STATE OF WISCONSIN

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

Case No. 2020AP001228-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SALAR ZANGANA,

Defendant-Appellant.

Appeal of Written Decisions and Final Orders Denying Defendant-Appellant's Postconviction Motion on July 7, 2020 and Motion for Reconsideration on July 13, 2020, in Milwaukee County Circuit Court Case No. 18CM1193, Hon. David A. Feiss, Circuit Judge, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The State's argument that appeal issues were forfeited is without merit.

The State's Brief begins (12-14) with a strenuous effort to avoid the serious issues on this appeal, by contending that those issues were forfeited for review because they were not raised in the trial court.

Irrelevant authority. The State's citations to cases (*e.g., Huebner, Peters, and Holmes*)[1] that discuss whether sufficiently specific, contemporaneous objections, to court procedures or evidence proffered by the State at trial, had not been lodged, are wholly without application here. In *Peters*, for example, the defense was faulted for not properly objecting when the State pushed for the admission of evidence. "General objections which do not indicate the grounds for inadmissibility will not suffice to preserve the objector's right to appeal." *State v. Peters*, 166 Wis. 2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991). See also, Wis. Stats. § 901.03(1)(a). Here, it was the State that was objecting to the admissibility of impeachment evidence directed at Zangana's main accuser, RZ, his daughter. Ironically, if these "improper defense objection" cases carry any relevance, they show how little specificity (i.e., based on the prosecutor's terse "hearsay" and "privilege" objections) was required to get a favorable ruling from the trial court that essentially shut down defense counsel's efforts to put the nature of the proposed evidence more fully in the record.

Opportunity for corrective action. To the extent that any logic from any of the above cases can be transferred to the issues here, *Holmes* teaches that the main reason to

[1] State's Brief at 12.

require specificity in evidence objections is so that the trial court can correct any mistaken, uninformed rulings. *Holmes v. State*, 76 Wis. 2d 259, 272, 251 N.W.2d 56, 63 (1977). Here, Judge Feiss simply would not allow defense counsel to lay out what he would have asked of RZ (by question-and-answer offer of proof). ("So the Court did indicate that it would sustain the objections and *would allow no further questioning* with regard to the text message." [R. 73. at 51-52]). (Emphasis added.) The judge cut counsel off (R. 73 at 24); the judge's mind was made up by his rushed rulings that evidence of a statement of apology by RZ for her accusations was inadmissible hearsay, and that the sought-after testimony from her husband would have been privileged. Ironically, it was defense counsel who was trying to give the judge sufficient information, which he would not hear, to honor *Holmes'* goal that a fully-informed evidentiary decision be made.

Counsel's compliance with Wis. Stat. §901.03(1)(b). Nonetheless, defense counsel did make sufficient facts known so that the nature of the evidence being proffered was known to the trial court. Indeed, Judge Feiss stated: "I think you've made a good record." [R. 73 at 52]). Moreover, the record is sufficient for this Court to see that defense counsel properly sought to impeach RZ based on Zangana's having received an apologetic text message from RZ's husband that justified his efforts to cross-examine her about that subject, and if she denied that she had ever made such inconsistent apology or other inconsistent statements, to confront her with the text message itself, and call her husband to rebut her denials. The substance of the line of inquiry as to RZ and the subject for the husband's testimony "was apparent from the context in which the questions were asked," as Wis. Stat. § 901.03(1)(b) prescribes, Also, the *Milenkovic* ruling (a case which undersigned counsel knows well from having tried it in

1976),[2] does not support the State's opposition here where the prosecution and trial court cut defense counsel off from using a question-and-answer format in his cross-examination of RZ to make an offer of proof. That was a discretionary error relating to the trial court's assessment of the impeachment and extrinsic evidence questions.

> Although the form of the offer of proof is at the circuit court's discretion, this court has specifically urged judges to use the question and answer form whenever practicable. . . . We conclude that offers of proof made in this manner will significantly reduce the possibility that trial counsel will inadvertently fail to offer to prove a crucial fact upon which the conclusion or inference which he seeks to establish necessarily depends. We also believe such a procedure will assist the trial court and any reviewing court in determining whether the evidentiary hypothesis can be sustained or the offer is overstated.

State v. Dodson, 219 Wis. 2d 65, 73-74, 580 N.W.2d 181 (1998)

Reversible error for interference with defense counsel's offer of proof. Accordingly, despite the State's arguments that fault defense counsel for not properly raising the issues for this appeal, it was the State and the trial court that caused reversible error by actively preventing counsel from providing more facts and more argument. *See. e.g., State v. Dodson*, 219 Wis. 2d 65, 73-77, 580 N.W.2d 181, 186-88 (1998) (sexual assault conviction reversed because "the circuit court would not allow defense counsel to question [the alleged assault victim] regarding his statements to the defendant's mother; nor would the court allow the defendant's mother to testify regarding [the alleged victim's] statements.").

[2] *Milenkovic v. State*, 86 Wis. 2d 272, 284, 272 N.W.2d 320

Finally, the acuteness of this reversible error is made plain by the difference in treatment the trial court bestowed on the prosecution, compared to the defense, when in its postconviction decision it rejected defense arguments (i.e., admissibility of extrinsic evidence; inapplicability of marital privilege; and calling RZ's husband as impeachment witness) based on reasons and arguments that the prosecution had never made (A. App. 107, footnote 4). If there was no forfeiture or waiver by the prosecution to those defense arguments, then there could hardly (or fairly) be defense forfeitures for having made those arguments.

II. The trial court's evidentiary rulings were wrong.

Before completing Zangana's reply arguments, there is a statement of fact in the State's Brief that deserves correction. At page 4 the State asserts that RZ testified that her husband's text "message was not sent because of any conversation she had with her husband." But she testified, instead, that she was not aware at the time she was hospitalized and giving birth (as she was unconscious when her husband sent the message) that the message was sent because of a conversation with her husband. (R. 73 at 21-22). The difference is subtle and important. RZ never ruled out that the message related to a conversation with her husband; and when defense counsel sought to develop the record (R. 73 at 24) so that foundation for impeachment of RZ would be made clear, by asking if the message was consistent with prior discussions with her husband, the prosecution's objection was sustained.

Furthermore, in the limited amount of questioning that defense counsel was permitted by the court, there was never

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(Ct. App. 1978).

any point when RZ testified to the effect that she did ***not*** authorize that message, or approve of it, or make statements to her husband before she entered labor that were consistent with it. She never condemned the sending of the message or disputed its meaning.

The rest of this reply brief will be brief – not because the issues are not worthy of careful consideration, but because they are relatively straightforward.

Prior inconsistent statement admissibility. The core of the State's inadmissibility argument about testimony from RZ regarding the text message or from her husband (Brief at 14-19) rests on an absurdity. Throughout its argument the State stresses: "it was not even a prior statement of RZ but rather of her husband," "RZ did not send the message," "it is clear that the message is not her statement," "there is no indication in the record . . . that RZ actually made such a statement to her husband," and "the written statement was not RZ's."

The State's inadmissibility argument therefore hinges on this scenario: This case had been set to begin trial on February 12, 2019 but the matter was then rescheduled to March because of a missing juror. (R. 69). Then on February 15, 2019, when RZ was about to give birth, and became unconscious in the hospital, her husband sent her father a text message that stated: "Hi Daddy" . . . I'm sorry . . . for those things I did against you. . . . I know I was wrong." (R. 48). The State does not dispute that this text message came from RZ's husband; and the husband clearly was not sending the message to his "Daddy." Moreover, there is nothing in the record, or argued by the State, that suggests that the husband had a need to apologize to RZ's father about something the husband had done against Zangana.

Where does that leave us? Is it not a reasonable (indeed, an inevitable) inference that this was a message intended by RZ to report what she had said to her husband

before she went into labor, with an understanding between the two of them that it would reach her father ("in case something goes wrong during childbirth")? The State prefers to rest on a specious argument that this statement could not be used as impeachment as a prior inconsistent statement because either her husband, or even perhaps a stranger using her husband's phone, were pretending to be RZ, and were disguising the statement of contrition as hers without any involvement by her. The proposition is absurd. The only reasonable and reliable inference was that this message captured what RZ wanted her husband to convey as her statement of apology to her father.

Yet the trial court held postconviction (A. App. 107) that the statement was inadmissible hearsay, and based that on its mid-trial ruling, which also held the statement was hearsay. (R. 73 at 52). *But neither ruling, betraying a hasty judgment call, explained why it was hearsay.*

Of course, there could be argument about whether RZ's husband had faithfully recounted in the text message what RZ had said to him, and whether the message was an apology by RZ for making a wrongful accusation against Zangana for some other transgression. But impeachment by a prior inconsistent statement is allowed even though the inconsistency may not be clear. *United States v. Jones*, 808 F.2d 561, 568 (7th Cir. 1986) ("statements need not be diametrically opposed to be inconsistent."). At any rate, whether the statement was indeed a retraction of RZ's accusations, or was inconsistent only to some lesser degree, should have been more properly subject to exploration by the parties' in their questioning of RZ on the witness stand, and when her husband then was called to recount why and how he sent the message.

In sum, the State argues unfairly that Zangana cannot argue on appeal that he was denied a right to cross examine

RZ about a prior inconsistent statement because it was not her statement. There was no such finding. The court did not block cross-examination based on a finding that RZ had not made or had not approved the text message. And to prevent Zangana's argument now, on appeal, compounds the unfairness of the trial court's shutdown of defense counsel's efforts to establish whether RZ's denials were supported by fact. It would have been proper, had defense counsel been allowed to proceed, to cross-examine RZ, even if her husband had not sent the text message, to question RZ about whether she had ever made statements – to her husband or anybody – where she expressed that she was wrong to have accused her father of any assault, or that the family dispute did not happen the way she claimed to police. But having received a text from her husband to that very effect, it was perfectly proper to try to cross-examine RZ about that subject, and if she denied that line of inquiry to confront her with the text message, and then to call her husband to rebut her denial.

Marital privilege. The trial court's privilege ruling was wrong and so is the argument set out in the State's Brief (19-21). Both the court and the State overlooked the plain language of Wis. Stats. § 905.05(1) that the privilege of nondisclosure only applies when one spouse is testifying as an adversary ***against*** the other. The privilege rule only applies when the one spouse, such as RZ, is in an adversarial position in court against a spouse. RZ and her husband were not adversaries in the criminal trial against Zangana.

Wisconsin's rule sets out the "adversarial spousal privilege" which applies in criminal proceedings and allows one spouse to refuse to testify against the other spouse. That obviously was not the setting and there was no adversity in that setting between RZ and her husband.

Moreover, the substance of the message (to "Daddy") made it obvious that this message was not meant to be held in

confidence between RZ and her husband. On the contrary, the content of the message directed that the message be disclosed by RZ's husband.

Continuance speculation. The State also is wrong when it argues (at 22-23), as an alternative basis to support the trial court's exclusion of testimony from RZ's husband, that the trial court could have rejected the testimony because the husband was not named as a witness. But RZ's husband would have been called as a rebuttal witness, which the rules allow. Wisconsin's criminal procedure rule on discovery expressly states in Wis. Stat. § 971.23(2m): "What a defendant must disclose to the district attorney.

> **(a)** A list of all witnesses, other than the defendant, whom the defendant intends to call at trial, together with their addresses. *This paragraph does not apply to rebuttal witnesses or those called for impeachment only.*

(Emphasis added.)

Further, the State entirely speculates, that had the trial court weighed the pro's and con's of a slight continuance in the trial to allow defense counsel to subpoena the husband, that it would have denied a continuance. (Recall that the court had already declared a one-day continuance for the start of the trial on February 11, 2019 and had sent the jury home in the morning to begin its business the next day.) (R. 67). At any rate, the trial court never weighed the pluses and minuses, and this Court is not the place to start that process.

Violation of Zangana's right of confrontation. The State complains (at 23) that Zangana's three-page argument (Appellant's Brief at 23-26) on how he had been denied his constitutional right of confrontation should not be considered because it was conclusory and under-developed, relying on *State v. Pettit*, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1972). The State ignores that the Court in *Pettit* declined to entertain certain "undeveloped" arguments because (1) they were lacking in any legal reasoning, and just were general

statements, and (2) they lacked references to legal authority. On the contrary, besides the three pages of appellate argument, Zangana's postconviction pleadings included nine pages of extended legal argument on the issue, supported by two precise evidentiary rule citations and thirteen case citations.

Harmless error speculation. The State argues (24-25) that any errors regarding RZ's apologetic statements and the trial court's restrictions on defense cross-examination of RZ and on calling her husband as a witness were harmless because those errors would not have affected the jury's verdict, which related to whether Zangana battered GZ (Count One) and engaged in disorderly conduct (Count Three). Here the State has the burden of proving that the error did not influence the jury or that it had such slight effect as to be *de minimus. State v. Dyess*, 124 Wis. 2d 525, 541-42, 370 N.W.2d 222 (1984).

The State's argument ignores the central role that RZ played in the prosecution's attempts to prove up those two counts. On appeal, the State argues that RZ's testimony was unimportant to the outcomes for the charges related to GZ. Yet at trial, the prosecutor repeatedly emphasized the importance of RZ's testimony for those counts. (R. 74 at 19-20).

Finally, to meet its burden, the State resorts to pure speculation (24-25) to assert that any error was harmless: "Clearly, the jury weighed GZ's and RZ's credibility independently. . . . It was GZ's, not RZ's, credibility that was the key component to Counts One and Three." This Court should reject the State's invitation to read the minds of the jury. *State v. Martinez*, 150 Wis. 2d 47, 56 n.4, 441 N.W.2d 690, 693 (1989) ("we need not and should not attempt to weigh the parties' conflicting theories as to the meaning of the jury's decisions").

Accordingly, the trial court's exclusionary rulings were not harmless errors. Instead, they constituted unduly prejudicial, constitutional errors that the State has failed to show, per its burden, did not likely influence the jury.

CONCLUSION

Based upon the foregoing arguments, Salar Zangana, respectfully requests that this court reverse his conviction and grant a new trial.

Dated at Milwaukee, Wisconsin, January 12, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,807 words.

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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 § 809.19(12). I further certify that:

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

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

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