SUPREME COURT NO. 17-0118
POLK COUNTY NO. FECR297552

IN THE SUPREME COURT OF IOWA

STATE OF IOWA
Plaintiff-Appellee,

v.

ANTHONY HARRIS
Defendant-Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE PAUL SCOTT, DISTRICT COURT JUDGE

REPLY BRIEF FOR APPELLANT

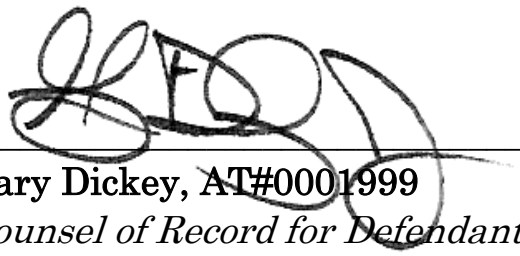
Gary Dickey
Counsel of Record
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@dickeycampbell.com

PROOF OF SERVICE & CERTIFICATE OF FILING

On February 3, 2018, I served this brief on the Defendant at his last known address in Des Moines and all other parties by EDMS to their respective counsel:

Attorney General
Criminal Appeals Division
Hoover Building
Des Moines, Iowa 50319
(515) 281-5976

I further certify that I did file this proof brief with the Clerk of the Iowa Supreme Court by EDMS on February 3, 2018.



Gary Dickey, AT#0001999
Counsel of Record for Defendant-Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@dickeycampbell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN ALLOWING THE INTRODUCTION OF INADMISSIBLE HEARSAY FROM ABSENT WITNESSES IMPLYING THAT THEY PURCHASED DRUGS FROM HARRIS

C.S.I. Chemical Sales, Inc. v. Mapco Gas Products, Inc., 557 N.W.2d 528 (Iowa Ct. App. 1996)
Katteakos v. Untied States, 328 U.S. 750 (1946)
State v. Dullard, 668 N.W.2d 585 (Iowa 2003)
State v. Huser, 894 N.W.2d 472 (Iowa 2017)
State v. Mitchell, 450 N.W.2d 828 (Iowa 1990)
State v. Mount, 422 N.W.2d 497 (Iowa 1988)
State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013)
State v. Plain, 898 N.W.2d 801 (Iowa 2017)
State v. Royer, 436 N.W.2d 637 (Iowa 1989)
State v. Sowder, 394 N.W.2d 368 (Iowa 1986)
State v. Tompkins, 859 N.W.2d 631 (Iowa 2015)
State v. Ware, 205 N.W.2d 700 (Iowa 1973)
United States v. Resnick, 2016 WL 4039701 (7th Cir. July 28, 2016)
Weiler v. United States, 323 U.S. 606 (1945)

Iowa R. Evid. 5.703

REPLY ARGUMENT

I. THE STATE CANNOT IDENTIFY ANY LEGITIMATE BASIS FOR THE ADMISSION OF TESTIMONY ABOUT CONVERSATIONS WITH ABSENT WITNESSES IMPLYING THEY PURCHASED DRUGS FROM HARRIS

The State does not dispute that Officer Shawn Herman's testimony implied that the two non-testifying witnesses told him they purchased drugs from Harris. And, the State acknowledges, as it must, that under *State v. Dullard*, 668 N.W.2d 585, 590 (Iowa 2003), testimony about nonverbal conduct offered to imply an assertion of fact constitutes hearsay under Rule 8.401. (State's Proof Br. at 14). Recognizing the clear error, the State suggests that the testimony was not offered to prove the truth of the matter asserted, but instead it was offered to explain the officers' "responsive conduct." (State's Proof Br. at 14). As a fallback position, the State argues that the testimony was admissible under Iowa Rule of Evidence 5.703 as facts relied upon by the officers to form their expert opinions. (State's Proof Br. at 14-15). Both contentions are borderline frivolous. The implied hearsay testimony was not necessary to explain the officers' subsequent conduct. Moreover, the officers were testifying as fact-witnesses;

not experts. Accordingly, the testimony constituted inadmissible hearsay and should not have been admitted.

A The purpose of the testimony implying that non-testifying witnesses purchased drugs from Harris was not to explain the law enforcement officers' responsive conduct

The State contends that the testimony implying that non-testifying witnesses purchased drugs from Harris was not offered to prove the truth of the implied assertion. (State's Proof Br. at 14). Instead, the State claims the testimony was offered "as responsive conduct to explain the basis for the traffic stop." (States' Proof br. at 14). Yet, in order for a statement to be admissible as showing responsive conduct, it must not only tend to explain the responsive conduct, but the conduct itself must be relevant to some aspect of the State's case. *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). "In essence, the court must determine whether the statement is truly relevant to the purpose for which it is being offered, or whether the statement is merely an attempt to put before the fact finder inadmissible evidence." *Id.* The testimony in this case falls into the latter category.

Two recent cases illustrate the "responsive conduct" analysis involving disputed hearsay testimony. In *State v. Tompkins*, 859 N.W.2d 631 (Iowa 2015), an officer testified that a witness stated a domestic abuse defendant pushed his girlfriend. *Id.* at 636. The Iowa Supreme Court concluded the officer's account of the declarant's out-of-court statement constituted inadmissible hearsay because it "went beyond the mere fact that a conversation occurred and instead actually stated what the witness said." *Id.* The court further concluded the out-of-court declaration recounted by the officer "did not merely explain the investigation" but instead "directly challenged [defense] counsel's assertion" to the contrary. *Id.*

More recently, in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), an officer testified that he had a conversation with two witnesses about the source of a mark on the wall. *Id.* at 811. Without divulging the witnesses' actual statements, the officer testified that he learned from their conversation that it was a pair of bolt cutters thrown by the defendant that caused the mark. *Id.* The Iowa Supreme Court held that the testimony constituted

inadmissible hearsay rather than evidence explaining responsive conduct because the "State did not ask why the officer took the bolt cutters into evidence but instead what caused the mark." *Id.* at 813.

From *Tompkins* and *Plain* it follows *a fortiori* that the officers' testimony implying that witnesses had told them they purchased drugs from Harris constitutes inadmissible hearsay. The testimony was wholly unnecessary to explain the officers' subsequent conduct. The prosecutor's questions expressly asked what Officer Herman learned from "speaking with Mr. Tynnush" and whether his "observations were confirmed." (11/16/16 Tr. of Herman, Wilshusen at 21). At no point during the examination did the prosecutor ask the officer to explain his response to his encounter with Tynnush. Instead, the clear purpose of the questions was to inquire whether the witnesses told the Officer Herman the purchased drugs during the transaction. Its only relevance was to bootstrap Officer Herman's belief that he observed a hand-to-hand drug transaction—which is precisely the reason it is inadmissible. When an "investigating officer

specifically repeats a [witness's] complaint of a particular crime, it is likely that the testimony will be construed by the jury as evidence of the facts asserted." *State v. Mount*, 422 N.W.2d 497, 502 (Iowa 1988) *overruled on other grounds by State v. Royer*, 436 N.W.2d 637 (Iowa 1989).

B. Iowa Rule of Evidence 5.703 is not a Trojan Horse to overcome otherwise inadmissible hearsay evidence

As a fallback position, the State argues that the hearsay testimony was admissible under Iowa Rule of Evidence 5.703[1] as evidence relied upon by the officers in forming their expert opinions. (State Proof Br. at 15). This argument fails on multiple levels. For starters, Officers Herman and Wilshusen were not offering any expert opinions when they were asked about their

---

[1] Iowa Rule of Evidence 5.703, which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Iowa R. Evid. 5.703.

conversations. To the contrary, they were testifying as fact witnesses and relaying their conversations with the participants to the purported drug transactions. Second, the prosecution offered no foundation to establish that the implied hearsay statements were the kind of information reasonably relied upon by experts in their field. Third, even if proper foundation existed, "the evidence is only admitted to explain the basis for the expert opinion." *C.S.I. Chemical Sales, Inc. v. Mapco Gas Products, Inc.*, 557 N.W.2d 528, 531 (Iowa Ct. App. 1996). "It is not admitted for its truth." *Id.* Most importantly, Rule 5.703 merely allows an expert to rely upon otherwise inadmissible evidence to form his or her opinion. It does not automatically open the door to introduction of the inadmissible evidence at trial. *State v. Neiderbach*, 837 N.W.2d 180, 205 (Iowa 2013) ("Rule 5.703 is intended to give experts appropriate latitude to conduct their work, not to enable parties to shoehorn otherwise inadmissible evidence into the case"). To hold otherwise would allow the State to avoid having to call a cooperating witness in any drug case simply by asking a narcotics officer to testify about his or her

opinion of drug activity and professing his reliance upon the witness's hearsay statements. In short, the use of an expert opinion as a Trojan Horse to introduce hearsay statements is not allowed.

II. THE PROPER STANDARD FOR HARMLESS ERROR ANALYSIS IS WHETHER THE ERRONEOUS ADMISSION OF THE HEARSAY STATEMENTS INFLUENCED THE JURY'S VERDICT

The State attempts to minimize the erroneous admission of the implied hearsay testimony on the basis that it was cumulative. (State's Proof Br. at 20). The implication is that if the prosecution "presents enough evidence of guilt it can then for good measure top off that evidence with evidence that violates a constitutional right, ignores evidentiary rules, and tempts the jury to abdicate its role as factfinder." *United States v. Resnick*, 2016 WL 4039701 at *2 (7th Cir. July 28, 2016) (Bauer, Posner, Flaum and Kanne, dissenting from denial of rehearing en banc). Yet, that is not how the harmless error standard works in Iowa. It bears repeating that for non-constitutional errors such as the erroneous admission of hearsay evidence, prejudice is presumed unless the contrary is affirmatively established by the State.

State v. Sowder, 394 N.W.2d 368, 372 (Iowa 1986). Moreover, Iowa follows the harmless error standard set forth in *Katteakos v. Untied States*, 328 U.S. 750 (1946). *See State v. Ware*, 205 N.W.2d 700, 704 (Iowa 1973). As explained in *Katteakos*, under harmless error analysis:

> the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Katteakos, 328 U.S. at 764. An appellate court is "not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because [it thinks] the defendant was guilty. *Weiler v. United States*, 323 U.S. 606, 611 (1945). "That would be to substitute [its] judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility." *Id.* Rather, error is harmless only if the court is sure the evidence "*did not influence the jury*, or had but very slight effect." *Katteakos*, 328 U.S. at 764; *see also State v. Huser*, 894 N.W.2d 472, 497 (Iowa 2017).

In light of the fact that the hearsay testimony touched directly on the ultimate issue, the error was highly prejudicial. Additionally, the State's evidence was not particularly strong. In these circumstances, the State cannot establish that the error did not influence the jury's verdict. Accordingly, Harris is entitled to a new trial.

CONCLUSION

For the reason set forth above, Anthony Harris requests this Court reverse his convictions.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's proof reply brief was $6.00, and that that amount has been paid in full by me.

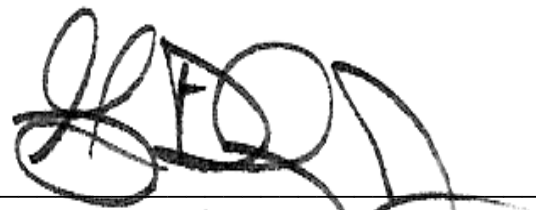
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(*g*)(1) or (2) because:

> [x] this brief contains 1,584 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1) or

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(*e*) and the type-style requirements of Iowa R. App. P. 6.903(1)(*f*) because:

> [x] this brief has been prepared in a proportionally spaced typeface using Century in 14 point.



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@dickeycampbell.com