STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2024AP672-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CYNTHIA M. DOMINGUEZ,

Defendant-Respondent.

APPEAL FROM AN ORDER VACATING A JUDGMENT ON THE VERDICT AND GRANTING A NEW TRIAL, ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE JOSANN M. REYNOLDS, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

Cynthia Dominguez, along with her co-actor Brittany Holsten, ambushed Alice.[1] Dominguez repeatedly kicked Alice in the stomach. Alice was 14 weeks pregnant. Holsten's boyfriend was the father. In addition to Alice's trial testimony and to phone records proving both assailants were at the crime scene, the State introduced 18 electronic messages Holsten had sent to Alice expressing anger toward her. The defense did not object. Dominguez was found guilty of attempted first-degree intentional homicide of an unborn child. Six days later, however, the circuit court held that all 18 of the unobjected-to messages were inadmissible hearsay, requiring reversal under the plain error rule.

1. Were the 18 electronic messages Dominguez's co-actor sent to Alice inadmissible hearsay?

The circuit court held that all 18 messages were inadmissible hearsay.

This Court should reverse. None of the 18 messages were offered for the truth of the matter asserted, but even if they had been, they still would have been admissible under exceptions to the rule against hearsay.

2. Assuming arguendo that the unobjected-to electronic communications were inadmissible hearsay, was their admission plain error warranting reversal?

The circuit court answered, "Yes."

This Court should reverse. Any error in admitting any of the electronic messages was not obvious, fundamental, and substantial, and in any event, the alleged errors were harmless.

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[1] "Alice" is a pseudonym.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

Dominguez attacked Alice, who was 14 weeks pregnant, and repeatedly kicked her in the stomach. Holsten's boyfriend was the father of the child Alice carried, and the State's theory was that the women attacked Alice in an attempt to terminate the pregnancy. At trial, Alice testified that both Dominguez and Holsten kicked her repeatedly in the stomach after Holsten told her, "I don't want you to have this baby." (R. 141:59.) Phone records showed both assailants were at the crime scene. Additionally, the State introduced 18 electronic messages Holsten had sent to Alice expressing anger toward her, primarily for her decision not to terminate her pregnancy. The defense did not object to the introduction of these messages. Dominguez was found guilty of attempted first-degree intentional homicide of an unborn child.[2]

Six days after the verdict, however, the circuit court sua sponte ordered the parties to brief whether Holsten's electronic communications were inadmissible hearsay statements whose admission required reversal under the plain error doctrine. After briefing, the circuit court held that

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[2] Holsten was tried separately after Dominguez's trial. Holsten was acquitted of attempted first-degree intentional homicide of an unborn child. Dane County Case No. 2023CF156, *State of Wisconsin v. Brittany L. Holsten*, Wis. Cir. Ct. Access, https://wcca.wicourts.gov/caseDetail.html?caseNo=2023CF000156&countyNo=13&mode=details (last visited June 20, 2024).

all 18 of Holsten's statements were offered for the truth of the matter asserted, that none of them were admissible under any hearsay exception, and that their admission was plain error requiring a new trial.

This Court should reverse the circuit court's order for a new trial. None of Holsten's electronic messages were offered for the truth of the matter asserted, but if they had been, they nevertheless would have been admissible under exceptions to the rule against hearsay. Even if the admission of any of Holsten's statements was error, it was not plain error because the alleged error was not obvious, fundamental, and substantial such that invocation of the sparingly-used plain error doctrine was appropriate. Finally, even if the admission of any of Holsten's statements was obvious, fundamental, and substantial, any error was harmless, so the plain error doctrine does not apply.

STATEMENT OF THE CASE

According to the criminal complaint, Dominguez and her alleged co-actor Brittany Holsten ambushed Alice in the parking lot of Alice's apartment building. (R. 2:2.) Alice was 14 weeks pregnant. (R. 141:53.) Holsten's boyfriend, Tom,[3] was the father of Alice's unborn child. (R. 141:15–17.) The complaint alleged that both Dominguez and Holsten repeatedly kicked Alice in the stomach after Holsten told Alice that she did not want her to have the baby. (R. 2:2.) Dominguez was charged with attempted first-degree intentional homicide of an unborn child as a party to the crime. (R. 17.)

The case proceeded to a jury trial. Alice testified that she began dating Tom around August 2022. (R. 141:6.) Shortly thereafter, she began to receive threatening Facebook

[3] "Tom" is a pseudonym.

messages from Brittany Holsten, with whom Tom shared a child. (R. 141:7–8, 10.) These messages expressed displeasure that Alice was dating Tom and included threats of physical harm against Alice. (R. 141:10–11.) Alice blocked Holsten on Facebook, but Holsten continued to contact Alice through other Facebook accounts and through other mediums such as text message, Snapchat, and Cash App. (R. 141:14–15, 25.)

Meanwhile, Alice learned in September 2022 that she was pregnant with Tom's child. (R. 141:15–16.) Alice and Tom broke up, and Tom resumed dating Holsten. (R. 141:17–18.)

The threatening messages from Holsten[4] did not stop. Holsten began expressing anger at Alice for her decision to continue her pregnancy. On October 19, for example, Holsten sent Alice a message commanding, "Get rid of the baby." (R. 94.) Less than a week later, Holsten told Alice, "kill yourself" (R. 95), and stated that Tom "don't want no child by a bitch he don't kno" (R. 96:1). The threatening messages continued through November 30, 2022, the night of the ambush. (R. 141:48.)

The defense did not object on hearsay grounds to the admission of Holsten's electronic messages.

Alice testified that on the night of the attack, Alice was scheduled to work an overnight shift. (R. 141:54.) As Alice walked through the parking lot of her apartment building, Holsten approached Alice from the front of Alice's vehicle. (R. 141:58.) Alice told Holsten that she was pregnant and did not want to fight. (R. 141:59.) According to Alice, Holsten responded, "I do not care. I don't want you to have this baby." (R. 141:59.)

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[4] Some of the messages were purportedly sent by Tom. However, Alice testified at trial that based on the messages' tone, content, etc., she believed all the messages were in fact sent by Holsten. (R. 141:20–23.)

At that point, Cynthia Dominguez—who told police that she was Holsten's "best friend"—emerged from behind a car and attacked Alice. (R. 141:59; 162:40–41.) Alice testified that Dominguez and Holsten grabbed her by her hair and threw her to the ground. (R. 141:59.) Alice cradled herself forward to protect her stomach. (R. 141:59.) Alice testified that Holsten told Dominguez to kick Alice in the stomach. (R. 141:59.) Dominguez then began targeting Alice's stomach and kicking her repeatedly. (R. 141:59.) Alice stated that both women kicked her in the face as well. (R. 141:59.)

Throughout the attack, Alice begged Dominguez and Holsten to stop while repeatedly yelling that she was pregnant. (R. 141:69.) Despite this, Dominguez kicked Alice's abdomen approximately 15 times, causing her pain. (R. 141:67.) Dominguez eventually yelled, "we gotta go," and both Dominguez and Holsten ran away.[5] (R. 141:69.) Alice suffered facial injuries, but the baby survived the attack and was eventually born healthy. (R. 141:81–83.)

Alice immediately called 911 and was taken to the hospital by ambulance. (R. 141:71.) Just a few minutes after the attack, Alice received a message from Holsten that said, "stop lying [about] me [Alice.] I'm in Chicago." (R. 105.) At the time that message was sent, however, the only people Alice had told about the attack were the people in the ambulance and her mother. (R. 141:109–10.)

Dominguez's Snapchat records showed that she was in the immediate area of the attack at the time of the attack, then began moving away from the area immediately after the attack. (R. 161:110–14.) Holsten's phone records showed that she was also in the area of the attack when it occurred. (R. 161:125–27.)

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[5] It is not clear from the record what caused Dominguez to decide they needed to flee at that moment.

Shortly after the attack, Dominguez sent a Snapchat message with a picture of Holsten's daughter that said, "Now y'all know not to talk about my niece." (R. 110:1; 162:28.) Holsten had apparently been under the impression that Alice said something disparaging about her daughter. (R. 141:36; 162:101.) Dominguez admitted to the police that the Snapchat account was hers. (R. 162:43–44.) She also admitted that when she said "my niece," she was referring to Holsten's daughter. (R. 162:41–43.)

The jury found Dominguez guilty as charged. (R. 162:139–40.) The circuit court entered judgment on the verdict. (R. 162:142.)

Six days after trial, however, the circuit court sua sponte ordered the parties to brief whether the admission of Holsten's unobjected-to electronic messages to Alice was plain error because the statements were inadmissible hearsay. (R. 143.) The circuit court had apparently been under the impression that the electronic communications were not objected to because they were statements of a co-conspirator,[6] but the court was now questioning whether that was the case. (R. 143:2.)

The State argued in its brief that none of Holsten's electronic communications were hearsay because none of them were offered to prove the truth of the matter asserted. (R. 154:4–5.) The State also argued that each one of Holsten's electronic messages, even if they were hearsay, would nevertheless be admissible under at least one exception to the rule against hearsay. (R. 154:4–5.) Dominguez argued generally that "[t]he statements, if offered to show Holsten's

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[6] The electronic communications were not statements of a co-conspirator because they were not "part of the information flow between conspirators intended to help each perform his or her role." *See State v. Savanh*, 2005 WI App 245, ¶ 16, 287 Wis. 2d 876, 707 N.W.2d 549.

mindset, were offered for their truth as it relates to the State's assertions of that mindset." (R. 151:4.)

The circuit court rejected the State's arguments and concluded that all of Holsten's electronic communications were inadmissible hearsay and that their admission was plain error. (R. 160:15–16.) The court did not address each electronic communication individually. Instead, the court reasoned generally that "Wisconsin broadly defines the term *matter asserted* to include *an expression of a fact, condition, or opinion*." (R. 160:13.) Based on this reasoning, the court held that all of Holsten's electronic communications "meet the definition of hearsay because they were statements expressing a condition and her intent." (R. 160:13.) As for the State's argument that some of Holsten's electronic communication were not actually statements because they did not assert propositions that can be true or false, the circuit court rejected this argument because the State failed to "explain[ ] why it matters whether a statement asserts a fact." (R. 160:12–13.)

The circuit court also rejected the State's arguments regarding hearsay exceptions. The court stated that statements fitting the state of mind exception "are introspective, looking inward, essentially describing her thoughts, feelings, and bodily sensations." (R. 160:13.) The court then concluded that because Holsten's communications were offered to show her intent, they could not fit the state of mind exception. (R. 160:13–14.) The court did not address the present sense impression exception. (R. 160.)

The circuit court further concluded that the error was not harmless. (R. 160:16.) The court therefore reversed Dominguez's conviction and ordered a new trial. (R. 160:18.)

The State filed a petition for leave to appeal (R. 173), which was granted.

STANDARD OF REVIEW

Appellate courts review evidentiary decisions under the erroneous exercise of discretion standard. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). However, "an exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion." *State v. Carlson*, 2003 WI 40, ¶ 24, 261 Wis. 2d 97, 661 N.W.2d 51.

The plain error doctrine is used sparingly and may only be used where an error is fundamental, obvious, and substantial. *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77.

ARGUMENT

I. None of Holsten's 18 electronic communications were hearsay, and they nevertheless would have been admissible even if they were hearsay.

A. Hearsay and its exceptions

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Wis. Stat. § 908.01(3). In contrast, a statement that is not offered for the truth of the matter asserted is not hearsay. *State v. Hanson*, 2019 WI 63, ¶ 19, 387 Wis. 2d 233, 928 N.W.2d 607. And the rule against hearsay does not prohibit all hearsay statements; it prohibits only those hearsay statements that do not fit one of the exceptions of Wis. Stat. §§ 908.03, 908.045, or 908.08.

A hearsay challenge therefore has two steps. The first step is to determine whether an utterance is hearsay at all, i.e., whether it is an out-of-court statement offered to prove the truth of the matter asserted in the statement. *See, e.g.*, *State v. Mercado*, 2021 WI 2, ¶ 40, 395 Wis. 2d 296, 953 N.W.2d 337. If the utterance is hearsay, the second step is to

determine whether it fits within an exception to the rule against hearsay. *See id.*

1. First step: was the statement offered for the truth of the matter asserted?

At the first step, "[t]he question is not whether the evidence might be inadmissible hearsay if it is offered to prove the truth of the matter asserted; rather, the question is whether the evidence is offered for a legitimate reason other than for the truth of the matter asserted." *Hanson*, 387 Wis. 2d 233, ¶ 25. In *State v. Hilleshiem*, 172 Wis. 2d 1, 19, 492 N.W.2d 381 (Ct. App. 1992), for example, a witness stated that police had warned him the defendant had made threats against the witness and his family. The court of appeals held that this statement was not hearsay because it was offered not for the truth of the matter asserted, but to explain why the witness testified in other cases under an alias. *Id.* And in *State v. Medrano*, 84 Wis. 2d 11, 19–20, 267 N.W.2d 586 (1978), a doctor's testimony that he was asked to examine the victim "because she stated she was raped" was not hearsay because it was offered not for its truth, but to explain the reason for the examination.

Relatedly, utterances such as questions or commands are generally not hearsay. In order to be a "statement," an utterance must assert a proposition that can either be true or false. *See, e.g.*, *Baines v. Walgreen Co.*, 863 F.3d 656, 662 (7th Cir. 2017); *State v. Kutz*, 2003 WI App 205, ¶ 41, 267 Wis. 2d 531, 671 N.W.2d 660 ("It is generally true that commands, instructions, and questions are not considered assertions under the federal rule because they are not expressions of a fact, opinion, or condition, but instead are telling someone to do something or asking someone for information.").

This does not mean that the grammatical form of an utterance has controlling weight. *Kutz*, 267 Wis. 2d 531, ¶ 41. Utterances like commands might sometimes implicitly assert

propositions that can be true or false, depending on the speaker's intent. *Id.* ¶¶ 42, 46. In *Kutz*, for example, this Court explained that a witness's statement to her mother, "[i]f I am not home in a half hour come looking for me," might in context have been an implicit assertion that the defendant was dangerous.[7] *Id.* ¶ 47. But the burden is squarely on the party opposing admission to "show that a particular expression of fact, opinion, or condition was intended by the speaker," including presenting evidence of such intent to the circuit court. *Id.* ¶ 46. Finally, statements that indirectly express a state of mind such as anger are generally "not hearsay because the truth of the assertion and the credibility of the declarant are not relied upon. Rather, the fact that the statement was made, regardless of its truth, is relevant to show the speaker's knowledge, intent, or some other state of mind." *People v. Jones*, 579 N.W.2d 82, 88 (Mich. App. 1998) (quoting *State v. Martin*, 458 So. 2d 454, 460–61 (La. 1984)).

2. Second step: does an exception to the rule against hearsay apply?

The second step of the hearsay analysis, assuming an utterance is hearsay, is to determine whether it is nevertheless admissible under an exception to the rule against hearsay. The two exceptions most relevant here are the present sense impression exception, Wis. Stat. § 908.03(1), and the then-existing mental, emotional, or physical condition exception, Wis. Stat. § 908.03(3).

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[7] However, this Court ultimately affirmed the circuit court's decision to admit this statement as nonhearsay because the circuit court reasonably concluded this was not the speaker's intent. The burden was squarely on the defendant, as the party opposing the statement, to prove that the declarant intended the statement to implicitly express that the defendant was dangerous. The defendant failed to prove this was the declarant's intent. *State v. Kutz*, 2003 WI App 205, ¶ 47, 267 Wis. 2d 531, 671 N.W.2d 660.

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Wis. Stat. § 908.03(1). A statement made during a 911 call, for example, may be a present sense impression because the caller is describing an event he or she has just perceived. *See State v. Ballos*, 230 Wis. 2d 495, 505, 602 N.W.2d 117 (Ct. App. 1999).

A then-existing condition, sometimes called "state of mind," is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health." Wis. Stat. § 908.03(3). In a sexual assault prosecution, for example, a victim's hearsay statements requesting that the defendant use a condom and lock the door and statements regarding sexual positions were admissible because they went to the victim's state of mind regarding consent.[8] *State v. Prineas*, 2012 WI App 2, ¶¶ 18–20, 338 Wis. 2d 362, 809 N.W.2d 68. The key is that the statement must express the declarant's state of mind (e.g., feeling of anger, intent or plan, etc.) at the time the statement was made. *See In re Estate of Klawitter*, 2023 WI App 60, ¶ 40, 409 Wis. 2d 696, 998 N.W.2d 579.

Other states have consistently held that statements expressing the declarant's then-existing emotion of anger fit the state of mind exception. In *Commonwealth v. Woollam*, 87 N.E.3d 64, 70 (Mass. 2017), for example, the Supreme Judicial Court of Massachusetts held that a victim's text messages expressing anger at his girlfriend for seeking drugs from the defendant were admissible under the state of mind exception, as they expressed the victim's feeling of anger at the time the

[8] This Court held that these statements were not hearsay at all, but alternatively held that even if they were hearsay, they would be admissible under the state of mind exception.

statements were made. And in *Humphrey v. State*, 185 P.3d 1236, 1250 (Wy. 2008), the Wyoming Supreme Court held that a hearsay statement was admissible under the state of mind exception because it showed the declarant's then-existing emotion of anger toward the defendant. *See also, e.g.*, 4 Clifford S. Fishman & Anne Toomey McKenna, *Jones on Evidence* § 29:1 (7th ed. Nov. 2023 update) (citing the hypothetical statement, "I am so angry at *X* I could spit," as a textbook example of a statement that would fit the state of mind exception).

B. None of the electronic communications were hearsay, but each communication would nevertheless have been admissible, even if hearsay, under at least one hearsay exception.

Each of Holsten's 18 electronic communications to Alice was properly admitted at trial. First, none of Holsten's 18 communications were offered to prove the truth of the matter asserted in the statements. Some of the communications were not statements at all, but rather, were questions or commands that cannot reasonably be interpreted as offering factual assertions. Others were nothing more than insults against Alice and/or boasts about Holsten's relationship with Tom. The State was not seeking to prove the truth of any of these statements. The State was not trying to prove, for example, that Alice was "ugly" (R. 100), or that Alice's decision to not terminate her pregnancy was "goofy shit" (R. 93). Rather, the statements were offered as examples of Holsten's anger toward Alice regarding the pregnancy, which helped to prove Dominguez's intent to kill Alice's unborn child.

Second, assuming arguendo that any of Holsten's electronic utterances were offered to prove the truth of the matter asserted, all 18 of them were nevertheless admissible under the state of mind exception or the present sense impression exception. Most of the utterances are admissible

under the state of mind exception as expression of Holsten's then-existing mental and emotional condition, as they show that she was angry with Alice at the time she made them. Some of the electronic utterances are present sense impressions. Some are admissible under both exceptions.

Each utterance is analyzed individually below.

Exhibit 2: August 16, 2022, message telling Alice she looks "dumb" talking to Tom, that Tom is "nasty," and advising Alice to "get checked and be careful." (R. 89.)

This exhibit was not offered for the truth of the matter asserted. The State had no interest in proving any of the propositions—only in showing that Holsten was angry with Alice and Tom. Wis. Stat. § 908.01(3); *Jones*, 579 N.W.2d at 88.

Even if it were hearsay, this exhibit would nevertheless be admissible under the state of mind exception because it is an expression of Holsten's then-existing anger toward Alice. § 908.03(3); Fishman & McKenna, *supra* § 29:1.

Exhibit 3: August 17 message stating, "tell [Tom] stop being messy [before] I beat both y'all ass"; stating, "[Tom] gone want u to call [the police] he kno how I get"; and stating that Holsten will not leave Tom alone. (R. 90.)

This was not offered for the truth of the matter asserted. The first utterance is not even a statement, but a command. And while it may implicitly assert that Tom is being "messy," the State was not attempting to prove this proposition. The State was also not trying to prove that Holsten would beat up Alice and/or Tom if Tom did not stop being "messy." This demonstrably did not occur—Holsten and Tom resumed dating months before the assault. As for the other statements in this exhibit, it does not matter whether Holsten will or will not leave Tom alone, whether Tom will want to call the police, etc. Rather, the purpose of introducing

this exhibit was to show Holsten's anger toward Alice. § 908.01(3).

If these statements were hearsay, they would fit the state of mind exception because they demonstrate Holsten's then-existing anger toward Alice. § 908.03(3).

Exhibit 5: October 4 message stating, "I swear to god if you don't pick up I'm contacting your dad and telling him everything." (R. 91.)

This exhibit was not offered to prove the truth of the matter asserted. It makes no difference whether Holsten planned to call Alice's father, and the State was not trying to prove this proposition. § 908.01(3).

Even if hearsay, this message is a present sense impression because it reports on Holsten's immediate attempts to contact Alice. § 908.03(1). It also fits the state of mind exception because it demonstrates Holsten's then-existing emotional state toward Alice. § 908.03(3).

Exhibit 6: October 17 message from Tom's phone, responding to Alice's mention of a medical appointment, stating, "don't say shit to me about no appointments yo ass weird and you don't even know who the babies is you just saying Anything what do you think I don't know you were still fucking with dude and you see me I keep a distance." (R. 92.)

This was not offered for the truth of the matter asserted. The State was not trying to prove that Alice was "weird" or that she did not know who the father of her unborn child was. And "don't say shit to me . . ." is not a statement, but a command that contains no implicit assertion of fact, so it cannot be hearsay. § 908.01(1), (3).

Even if this message could be hearsay, it would fit the state of mind exception because it shows Holsten's then-existing mental feeling and anger toward Alice. § 908.03(3). It also goes to motive because rather than considering the

content of the message, the jury would be considering that Holsten was pretending to be Tom in an effort to get Alice to terminate the pregnancy.

Exhibit 7: October 19 message stating, "Girl don't keep a baby a man don't want that's goofy shit," and "now the joke on you and he don't want u." (R. 93.)

This was not offered for the truth of the matter asserted. The State was not trying to prove that Alice's decision not to terminate the pregnancy was "goofy shit" or that Tom did not want Alice. And "don't keep a baby a man don't want" is a command, not a statement. The only potential implicit assertion contained in this command is the assertion that Tom did not want the baby, which also had nothing to do with what the State was trying to prove. Rather, the messages were simply introduced to demonstrate Holsten's anger at Alice for keeping the baby. § 908.01(3).

Assuming arguendo that this message could be considered hearsay, it was nevertheless admissible under the state of mind exception because it demonstrates Holsten's then-existing emotional feeling toward Alice. § 908.03(3).

Exhibit 8: October 19 message asking, "Do you even know the father to the baby," and commanding, "Get rid of the baby." (R. 94.)

This is not hearsay because these utterances are not statements at all—one is a question and one is a command. They do not assert propositions that can be true or false. § 908.01(1), (3).

If this message could be hearsay, it would fit the state of mind exception because it shows Holsten's then-existing mental feeling of anger toward Alice for keeping the baby, helping to explain her motivation for the attack.

Exhibit 9: October 22 message commanding, "Get rid of that baby my man don't even want anything to do with u," and telling Alice, "kill yourself." (R. 95.)

These are primarily not statements, but commands that do not assert any proposition that can be true or false. § 908.01(1). "Get rid of the baby" could arguably have been an implicit assertion that Alice was pregnant, but the State, of course, was not introducing this exhibit to prove that Alice had been pregnant. And the only statement in this exhibit, "my man don't want anything to do with you," was not offered for the truth of the matter asserted because the State was not attempting to prove that Tom did not want anything to do with Alice.

Even if these assertions had been hearsay, they would nevertheless have been admissible under the state of mind exception because they are expressions of Holsten's then-existing anger and animosity toward Alice. § 908.03(3).

Exhibit 10: October 25 message stating that Holsten could have "six of [Tom's] babies and he would never miss an appointment"; that Tom called Alice "weird"; that Holsten and Tom were "laying down with [their] baby"; and that Tom "don't want no child by a bitch he don't kno." (R. 96.)

This was not offered for the truth of the matter asserted because the State was not attempting to prove any of these propositions. It made no difference whether Tom wanted the baby, whether he would or would not miss Holsten's hypothetical future doctor's appointments, whether Holsten and Tom were lying down with their child, etc. Rather, the State introduced these messages merely to show Holsten's anger and ill will toward Alice. § 908.01(3).

Even if they were hearsay, these utterances would nevertheless be admissible under the state of mind exception because they are expressions of Holsten's then-existing mental or emotional feeling of anger toward Alice. § 908.03(3).

Exhibit 12: November 8 message calling Alice "miserable" for "putting a baby on [Tom]" and stating, "if I hear u bring up my name one more time I will be at your apartment door no police or no one will stop me." The message also stated, "My daughters name should have never came out your mouth." Finally, the message also stated that Holsten's friend wanted to date Alice's ex-boyfriend. (R. 97.)

This was not offered for the truth of the matter asserted because the State was not trying to prove any of these propositions. The State was not trying to prove, for example, that Alice talked about Holsten's daughter. As for Holsten's threat to show up at Alice's apartment door, threats like this one are normally not hearsay because the significance of a threat is merely the fact that the statement was made. *See, e.g.*, *United States v. Feliz*, 794 F.3d 123, 132 (1st Cir. 2015) ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." (quoting Fed. R. Evid. 801(c) advisory committee's note)).

Even if these utterances could be considered hearsay, they would nevertheless be admissible under the state of mind exception by showing Holsten's then-existing anger toward Alice, along with her intent/plan. § 908.03(3).

Exhibit 15: November 14 message purporting to be sent by Tom.[9] The message states, "I don't want the baby it's to soon," and admonishes Alice for keeping the baby against Tom's wishes. (R. 98.)

This message was not offered for the truth of the matter asserted because it makes no difference whether Tom wanted the baby. Rather, this statement, like the others, was introduced merely to show Holsten's mental feeling toward

[9] Again, Alice explained that she believed the message was actually sent by Holsten from Tom's phone.

Alice and help explain her motivation for the attack. § 908.01(3).

Even if this message could be considered hearsay, it would nevertheless be admissible under the state of mind exception because it demonstrates a then-existing mental feeling. § 908.03(3).

Exhibit 16: November 18 message stating that Alice will not be able to keep Holsten away from Alice's child; calling Alice "lame"; and telling Alice that Holsten and Tom will stay together. (R. 99.)

These utterances were not offered for the truth of the matter asserted. The State was not trying to prove that Holsten and Tom were going to stay together, nor that Alice would, in fact, be unable to keep her child away from Holsten. Rather, the messages were offered to further demonstrate Holsten's anger and ill will toward Alice for her pregnancy with Tom's child. § 908.01(3).

Even if these messages could be considered hearsay, they would be admissible under the state of mind exception by showing Holsten's then-existing emotion of anger toward Alice, as well as an expression of her intent/plan. § 908.03(3).

Exhibit 17: November 15 text message purporting to be sent by Tom, calling Alice a "weird ugly ass bitch" and stating that Holsten wanted to speak with Alice and was not going to stop calling her. (R. 100.)

This was not offered for the truth of the matter asserted. The State was not trying to prove that Alice was weird or ugly, and the State was not trying to prove that Holsten would continue calling Alice. Rather, these messages were merely offered as yet another example of Holsten's anger and ill will toward Alice resulting from Alice's pregnancy. § 908.01(3).

Even if these messages were hearsay, they would nevertheless be admissible under the state of mind exception because they show Holsten's then-existing emotion of anger toward Alice. § 908.03(3). The statement that Holsten would not stop calling Alice would also be a present sense impression because it reports on an event while the declarant is immediately perceiving the event. § 908.03(1).

Exhibit 20: November 26 message commanding, "don't bring me up to [Tom] talk about that baby." (R. 101.)

This is a command, not a statement. It cannot be hearsay because it does not assert a proposition that can be true or false. § 908.01(1). Even if it can be said that this command implicitly asserts that Alice did bring up Holsten to Tom, this is not what the State was trying to show. Rather, the State introduced this statement as another demonstration of Holsten's anger toward Alice, which goes to motive and intent.

Even if hearsay, this utterance would nevertheless be admissible under the state of mind exception because it shows Holsten's then-existing feeling of anger toward Alice. § 908.03(3).

Exhibit 21: November 30 message (sent hours before the attack) stating, "check fb this [Tom]." (R. 102.)

"Check fb" is a command, not a statement. It does not assert any proposition that can be true or false. Additionally, this message was not offered to prove the truth of the matter asserted because the State was not trying to prove that it was Tom who sent this message. On the contrary, the State's position was that Holsten, not Tom, sent this and all the other messages. § 908.01(1), (3).

Exhibit 22: November 30 message (sent hours before the attack) purporting to be sent by Tom, stating, "[Holsten] a part of me and baby I have u a cry baby." (R. 103.)

This message was not offered for the truth of the matter asserted. The State was not trying to prove that Tom loved Holsten or that Alice was a "cry baby." Rather, the reason this message was offered was to show that Holsten was angry with Alice. § 908.01(3).

Even if it were hearsay, this message would be admissible under the state of mind exception as an expression of a then-existing emotional feeling of anger at Alice. § 908.03(3).

Exhibit 23: November 30 message (sent hours before the attack) stating, "I messaged your dad so did [Tom]." (R. 104.)

This message was not offered for the truth of the matter asserted because it made no difference whether Holsten and/or Tom messaged Alice's father, and the State was not attempting to prove that Holsten and/or Tom messaged Alice's father. § 908.01(3).

Even if this message were hearsay, it would be admissible as a present sense impression because it reports on Holsten's immediate observation regarding an event that had just occurred. § 908.03(1).

Exhibit 26: November 30 message (sent approximately 10–15 minutes after the attack) stating, "stop lying [about] me [Alice] I'm in Chicago." (R. 105.)

This message could not have been offered to prove the truth of the matter asserted. The State, of course, was not trying to prove that Holsten was in Chicago. On the contrary, the State's theory of the case depended on proving that Holsten was *not* in Chicago. This message, combined with phone and Snapchat records showing that Holsten and Dominguez were in fact at the scene of the crime, was used to show consciousness of guilt. § 908.01(3). The statement was introduced to prove its falsity, not its truth.

Even if this statement could be considered hearsay despite the State actively trying to prove that the matter it asserted was *not* true, it would nevertheless be admissible as a present sense impression because it reports on the declarant's immediate observation regarding her own location. § 908.03(1).

Exhibit 27: November 30 message (sent approximately 10–15 minutes after the attack) asking, "wtf are you even talking about." (R. 106.)

This is not a statement, but a question, and it does not appear to explicitly or implicitly assert any proposition that can be true or false. It therefore cannot be hearsay. § 908.01(1), (3).

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For all these reasons, each one of Holsten's 18 electronic out-of-court utterances to Alice was properly admitted. The circuit court was correct that, generally, the matter asserted by a statement might include an expression of fact, condition, or opinion. But this general observation does not lead to the specific conclusion that any of Holsten's electronic communications were offered to prove the truth of the matters asserted in the communications. As discussed above, some of the communications asserted no propositions at all, and the State did not introduce any of them to prove the truth of the matter asserted. Finally, since the statements were offered to show Holsten's then-existing emotion of anger toward Alice, they would have been admissible even if they had been offered to prove the truth of the matters asserted in the messages.

II. If the admission of any of Holsten's electronic communications was error, it was not plain error, and any error nevertheless was harmless.

A. Plain error

The plain error doctrine, codified in Wis. Stat. § 901.03(4), permits courts to "review errors that were otherwise waived by a party's failure to object." *Jorgensen*, 310 Wis. 2d 138, ¶ 21. However, a plain error is not just any error; it is an error that is "obvious and substantial," and is "so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *Id.* (quoting *State v. Sonnenberg*, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984)).

"Courts should use the plain error doctrine sparingly [—f]or example, 'where a basic constitutional right has not been extended to the accused.'" *Jorgensen*, 310 Wis. 2d 138, ¶ 21 (citation omitted). And the defendant has the burden of proving that an unobjected-to error is an obvious, substantial, and fundamental error. *Id.* ¶ 23.

In this case, invocation of the plain error doctrine was not appropriate for two separate reasons. First, as explained in detail above, it is at a minimum reasonably debatable that Holsten's electronic communications were admissible. Therefore, the error was not so obvious, fundamental, and substantial as to require a new trial despite Dominguez's non-objection to any of this evidence. *See Jorgensen*, 310 Wis. 2d 138, ¶ 21.

Second, and more importantly, Dominguez has another reasonable avenue to raise her claim—ineffective assistance of counsel. The plain error doctrine is to be used "sparingly." *Jorgensen*, 310 Wis. 2d 138, ¶ 21. Therefore, the existence of a reasonable avenue for Dominguez to raise her claim should counsel against its use here. There is no barrier to Dominguez

asserting, in a postconviction motion, that her trial counsel was ineffective for not objecting to these statements.

Ineffective assistance is the better framework for this claim because, as with any ineffective assistance of counsel claim, there is always the chance that counsel had a good reason for not objecting to at least some of the evidence. *See, e.g.*, *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). For example, it could be that trial counsel's strategy was to pin the blame on Holsten rather than Dominguez, and that counsel's non-objection to some or all of the evidence was motivated by that strategy.[10] This would make a plain error determination especially inappropriate. "[T]he 'plain error' doctrine does not ride to the rescue when the choice has been made deliberately." *United States v. Boyd*, 86 F.3d 719, 722 (7th Cir. 1996).

Because invocation of the plain error doctrine was not necessary in order for Dominguez to have her claim heard, its use in this case did not comply with the Wisconsin Supreme Court's mandate to use it "sparingly." *Jorgensen*, 310 Wis. 2d 138, ¶ 21.

B. Harmless error

Even if this Court concludes that some of Holsten's electronic communications were hearsay, and that the error was "fundamental, obvious, and substantial," the State may still show that any error was harmless. *Jorgensen*, 310 Wis. 2d 138, ¶ 23. "For an error to be harmless, the party who benefitted from error must show that 'it is clear beyond a reasonable doubt that a rational jury would have found the

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[10] Indeed, trial counsel argued in closing that Holsten was "the elephant who is not in this courtroom" and asserted, "There was a very significant amount of evidence that you have been presented with against [Holsten] and very little against Cynthia Dominguez." (R. 162:109.)

defendant guilty absent the error.'" *State v. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362 (citation omitted).

Here, given the strong evidence of Dominguez's guilt, any error in admitting Holsten's electronic communications was harmless. As discussed above, Alice testified in detail about the facts of the assault. She explained that Dominguez, along with Holsten, physically ambushed her in a parking lot. (R. 141:58–59.) Snapchat records confirmed that Dominguez was at the scene of the crime when it occurred, then left the scene immediately after the crime. (R. 161:110–14.) Shortly after the attack, Dominguez even sent a Snapchat message stating, "Now y'all know not to talk about my niece. (R. 110:1; 162:28.) And Dominguez admitted that this was a reference to Holsten's daughter. (R. 162:41–43.)

As for Dominguez's knowledge that the plan was to kill Alice's unborn child, Alice testified that Dominguez was present when Holsten said, "I don't want you to have this baby," then commanded Dominguez to kick Alice in the stomach. (R. 141:59.) The admission of these statements was not challenged by the circuit court, but in any event, they are not hearsay because they are statements of a co-conspirator made during the course of and in furtherance of the conspiracy. Wis. Stat. § 908.01(4)(b)5.

And aside from any of Holsten's statements, common sense leaves no doubt as to Dominguez's intent. Dominguez physically attacked a woman she knew was pregnant, threw her to the ground, and kicked her in the stomach over and over again while the victim repeatedly yelled that she was pregnant. (R. 141:67, 69–70.) The only rational explanation of Dominguez's actions is that she was trying to kill Alice's unborn child. Therefore, any error in admitting the electronic statements was harmless.

Finally, as discussed above, all 18 electronic communications must be analyzed individually. Since it is clear beyond a reasonable doubt that Dominguez would have been found guilty absent the electronic communications, if this Court concludes that one or more of the statements was admissible, this would only strengthen the State's harmless error argument. Any error in admitting some or all of the electronic statements was harmless. *Deadwiller*, 350 Wis. 2d 138, ¶ 41.

CONCLUSION

This Court should reverse the circuit court's order vacating the judgment on the verdict and ordering a new trial.

Dated this 21st day of June 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 6,856 words.

Dated this 21st day of June 2024.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 21st day of June 2024.

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