STATE OF WISCONSIN

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

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE REPEATEDLY MISAPPLIES THE LAW ON PARTY TO A CRIME

Several of the State's arguments are based on a single, faulty premise: that Hirsi is guilty even if Guled Abdi was the shooter (State's brief: 2, 19-20, 34) ("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"). Although the State initially recites the party-to-a-crime requirements correctly (State's brief: 8), it repeatedly misapplies the law by ignoring a key requirement: foreknowledge.

As the court instructed the jury, "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" (R266:20) (emphasis added).

The criminal conduct at issue is the shooting; all of the charges with party-to-a-crime liability (attempted homicide, reckless injury, and recklessly endangering safety) stem from the shooting. Ahmed Hirsi had no foreknowledge that Abdi was going to start shooting. The State points to no evidence in the record suggesting Hirsi had foreknowledge. In fact, there is none. Accordingly, Hirsi was innocent of those charges.

Contrary its arguments at trial (see R253:113-14), the State argues Hirsi drove the vehicle at the scene. Even assuming *arguendo* that Hirsi was the driver, driving away after the shooting would not make Hirsi a party to the shooting. *See* ***State v. Rundle***, 176 Wis.2d 985, 1007, 500 N.W.2d 916 (1993) ("[T]he accessory after the fact, by virtue of his involvement only after the felony was completed, is not truly an accomplice in the felony").

Thus, the State's arguments that any error was harmless because Hirsi was guilty either directly or as a party-to-the-crime fail because there is no evidence Hirsi had foreknowledge of Abdi's criminal intentions.

II. VIOLATIONS OF HIRSI'S DUE PROCESS RIGHTS WARRANT A NEW TRIAL

The State argues no due process violations occurred because (1) it was not required to disclose the proffer letter; (2) there is no duty under ***Brady***[1] for the State to inform the jury of consideration given to an accomplice; (3) Hirsi had the ability to cross-examine Abdi about details of his consideration; (4) Abdi didn't testify falsely about the timing of his "deal;" and (5) Hirsi failed to request an accomplice jury instruction (State's brief: 12-18). The State's arguments ignore, and then misapply, ***State v. Nerison,*** 136 Wis.2d 37, 401 N.W.2d 1 (1987).

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

Brady is a pre-trial disclosure rule, not a trial rule. At trial, ***Nerison*** requires not just the opportunity for cross-examination, but also "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. The State offered the accomplice's testimony, and must ensure the due process requirements are fulfilled in order to submit that testimony. ***Id.*** at 46 ("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").

The State claims ***Nerison*** only applies when the cooperation agreement specifically requires testimony against a defendant, and here the only agreement was to testify truthfully, not to testify against Hirsi specifically (State's brief: 18). This argument, and the testimony supporting this argument, are false. The proffer letter directly contradicts this argument by including the following requirement: "Truthful testimony against any co-actors, including Ahmed Farah Hirsi" (R188:3).

This same proffer letter wasn't disclosed to the defense, and now the State disclaims a duty to disclose it under ***Brady***. Had the State disclosed this letter, the defense could have disproven that lie during trial.

Likewise, the undisclosed letter left Hirsi ignorant of another crucial fact—the timing of the deal. Abdi testified he hadn't been handed a "deal" before telling police that Hirsi was the shooter (R262:7). But the date of the proffer letter (7/15/2014) shows this testimony was false, because Abdi had been offered that "deal" approximately six weeks before speaking to police and identifying Hirsi as the shooter (R188:3). Without that letter, the defense was unaware that the terms of the agreement had been dictated in advance, and those terms induced Abdi's statement, rather than vice versa. Since

Hirsi didn't know this, he couldn't challenge Abdi's false testimony.

The State thereby suppressed material aspects of the proffer. Accordingly, the holdings of ***State v. Lock***[2] are inapplicable.

The State argues Abdi's testimony wasn't false because Detective Willems testified Abdi had cooperated before reaching a deal (State's brief: 17). But the question didn't ask whether Abdi cooperated after being given a deal; the question asked **whether Abdi specifically identified Hirsi as the shooter after being given a deal**—which Abdi falsely denied (R262:7). The State failed to correct this lie, as well as Abdi's lie that he "didn't receive nothing yet," when he'd already had fifteen charges carrying 510 years of exposure dismissed before testifying (R262:8).

The jury never heard the cautionary instruction on accomplice testimony required by ***Nerison***. Thus, two of ***Nerison's*** three procedural safeguards were violated, and the jury heard false and misleading testimony left uncorrected by the prosecutor. Since the State's argument against harmless error (State's brief: 19-20) is based entirely upon the erroneous party-to-a-crime analysis discussed *supra*, the errors were not harmless, and a new trial is required.

III. ADMISSION OF OTHER-ACTS EVIDENCE WAS ERRONEOUS AND COMPOUNDED BY FAILURE TO INFORM THE JURY OF HIRSI'S ACQUITTAL

The circuit court erred in three clear respects by allowing evidence of the Saint Paul incident for the purpose of identity: (1) it was irrelevant to the identity of the shooter, as demonstrated by ***State v. Balistreri,*** *infra;* (2) it was not sufficiently probative, as it required a series of speculative

[2] ***State v. Lock,*** 2012 WI App 99, 344 Wis.2d 166, 823 N.W.2d 378.

assumptions to have any relevance; and (3) failure to instruct the jury that Hirsi was acquitted of possessing and discharging the firearm in Saint Paul was unduly prejudicial.

The State attempts to distinguish ***Balistreri*** in a footnote by noting "identity was the crux of Hirsi's case at trial" (State's brief: 23,n.13). But the shooter's identity was also the crucial issue in ***Balistreri,*** which held that evidence of a third party committing a shooting with the murder weapon one day earlier was inadmissible. ***Id.***, 106 Wis.2d 741, 754-57, 317 N.W.2d 493 (1982). Balistreri was convicted of shooting and killing Michael Trapp with a .357 magnum revolver on December 17, 1978. ***Id.*** at 745. The defense argued that Robert Roe, not Balistreri, fired the .357 and murdered Trapp. ***Id.*** at 755. The defense sought to present evidence that Roe used the same .357 revolver in a shooting one day earlier to show motive, plan, intent, and identity. ***Id.***

The trial court rejected the evidence as irrelevant to identity, and the Wisconsin Supreme Court agreed:

> Identity was not an issue at defendant's trial. All parties in the car at the time of the shooting were consistently identified by all witnesses. The identity of the person who shot the revolver at the scene of this crime was testified to by all living parties present and that testimony was in conflict.

Id. at 756.

The circumstances here are nearly identical—all the parties in the vehicles were consistently identified. The conflict was who fired the gun, Abdi or Hirsi. Identity is not a proper purpose for evidence of the Saint Paul incident. Thus, it is inadmissible.

The facts of ***Balistreri*** also illustrate why the Saint Paul evidence is insufficiently probative for admissibility. It was undisputed in ***Balistreri*** that the same gun was used in both

shootings, and that Roe had actually fired the gun the day before; the prosecutor admitted it, and Roe pleaded guilty to armed robbery for that incident. ***Id.*** at 750-51, 754. By contrast, here there was only a photo of a man, purportedly Hirsi, taken two days before the Hudson shooting, holding what looked like a firearm, in an apartment building where a bullet was later found in a wall, and the bullet was the same caliber as the bullets in the Hudson shooting (R265:62-63,87,91,166,179).

Photos of a person holding a possible firearm of unknown make and caliber—with no evidence the gun was actually fired, when it was fired, or who fired it—are not remotely as probative as in ***Balistreri,*** where Roe admitted to firing the same gun as the murder weapon the day before the murder. Yet in ***Balistreri,*** both the trial court and Supreme Court found this evidence irrelevant to the Trapp shooting because there was no "relevant connecting link" between the shootings. ***Id.*** at 757. In other words, a jury would have to make numerous assumptions, based entirely upon speculation, to reach the same level of probative value as ***Balistreri,*** which the courts still found absent.

The State's argument that a "jury could make its own assessment" of this evidence—or complete lack thereof—is fatally flawed (State's brief: 23-24). Evidence so lacking in probative value should never be presented to the jury in the first place.

Given that limited probative value, the danger of prejudice was unduly high, leaving the jury with the false impression that Hirsi was a dangerous criminal who discharged firearms in apartment complexes. This was especially prejudicial considering a unanimous jury acquitted Hirsi of that alleged conduct.

Prejudice could have been minimized had the court's cautionary instruction included the acquittals, but the court

failed to do so. The State argues Hirsi waived any challenge to the failure to instruct the jury on his acquittal (State's brief: 24), ignoring the facts that the other-acts were admitted over Hirsi's objections, and his explicit arguments that if the jury heard the other-acts, the jury needed to hear about the acquittals (R258:48-49).

The State argues that no case mandates mention of the acquittal in all cases where the State presents other-acts for which the defendant was acquitted (State's brief: 25), and cites non-binding, 7th Circuit opinions to the contrary. This misses the point entirely. Both leading authorities on this issue—***Dowling*** and ***Landrum***—grappled with the issue of fairness when presenting evidence of alleged crimes for which a defendant was previously acquitted by a jury. Both cases used cautionary instructions which informed the juries of the acquittals, to emphasize the limited purpose of the evidence and to minimize prejudice. *See* ***Dowling v. United States,*** 493 U.S. 342, 345-46 (1990); ***State v. Landrum***, 191 Wis.2d 107, 122, 528 N.W.2d 36 (1995). The court's failure to instruct the jury of Hirsi's acquittals was a significant error because it failed to mitigate the prejudice.

Likewise, the erroneous cautionary instruction which failed to inform the jury of Hirsi's acquittals cannot possibly render harmless the error of admitting the other-acts. The prosecution placed great emphasis on this evidence in opening statements, the evidentiary portion of trial, and closing remarks. *See* ***State v. McGowan,*** 2006 WI App 80, ¶25, 291 Wis.2d 212, 715 N.W.2d 631 (frequency of the error and importance of the erroneously admitted evidence are key factors in assessing harmlessness). In the context of a weak case overall, the State cannot prove these errors were harmless beyond a reasonable doubt.

IV. THE COURT ERRED BY ADMITTING LAY OPINION TESTIMONY IDENTIFYING HIRSI FROM SURVEILLANCE PHOTOGRAPHS

The State's argument that Hirsi waived a challenge to foundation of Detective Willems identifying him from photographs is flatly incorrect. Hirsi filed a motion in limine to exclude police officers from identifying him from photographs because they would lack personal knowledge of him (R105:1). Hirsi made similar arguments at the motion hearing (R256:61,67-68). Accordingly, the issue is not waived.

Nor did Willems have adequate foundation to identify Hirsi due to his extensive hours working on this case (State's brief: 29). Det. Willems testified that his only knowledge of Hirsi came from this case (R260:16-17). No matter how much time he spent before trial looking at those same photos, he still had no pre-existing knowledge or foundation to be able to identify Hirsi. And the opportunity for cross-examination doesn't cure the problem of the jury hearing testimony that completely lacks foundation.

The State's waiver argument has more merit regarding Detective Henry, as Hirsi's pretrial objections to police officers identifying him from photographs were based on foundation, not bias (R105:1) (State's brief: 30). But any request to impeach Detective Henry on bias would have been denied. The court explicitly barred Hirsi from making <u>any reference</u> to the trial on the Saint Paul allegations (R258:50-52).

Accordingly, the most probative areas of Det. Henry's bias were off-limits: the fact that she was Hirsi's arresting officer in that case; that she testified against Hirsi and tried to provide identification testimony from a photograph; that she violated the judge's explicit instructions not to identify it as a booking photograph (R188:4-6); and that despite her testimony, Hirsi was acquitted. Had Hirsi attempted to raise the

issue, the court's prior ruling would have precluded this line of questioning.

The State argues any error is harmless, claiming no reasonable probability the jury would have reached a different verdict without the identification testimony, based on the strength of other evidence—including the testimony of Abdi, and the other-acts evidence from Saint Paul (State's brief: 31). But this error was magnified by each of those errors, *supra,* and all evidentiary and constitutional errors should be evaluated for their cumulative impact. ***State v. Mayo***, 2007 WI 78, ¶64 & n.8, 301 Wis.2d 642, 734 N.W.2d 115 (applying cumulative impact analysis to all errors). The State cannot rely on the remaining flawed and erroneous evidence to disprove the harmlessness of these errors.

V. INFLAMMATORY "EXPERT" TESTIMONY AND IMPROPER ARGUMENTS REGARDING SOMALIAN CULTURE CONSTITUTED PLAIN ERROR, AND THE STATE'S FAILURE TO ADDRESS THE MERITS OR ARGUE HARMLESS ERROR CONCEDES THIS ISSUE

Hirsi argued that the State's presentation of Det. Henry's "expert" testimony on Somali culture, and the prosecutor's improper arguments based on that testimony, constituted plain error in numerous ways: (1) statistics about unsolved "Somali-on-Somali" homicides were inflammatory, irrelevant and misleading, and suggested Somalis had a propensity for violence; (2) testimony that Somalian people were uncooperative with police, more likely to settle matters themselves, and had a "tendency to fabricate" events constituted a ***Haseltine***[3] violation and evinced clear racial bias; (3) the prosecutor's arguments claiming victim A.H. was lying based on "Somali culture" was similarly improper; and (4) the prosecutor's false argument that only two of six victims gave

[3] ***State v. Haseltine,*** 120 Wis.2d 92, 352 N.W.2d 673 (Ct.App.1984).

statements to police, which he again linked to Somalis being uncooperative with police, was improper (Hirsi's brief-in-chief: 40-45).

The State's Reply never addresses the merits of these claims. Instead, the State raises only procedural objections, such as waiver for failure to object at trial (State's brief: 32-33). While failure to object waives any direct claim on erroneous admission of evidence or prosecutorial misconduct, Hirsi argued these errors under the plain error doctrine, which "allows appellate courts to review errors that were otherwise waived by a party's failure to object." ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis.2d 138, 754 N.W.2d 77.

In a footnote, the State claims Hirsi abandoned his objections to the prosecutor's improper arguments for failure to raise a prosecutorial misconduct claim (State's brief: 32). The "abandonment" argument is nonsense. While not explicitly using the words "prosecutorial misconduct," Hirsi's brief repeatedly argued that both the improper evidence and arguments violated Hirsi's due process rights and constituted plain error (Hirsi's brief-in-chief: 3-4, 40-45). Hirsi cited the specific improper arguments, and numerous plain-error cases reversing convictions based on improper arguments.[4] This includes ***Jorgensen,*** which reversed a conviction in part based on several unobjected-to arguments by a prosecutor. ***Jorgensen*** characterized those arguments as violating due process, without ever using the words "prosecutorial misconduct," and instead invoking plain error. ***Id.,*** ¶¶40-45.

Since neither procedural objection can preclude Hirsi's plain error challenge, the court must address the merits. The State, however, offered no response to any of the four substantive arguments identified *supra*. Accordingly, the State

[4] Hirsi also made an interest of justice claim based on those same improper arguments by the prosecutor (Hirsi's brief-in-chief: 50)—which the State also fails to respond to in its brief.

has conceded each of those arguments. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Nor does the State argue that any such error was harmless. That argument is also conceded. ***Id.***

VI. THE REAL CONTROVERSY WAS NOT FULLY TRIED

The State raises only three substantive objections to Hirsi's interest-of-justice arguments: (1) the individual errors do not provide grounds for relief, based on its previous arguments; (2) Hirsi is guilty as party-to-a-crime even if Abdi was the shooter, so Maryann Hurshe's testimony doesn't matter; and (3) Hirsi could have called Hurshe as a witness but failed to do so (State's brief: 34-35).

First, Hirsi incorporates his arguments *supra* on the individual errors. Many of the State's arguments rely upon waiver for failure to object. But interest-of-justice claims don't require contemporaneous objections to be preserved for appeal. *See* Wis. Stat. sec. 752.35 ("If it appears from the record that the real controversy was not fully tried…the court may reverse the judgment…regardless of whether the proper motion or objection appears in the record").

Additionally, because the State never addressed the substantive merits of any of his arguments regarding the improper "expert" testimony on Somalian culture, the ***Haseltine*** violation regarding Somalis having a "tendency to fabricate" events, or the prosecutor's improper arguments about that testimony, the State has no arguments to fall back upon here.

Second, Hirsi previously refuted the State's erroneous party-to-a-crime arguments, *supra,* and hereby incorporates that analysis.

Third, the State ignores Hirsi's citation to ***Garcia v. State***, 73 Wis.2d 651, 245 N.W.2d 654 (1976), as authority demonstrating that his ability to call the witness is irrelevant in the interest-of-justice analysis. The question is whether the absence of Hurshe's testimony prevented the real controversy from being fully tried. For reasons previously discussed, both Hurshe's testimony and the numerous other errors prevented the real controversy from being fully tried, and warrant a new trial.

CONCLUSION

This Court should vacate the judgment of conviction and remand for a new trial.

Respectfully submitted: May 17, 2019

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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 2,999 words.

Signed May 17, 2019

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 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 May 17, 2019:

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