trial court instructed the jury that it could consider factors such as "[w]hether the witness has an interest or lack of interest in the result of this trial," as well as "bias or prejudice if any has been shown," and "possible motives for falsifying testimony." (R. 266:27.)

Willems and Henry identifying Hirsi in photographs from the St. Paul shooting. (R. 265:166, 179.) Hirsi has failed to prove any due process violation.

C. Any alleged errors are immaterial and harmless.

Finally, any alleged *Brady* violation with regard to Abdi's proffer was not material because there is not a reasonable probability that, absent the alleged error, the result of the proceeding would have been different. *Lock*, 344 Wis. 2d 166, ¶ 94. While Hirsi argues that "a reasonable likelihood exists the jury would have believed Abdi was the shooter, motivated to lie to shift the blame onto Hirsi" (Hirsi's Br. 26), it doesn't matter because Hirsi was charged as a PTAC. As previously noted, the court instructed the jury that "whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it." (R. 266:20.) And: "If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it. (*Id*.)

To that end, the court instructed the jury that all 12 jurors did not have to agree whether Hirsi "directly committed the crime or aided and abetted the commission of the crime." (R. 266:21.) So, it does not matter, as Hirsi argues, that aside from Abdi, "none of the other witnesses testified that Hirsi was the shooter." (Hirsi's Br. 26.) No witnesses testified that Abdi was the shooter, either.

Nor does it matter that during closing argument "the State emphasized Abdi's credibility, while Hirsi argued Abdi was lying in exchange for a deal, and suggested Abdi was the shooter." (Hirsi's Br. 26.) This is what the case was about, the jury knew this, and the jury decided that Hirsi was guilty. Hirsi fails to prove any due process violations.

Finally, even if the court erred by failing to *sua sponte* instruct the jury on accomplice testimony, that error is harmless. "[B]ased on the totality of the circumstances, it is clear beyond a reasonable doubt that a rational jury, properly instructed, would have found [Hirsi] guilty." *See State v. Beamon*, 2013 WI 47, ¶ 3, 347 Wis. 2d 559, 830 N.W.2d 681. As discussed, based on the strength of the evidence proving that Hirsi was involved in the shooting and the instructions that the court provided—both on PTAC and credibility of witnesses—any error was harmless.

II. The trial court properly admitted other-acts evidence regarding the St. Paul shooting that happened two days before the Hudson shooting.

A. Legal principles and standard of review

Courts apply a three-step analysis to determine the admissibility of other-acts evidence. *State v. Sullivan*, 216 Wis. 2d 768, 771–73, 576 N.W.2d 30 (1998). First, the evidence must be offered for an admissible purpose under Wis. Stat. § 904.04(2)(a), such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, although this list is not exhaustive or exclusive. *Sullivan*, 216 Wis. 2d at 772.

Second, the evidence must be relevant, which means it must both be of consequence to the determination of the action, and it must also tend to make a consequential fact or proposition more or less probable than it would be without the evidence. *Id.* at 772.

Third, the probative value of the evidence must not be substantially outweighed by the considerations set forth in section 904.03, including the danger of unfair prejudice. *Id.* at 772–73. The opponent of the evidence must demonstrate that any unfair prejudice substantially outweighs its probative value. *State v. Hunt*, 2003 WI 81, ¶ 53, 263 Wis. 2d 1, 666 N.W.2d 771.

The decision to admit or exclude evidence rests within the circuit court's discretion. *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis. 2d 253, 759 N.W.2d 557. This Court will only reverse a decision to admit or exclude evidence when the circuit court has erroneously exercised its discretion. *Id.* This Court will not find an erroneous exercise of discretion if the record contains a reasonable basis for the circuit court's ruling. *State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis. 2d 686, 613 N.W.2d 629.

B. The court properly allowed evidence of the St. Paul shooting.

The State moved to admit other-acts evidence from the St. Paul apartment shooting, arguing that it was relevant to prove identification that Hirsi was the individual in possession of the firearm at the St. Paul shooting. (R. 81:2.) This evidence included a ballistics expert, lay witness identification testimony, video surveillance evidence, and a bullet found in the apartment wall. (R. 81.) After conducting a *Sullivan* analysis, the court granted the State's motion. (R. 256:72–80.)

That analysis was sound.

First, the court held that the evidence was being introduced for a proper and allowable purpose: identity. (R. 256:73.) It determined that the evidence was relevant because "if a jury is satisfied that the bullets were the same and you're the same person that fired the gun, that would tend to make it more likely, more probable that you were the shooter in the Hudson case. So for that reason it would be relevant evidence." (R. 256:73–74.)

With respect whether the probative value outweighed the unfair prejudicial effect, the court stated, "if in fact a jury believed you were the same person in Minnesota two days earlier that fired the gun that -- from which bullets were recovered that they can say were fired from the same gun as

those that were fired in Hudson on January 19th, the Court believes that would be highly probative evidence." (R. 256:79.) It then determined that the probative value outweighed any unfair prejudice. (*Id.*)

The court then informed Hirsi that it would "fashion a jury instruction related to the use of this other acts evidence," which it ultimately did.[12] (R. 256:80; 266:24–25.) The court also informed Hirsi that the allegation that Hirsi was the shooter in the St. Paul shooting "goes to just identity," and that the jury would not hear about the trial, because those details were more likely to be unduly prejudicial to Hirsi. (*Id.*)

> We're not putting you on trial for what happened in Minnesota. It's just - - and in fact the facts that you - - you say you were - - *if you told the jury here you were acquitted in Minnesota and they see this evidence that could work against you as well. I think it could be highly prejudicial to you.* And so I'm going to allow -- or I'm going to grant that particular motion. And it will just be limited to the facts about - - that relate to the purpose that the evidence is offered. And that is to try and establish identity of the person that fired the gun that discharged the bullet in St. Paul and the bullet fired - - or bullets - - I'm not sure whether it's multiple or not - - in Wisconsin. So we're going to limit it to that. And we're not going to get into what happened at the trial or the outcome of the trial one way or the other.

(R. 258:51–52 (emphasis added).) Importantly, during trial, the jury was never informed that Hirsi was charged or tried in the St. Paul shooting.

Further, the postconviction court echoed its pre-trial decision, noting that the other-acts evidence was admitted for purposes of "identity of the shooter, not the identity of who he

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[12] *See supra* State's Brief at 26 (citing R. 266:24–25), for this jury instruction.

is." (R. 277:41.) "I wasn't thinking of it in terms of the identity that this is Ahmed Hirsi, but that it's the identity of the person who did the shooting." (R. 277:40.) And, as the State argued at the postconviction hearing, the evidence "went to . . . identity, and regarding the possession of the firearm and the recovered bullets in that situation, and the identity of the gun and the identity of the individual." (R. 277:42.)

In arguing that the other-acts evidence was improperly admitted (Hirsi's Br. 29–31), Hirsi ignores the *Sullivan* analysis that the circuit court conducted. He simply argues that his identity "was never truly at issue" during the trial, and therefore the other-acts evidence should have been inadmissible. (Hirsi's Br. 29–30.) But identity was Hirsi's entire defense, even throughout his closing argument:

> I did not commit these crimes. Someone else did. I had no involvement whatsoever in this case. It's sad to know I'm being accused of a crime I did not commit, a crime that took place right here in Hudson, not too far from here, an attempted homicide. I did not shoot anyone.

(R. 266:62.) Hirsi also argued, "I'm not the person responsible. I did not commit these acts. I would not commit these acts." (R. 266:71.) And, "[t]here is no irrefutable evidence to say I was present in Hudson, in order to be in possession of a weapon." (R. 266:72.) In short, identity was the crux of Hirsi's case at trial.[13]

Hirsi next argues that "the State offered no evidence to the jury that [Detective] Henry had the foundation necessary to identify" the firearm used in the St. Paul shooting (Hirsi's Br. 30) is of no consequence. The jury could make its own assessment of Detective Henry's testimony. The same goes with Hirsi's arguments that no witnesses testified to seeing a

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[13] Hirsi's reliance on *State v. Balistreri*, 106 Wis. 2d 741, 757, 317 N.W.2d 493 (1982) (*see* Hirsi's Br. 30), is therefore misplaced.

gun fired, the type of gun in the images, the type of bullet in the St. Paul apartment, whether it was the same gun, or whether the man in the images was the man who fired the gun. (Hirsi's Br. 30–31.) The jury could assess, and did assess, the other evidence presented to determine Hirsi's guilt or innocence.

Hirsi also fails to prove that the admission of the probative evidence of the St. Paul shooting was unfairly prejudicial. *Hunt*, 263 Wis. 2d 1, ¶ 53. Nor can he. As the trial court explained, if the jury believed that Hirsi was the same person who, two days earlier, fired shots "from the same gun as those that were fired in Hudson," that evidence "would be highly probative." (R. 256:79.) And although that evidence might be incriminating, "just because evidence is incriminating doesn't make it *unfairly* prejudicial." (R. 256:79 (emphasis added).) And so the court believed, correctly, that the probative value of the evidence outweighed any unfair prejudicial effect. (*Id.*) Finally, the court "fashion[ed] a jury instruction related to the use of this other acts evidence." (R. 256:80.)

C. Hirsi waived a challenge to the trial court's failure to instruct the jury on his acquittal; alternatively, there is no reversible error.

Hirsi's complaint regarding the lack of instruction to the jury regarding his acquittal is waived. Here, the court conducted a jury instruction conference where the parties discussed each proposed instruction and noted their objections. When the Court asked if either party was requesting an additional instruction, both the State and Hirsi indicated that they were not. (R. 260:186.) By failing to request that the jury be instructed about his acquittal, Hirsi has waived this issue. *See Roth*, 115 Wis. 2d at 167–68.

And regardless of his waiver, Hirsi fails to identify any case law that requires a court to provide a jury instruction

regarding an acquittal. He invokes *State v. Landrum*, 191 Wis. 2d 107, 528 N.W.2d 36 (Ct. App. 1995), but all that *Landrum* provides is that "[a]n acquittal does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." 191 Wis. 2d at 120 (citing *Dowling v. United States*, 493 U.S. 342, 349 (1990)). Accordingly, and as Hirsi notes in his brief, *Landrum* merely recognized a "potential" for prejudice if other acts are admitted. While in *Landrum*, the court provided a limiting instruction, *Landrum*, 191 Wis. 2d at 122, nothing in *Landrum* requires a limiting instruction in every case.

Nor does *Dowling,* 493 U.S. 342 "dictate" reversal here. (Hirsi's Br. 32.) At issue in *Dowling* was whether evidence that the defendant been acquitted on a prior charge violated due process or double jeopardy. *Dowling*, 493 U.S. at 353. The Supreme Court held that the use of the evidence was constitutional, "[e]specially in light of the limiting instructions provided by the trial judge," which explained to the jury the limited purpose for which the evidence had been offered. *Id*. at 353. Like *Landrum*, *Dowling* does not require courts to advise the jury of a defendant's acquittal. *See, e.g.*, *United States v. Tirrell,* 120 F.3d 670 (7th Cir. 1997) (holding that *Dowling* does not require the jury to be told of an acquittal). And as the *Landrum* court stated, 191 Wis. 2d at 120, and the circuit court noted here (R. 276:65; 277:44), judgments of acquittal are irrelevant because they do not prove innocence; they simply show that the State did not prove guilt beyond a reasonable doubt. The court also explained that it was concerned that evidence of Hirsi's acquittal "would have created some confusion" and invited speculation. (*Id*.)

Finally, in this case, neither side made any reference to the St. Paul "trial" or even to the fact that Hirsi had been charged. The circuit court correctly surmised that a reference to the trial and acquittal could have confused the jury. In the

circumstances presented here, the court's ruling was not "plainly erroneous" (Hirsi's Br. 32), and it is certainly not reversible error.

D. If the court erred in admitting the other-acts evidence, the error was harmless.

Here, any error was harmless because the court provided a limiting instruction to the jury:

> [E]vidence has been presented regarding other conduct of the Defendant for which the Defendant is not on trial. Specifically evidence has been presented that the Defendant possessed and fired a handgun on January 17th, 2014, and that a fired bullet was recovered from that shooting. If you find that this conduct did occur*, you should consider it only on the issue of identity*. You may not consider this evidence to conclude that the Defendant has a certain character or a certain character trait and that the Defendant acted in conformity with that trait or character with respect to the offense charged in this case. The evidence was received on the issue of identity, that is, whether the prior conduct tends to identify the Defendant as the one who committed the offense charged.
>
> *You may consider this evidence only for the purpose I have described*, giving it the weight you determine it deserves. It is not to be used to conclude that the Defendant is a bad person and for that reason is guilty of the offense charged.

(R. 266:24–25 (emphasis added).) Jurors are presumed to follow the court's instructions. *State v. LaCount*, 2008 WI 59, ¶ 23, 310 Wis. 2d 85, 750 N.W.2d 780. In this case, the trial court correctly informed the jury of the limited purpose of the other-acts evidence. *See State v. Payano*, 2009 WI 86, ¶ 100, 320 Wis. 2d 348, 768 N.W.2d 832 ("Other act evidence normally *should* be accompanied by an admonitory or limiting instruction precisely because the evidence is being introduced for only a limited purpose.") (citing 7 Daniel D. Blinka,

Wisconsin Practice Series: Wisconsin Evidence § 404.6 at 186 (3d ed. 2008)).

Hirsi is correct that he pointed out to the jury that no weapon was analyzed to determine who was in possession of the gun. (Hirsi's Br. 34.) Yet the jury heard this argument, as well as the rest of the evidence, and it convicted Hirsi anyway. Hirsi is incorrect, however, that the State "crossed the line" during closing arguments.[14] (*See id.*) The State argued the other-acts evidence for its permissible purpose of identity: "You saw the picture of the individual who was identified as Ahmed Hirsi holding the gun, a gun. You heard the evidence about the bullet hole in the apartment. That bullet is the same -- comes from the same gun as the bullets used in the shooting here in Hudson." (R. 266:76.) The State further argued: "[t]here is no evidence of anybody else. And that gun is the same gun used here in Hudson. That nexus, that's scientific evidence, that's circumstantial evidence that connects him." (R. 266:77.)

The circuit court did not err when it admitted the other-acts evidence; even so, any error was harmless.

III. The trial court properly admitted lay opinion testimony from Detectives Henry and Willems regarding the identification of Hirsi in surveillance images.

A. Legal principles and standard of review

The admission of lay opinion testimony is governed by Wis. Stat. § 907.01:

> **907.01 Opinion testimony by lay witnesses.** If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is

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[14] Hirsi does not claim prosecutorial misconduct. *See also* State's Brief at 32 n.17.

> limited to those opinions or inferences which are all of the following:
>
> **(1)** Rationally based on the perception of the witness.
>
> **(2)** Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> **(3)** Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02 (1).

"[T]he opinion or inference permitted by this rule is, in reality, the witness's conclusory description of what he or she has perceived." Ralph Adam Fine, *Fine's Wisconsin Evidence* § 907 at 280 (2d ed. 2008). Further, Wis. Stat. § 907.04 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

The trial court has discretion whether to admit opinion testimony, and this Court will uphold such a decision unless the trial court failed to exercise its discretion or its decision lacked a reasonable basis. *Wester v. Bruggink*, 190 Wis. 2d 308, 317, 527 N.W.2d 373 (Ct. App. 1994); *see also York v. State,* 45 Wis. 2d 550, 560, 173 N.W.2d 693 (1970) (evidentiary rules limiting opinion testimony should not generally exclude evidence pertaining to the "corporal appearance" of things, nor to "the probability or possibility of an event, form, identity, speed, time, size, weight and direction").[15]

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[15] Hirsi cites two 9th Circuit cases, *United States v. Barrett*, 703 F.2d 1076 (9th Cir. 1983) and *United State v. LaPierre*, 998 F.2d 1460 (9th Cir. 1993), for persuasive authority. (Hirsi's Br. 36–37.) Because Wisconsin has adequate statutes and case law on this subject, the State applies that controlling law.

B. Detective Willems's testimony

"[O]bjections to the admissibility of evidence must be made promptly and in terms which inform the [trial] court of the exact grounds upon which the objection is based." *State v. Hartman*, 145 Wis. 2d 1, 9, 426 N.W.2d 320 (1988). The trial court has no duty to independently strike inadmissible testimony. *State v. Johnson*, 2004 WI 94, ¶ 25, 273 Wis. 2d 626, 681 N.W.2d 901.

To start, to the extent that Hirsi argues that Willems did not have the proper foundation to identify Hirsi based on her prior contact with him (Hirsi's Br. 37), Hirsi waived that argument by not objecting at trial. *See Johnson*, 273 Wis. 2d 626, ¶ 25. Similarly, while "no opportunity was provided [to Hirsi] to voir dire" Willems (Hirsi's Br. 37), Hirsi did not request any such opportunity. This was Hirsi's, not the court's, failure.

And by failing to raise a foundational objection, Hirsi did not give the trial court or the State an opportunity to correct any potential error in admitting Willems's testimony. Therefore, the question whether the trial court properly exercised its discretion in resolving any foundation problem is unpreserved for appeal. *See State v. Romero*, 147 Wis. 2d 264, 274, 432 N.W.2d 899 (1988).

Even ignoring waiver, Hirsi loses because Willems had an adequate foundation for his testimony. Willems testified that he had spent "[h]undreds" of hours working on this case, and that due to his involvement, he was able to identify Hirsi in certain photographs. (R. 265:224.) Beyond this, Hirsi was afforded the opportunity to fully cross-examine Willems. Willems rationally based his lay opinion on his perceptions, it was helpful to the determination of a fact in issue, and it was not based on scientific, technical, or other specialized knowledge. *See* Wis. Stat. § 907.01. And as the postconviction court determined, "[a]ll the witnesses that testified had

identified [Hirsi] out of the imag[es]. They had an opportunity to see him and know what he looks like." (R. 276:65.) The circuit court soundly exercised its discretion in allowing Willems's testimony.

C. Detective Henry's testimony

Likewise, Hirsi waived by not raising an objection to Detective Henry's testimony based on what he now claims is her bias against him. (Hirsi's Br. 38.) Notably, in arguing that his acquittal should be introduced at the trial stage, Hirsi did not claim Henry was biased, nor did he ask to voir dire her outside of the presence of the jury. Hence, Hirsi waived his arguments regarding Henry's "bias." *See Johnson*, 273 Wis. 2d 626, ¶ 25.

Hirsi also loses on the merits. To start, Hirsi bases his claim of bias on speculation,[16] and he makes no proffer of Henry's bias. (Hirsi's Br. 37–38.) In addition, as the court explained at the motion hearing, the value of the witness testimony was up to the jury: "[I]f there's somebody that knows you, and can identify you and give their opinion that that's you, the jury would be able to also see the video. And if they don't agree with the witness, they don't believe it's you, it's ultimately up to the jury. And they're instructed to that effect." (R. 258:12.)

Indeed, the court instructed the jury that it was to determine the weight it should give to Abdi's, Henry's, and Willems's identification testimony:

> Ordinarily a witness may testify only about facts. However, in this case Guled Abdi, Tracy Henry and Geoff Willems were allowed to give an opinion as to the identity of Ahmed Hirsi. In determining the weight you give to this opinion, you should consider

[16] Hirsi, with no citation to the record, argues that "she likely felt Hirsi escaped justice in [the St. Paul] case." (Hirsi's Br. 38.)

> the witnesses's opportunity to observe what happened and the extent to which the opinion is based on that observation. Opinion evidence was received to help you reach a conclusion. However, you are not bound by the opinion of any witness.

(R. 266:28–29.) Hirsi did not object to this instruction. (R. 266:5–6.)

Finally, if Hirsi truly thought that Henry was biased, he could have cross-examined her about it. As the postconviction court determined, Hirsi "had the opportunity to rebut these issues, but he chose not to. And that was his choice. He was *pro se*, and that was his strategy." (R. 277:73.)

In sum, the circuit court soundly allowed Henry's lay opinion testimony.

D. Any error in admitting the detectives' testimony identifying Hirsi was harmless.

The question of harmless error arises only if this Court concludes that the Detectives' opinion testimony should have been excluded. Even if this is the case, Hirsi is not entitled to relief because there is no reasonable possibility that the testimony was critical to the jury's verdict. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

As discussed above, the other evidence at trial linked Hirsi to the Hudson shooting, including Abdi's testimony about his and Hirsi's involvement in the Hudson shooting, expert testimony, as well as the identity evidence regarding the St. Paul shooting. Therefore, even without the detectives' lay testimony, there was no reasonable probability that the jury would have reached a different verdict. The error is harmless, and Hirsi is not entitled to a new trial.

IV. Hirsi is not entitled to relief on his claim regarding Detective Henry's expert testimony.

To start, Hirsi received notice of Detective Henry's proposed expert testimony and did not object to it; hence, he has waived his claim of error (Hirsi's Br. 40) to its admission. Before trial, the State notified the court and Hirsi of its intent to offer Henry as an expert regarding the Somali culture. (R. 265:70; 80:2.) Hirsi informed the court that he received notice of Henry's proposed testimony and that he did not object to it. (R. 80; 265:70–71.)

The Wisconsin Supreme Court has explained the importance of the waiver rule:

> We have described this rule as the "waiver rule," in the sense that issues that are not preserved are deemed waived. The waiver rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice. The rule promotes both efficiency and fairness, and "go[es] to the heart of the common law tradition and the adversary system."

State v. Huebner, 2000 WI 59, ¶ 11, 235 Wis. 2d 486, 611 N.W.2d 727 (citations omitted). Here, Hirsi waived this claim, and on appeal, he has failed to cite any authority that would justify his circumventing the waiver rule.[17] (Hirsi's Br. 45–46.)

Further, Hirsi could have, but did not, bring in his own expert to dispute Henry's testimony or argue that Henry was not qualified to discuss the Somali culture. Also, the court

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[17] To the extent that Hirsi takes issue with the some of the prosecutor's statements during closing argument (Hirsi's Br. 44–45), Hirsi raises no claim of prosecutorial misconduct, even though he raised it in his postconviction motion (R. 189:24). This claim is therefore abandoned, and the State does not respond to Hirsi's accusations.

instructed the jury that it was not bound by an expert's opinion:

> [A] witness with expertise in a particular field may give an opinion in that field. In determining the weight to give to this opinion, you should consider the qualifications and credibility of the witness, the facts upon which the opinion is based and the reasons given for the opinion. Opinion evidence was received to help you reach a conclusion. However, you are not bound by any expert's opinion.

(R. 266:28.)

Because Hirsi did not object to Henry's testimony, he relies on the doctrine of plain error, which allows this Court to review errors waived by a party's failure to timely object. Wis. Stat. § 901.03(4); *State v. Cameron*, 2016 WI App 54, ¶ 11, 370 Wis. 2d 661, 885 N.W.2d 611. The plain error doctrine should be employed sparingly. *State v. Jorgensen,* 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77. "For example, 'where a basic constitutional right has not been extended to the accused,' the plain error doctrine should be utilized." *Id.* (citation omitted).

This is not the rare case triggering plain-error review. Hirsi argues that because "Hirsi represented himself pro se" the admission of the testimony constitutes plain error. (Hirsi's Br. 46.) But Hirsi fails to cite any case law supporting that proposition. On the contrary, Hirsi is to be held to the same standards as a reasonably competent attorney, and he has no license "not to comply with relevant rules of procedural and substantive law." *Graf,* 166 Wis. 2d at 452 (citation omitted).

Hirsi is not entitled to relief on his claim regarding Henry's expert testimony.

V. The real controversy was fully tried.

This Court may grant a new trial in the interest of justice when it appears from the record that the real

controversy has not been fully tried. *State v. Peters*, 2002 WI App 243, ¶ 18, 258 Wis. 2d 148, 653 N.W.2d 300. It need not determine that a new trial would likely result in a different outcome. *State v. Watkins*, 2002 WI 101, ¶ 97, 255 Wis. 2d 265, 647 N.W.2d 244. This Court's "discretionary reversal power is formidable, and should be exercised sparingly and with great caution." *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719.

Hirsi essentially argues that the cumulative effect of all the errors he alleges caused the controversy to not be fully tried, and thus, he is entitled to a new trial in the interest of justice. (Hirsi's Br. 46–52.) For the same reasons that all of Hirsi's individual claims failed, they do not provide grounds for a new trial in the interest of justice.

And the real controversy was whether Hirsi, as a PTAC, directly committed the crimes or intentionally aided and abetted in their commissions. Wis. Stat. § 939.05(2). This question was addressed, instructed, and resolved at trial. While Hirsi argues that the "[a]vailable physical evidence couldn't distinguish whether either Hirsi or Abdi was the shooter" (Hirsi's Br. 15), since Hirsi was charged as a party to a crime, it doesn't matter whether he was the shooter or the driver who fled the scene.

In addition to the previous issues raised, Hirsi also argues that because the jury did not hear evidence from Maryann Hurshe, the controversy was not fully tried. (Hirsi's Br. 47–49.) According to Hirsi, Hurshe would have testified that Abdi (1) carried a gun the morning of the shooting, and (2) made statements establishing a motive (revenge) to commit the shooting. (Hirsi's Br. 47–48, *see also* R. 276:19–20.) But again, it doesn't matter whether it was Abdi or Hirsi who pulled the trigger because those concerned in the commission of a crime are equally liable along with the one who directly committed it. *Holland v. State*, 91 Wis. 2d 134,

141, 280 N.W.2d 288 (1979). Because Hirsi was tried as a PTAC, Hurshe's testimony would not have helped Hirsi.

Finally, as the postconviction court noted, nothing prohibited Hirsi from calling Hurshe as a witness at trial. (R. 276:59.) As the court recognized, Hirsi "had the discovery;" he "could have called this witness." (R. 276:59.) Hirsi simply failed to do so. He is not entitled to a new trial in the interest of justice.

CONCLUSION

This Court should affirm Hirsi's judgment of conviction and the postconviction order denying relief.

Dated this 2nd day of May 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,030 words.

Dated this 2nd day of May 2019.

_____
SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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

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

Dated this 2nd day of May 2019.

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SARA LYNN SHAEFFER
Assistant Attorney General