COURT OF APPEALS DECISION DATED AND FILED

April 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2012AP2693-CR **Cir. Ct. No. 2009CF1121**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TEDDY W. BIEKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J. and Reilly, J.

¶1 BROWN, C.J. This appeal concerns a joint murder trial that should never have proceeded jointly. Relying upon the "interlocking confessions" doctrine, which had been abrogated by the United States Supreme Court more than

twenty years earlier, the circuit court denied Teddy Bieker's motion to sever his trial from the trial of his codefendant John Navigato, despite the fact that the State intended to introduce Navigato's out-of-court statements as evidence against both defendants. The same happened to Navigato, as we explain in our separate opinion concerning his appeal—the court denied Navigato's motion to sever the trials but allowed the State to introduce out-of-court statements by Bieker as evidence against Navigato.

¶2 This significant procedural defect meant that Bieker had to defend against Navigato's pretrial statements to police, without any opportunity to cross-examine Navigato, in violation of his Sixth Amendment rights.

> [W]here a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant … the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him.

Cruz v. New York, 481 U.S. 186, 193-94 (1987). The failure to sever also violated the state statute that codifies this principle:

> The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge *shall* grant a severance as to any such defendant. [Emphasis added.]

WIS. STAT. § 971.12(3) (2011-12).[1]

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[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 This error had a domino effect. It led to the admission of numerous out-of-court statements by Navigato concerning Bieker's motive for the crime. It may have compelled Bieker to testify against himself. And it left Bieker unable to confront Navigato, who did not testify. The errors were magnified because Bieker's trial counsel did not make any hearsay or relevance objections to the admission of Navigato's statements as evidence against Bieker and did not seek any instructions to the jury alerting them to the fact that some of the evidence was not to be considered in assessing Bieker's guilt.

¶4 In the context of this trial, in which the only issues were intent, we cannot say beyond a reasonable doubt that these compounding errors were harmless. There is no way to know from this record whether, in a separate trial, the jury would have found that Bieker committed the *charged* crimes. So, we must reverse and remand for new proceedings.

The Crimes

¶5 Just after midnight on October 13, 2009, Susan Leydel called 911 to report that armed attackers were in her home threatening her life and had already harmed her husband, who was lying on her kitchen floor. She reported that the men were "still standing there with guns" while she made the call, that they knew she was calling the police, and that she knew one of the men, Navigato. The men, she said, had demanded drugs and money and were ransacking the house. While she was still on the phone with the dispatcher, the men exited the house through the back door and she heard tires squeal. She told the dispatcher, "this idiot John Navigato, was a friend of my husband for 30 years and they had a falling out and this is how he repays him."

¶6 Despite medical rescue efforts, Robin Leydel never recovered and was pronounced dead at the hospital at 1:20 a.m., the cause of death being loss of blood from a gunshot wound to the chest. The bullet that killed Leydel was from a small caliber weapon.

¶7 Kenosha county sheriff's deputies had been dispatched to the Leydel residence as soon as Susan called 911. One of the responding deputies saw a vehicle driving away from the residence "at a high rate of speed." He followed the speeding vehicle, until another deputy joined in the pursuit, and together they pulled the car over.

¶8 The men in the car were identified as Richard Beeter (the driver), Navigato (in the front passenger seat), Brian Suchecki (in the rear seat behind the driver), and Bieker (in the rear seat behind the passenger). Deputies found three weapons and numerous prescription pill bottles in the vehicle. A .22 caliber shell casing was recovered from within the floor of the entry way at the Leydel residence.

¶9 It so happened that the Kenosha county sheriff had attended high school with the victim Leydel and one of the suspects, Navigato. That night during the investigation, the sheriff encountered Navigato in custody in a squad car, and though he asked no questions, Navigato began telling the sheriff his version of what had happened. Navigato said he went to Leydel's home to confront him about selling drugs to Navigato's daughters. According to Navigato, Leydel started fighting, and "Teddy" (i.e., Bieker) shot Leydel in Navigato's defense.

¶10 Later that evening officers interviewed all four of the suspects. The driver, Beeter, claimed that he had just given his friends a ride and knew nothing

about what went on in the house. He asked to speak to a lawyer. Suchecki gave a longer statement, explaining that Navigato had announced they were going to confront Leydel about stealing Navigato's marijuana plants. Beeter gave them a ride because none of the other men had a working car. All but Beeter took one of Navigato's weapons, and Beeter drove them to Leydel's house. Navigato went to the door with his gun, and almost immediately Leydel and Navigato started fighting. Suchecki and Bieker joined him at the entryway, then moved into the kitchen.

¶11 Suchecki did not remember hearing any gunshots, but in the kitchen he saw Leydel fall to the floor, and he believed Leydel had been shot with Bieker's .22 caliber rifle, based on the size of the injury to his chest. Suchecki admitted that he had threatened Susan with his gun and demanded drugs and money. He claimed, however, that the men had never planned to kill anyone. He said he did not know why Bieker shot Leydel; "the only thing I can think of is it was just an accident."

¶12 Navigato's statement that evening was consistent with Suchecki's in many respects, but Navigato continued to claim that the motive for the confrontation was that Leydel had been selling drugs to Navigato's daughters. Navigato asserted that he came in an armed group because Leydel had threatened to kill him in the past and he expected there would be other people at Leydel's home. After opening the door, Navigato claimed, Leydel struck him with a club or walking stick. Navigato said that although he heard no gunshots, once he saw Leydel's chest wound he knew that a shot had been fired and that "it had to have come from behind me." Specifically, Navigato said that based upon the size of the wound, Leydel must have been shot with the .22 caliber rifle, which Bieker had been carrying. During his interview, Navigato said, "[I]f I was to—to bet on it

(pause) I'd tell ya the kid freaked out. Seeing me get clubbed," and therefore fired the shot.

¶13 Bieker's statement was shorter than Navigato's or Suchecki's. Bieker reported that at the time of the shooting he was very drunk because he had been drinking a lot of alcohol after breaking up with his girlfriend that day. He remembered getting into Beeter's car with the other men, but claimed he did not know where they were headed. He said, "I vaguely remember going to a house…. I vaguely remember a shot going off…. I believe I was standing in the doorway of the house when I fired the shot. I don't know why I fired the shot."

¶14 A couple of days after the shooting, a prisoner, Brian Reichardt, approached police, claiming to have spoken with Bieker in the jail on the night of his arrest. Reichardt reported that Bieker "said that he and some other guys were drinking and decided to go to some guys house to do a home invasion" and that "the old man with the new car told him that 'if you got balls, pull the trigger,' 'he won't die if you don't shoot him right on.'"

The Pretrial Proceedings

¶15 In December, the district attorney filed an information charging all four men as parties to the crimes of first-degree intentional homicide, armed burglary, and armed robbery. During discovery the State provided notice of its intent to use "all statements made by the defendants to any law enforcement officers or civilians," and the defense obtained copies of the statements of Reichardt and Navigato, as well as police reports that recorded certain statements made by Beeter and Navigato's statements to the sheriff.

¶16 In February 2010, Suchecki pled guilty in a deal with the prosecution, under which he would "cooperate and testify truthfully for the prosecution" against the other men, in exchange for a reduction in his charges. Soon after Suchecki pled guilty, the other defendants moved to sever.

¶17 The State consented to severance of Beeter's trial, stating that "given the nature and circumstances surrounding this case and the statements made by defendants Bieker and Navigato, a ***Bruton***[2] problem could exist regarding defendant Beeter." However, on the grounds that Bieker and Navigato gave essentially "interlocking" statements and did not have "antagonistic or inconsistent" defenses, the State argued, there was no basis to sever their trials.

¶18 After hearing arguments, the court denied severance for Navigato and Bieker, reasoning that "because I think the statements are interlocking, I don't think one is any more inculpatory than the other. They are not inconsistent on material points." Just before trial, with a new judge having rotated in, Bieker's counsel raised the issue again, in the context of discussing certain out-of-court statements by Navigato that the State might seek to introduce at trial. The judge declined to reconsider the severance issue, saying, "I'm not going to sever this case at this time…. I think [the severance decision] was correctly made and we might not even have this issue if Mr. Navigato testifies."

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[2] In ***Bruton v. United States***, 391 U.S. 123, 136-37 (1968), the Supreme Court held that the introduction of a nontestifying codefendant's confession implicating the defendant was a Confrontation Clause violation that could not be remedied by jury instructions limiting use of the evidence.

The Trial

¶19 In the end, Navigato did not testify and his out-of-court statements became important parts of the State's proof of Bieker's intent. The State's opening termed Navigato the "navigator" of these crimes and identified "the threshold issue in this case" as "intent to kill." The State ended its opening by stating that "maybe we concede that [while still at Navigato's house] they weren't planning to necessarily kill," but contending that

> the evidence will show that the commission of the intent to kill occurs [in] the instant preceding the fatal act and … that it is a natural and probable consequence of the attempt to commit a robbery … that [if] you take loaded guns and somebody resists, somebody's going to get shot.[3]

¶20 The defendants' opening statements characterized the killing as "tragic" and unintentional. Bieker's attorney emphasized the lack of any evidence that the parties discussed killing Leydel. The question for the jury, Bieker suggested,

> what did [Bieker] believe, what was his understanding … when they were going to the Leydel residence as to what was to occur. Was it just to have Mr. Navigato have an argument with Mr. Leydel or were they there to commit some type of a crime … that he's willing to be a part of…?

¶21 Though Navigato did not testify, the entirety of his written statement to police was read aloud to the jury by a police detective, and the transcript of his police interview was referred to throughout that detective's testimony. During that testimony, the State drew attention to Navigato's repeated statements that Bieker

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[3] The court sustained an objection to this portion of the opening as inappropriately argumentative and instructed the jury that there were to be no arguments during openings.

shot Leydel because he was "protecting" Navigato and "defending [Navigato's] life." The detective's testimony also described the statements that Navigato made to the sheriff naming Bieker as the shooter.

¶22 Suchecki was a key State witness, essentially reiterating what he told investigators during his interviews and written statements, that Navigato's reason for going to Leydel's home that night was "to get payback" from Leydel for stolen marijuana plants. Suchecki's understanding was that Navigato wanted to shoot out Leydel's windows, confront Leydel, and get money from him. At the Leydel residence, Suchecki and Bieker were supposed to "back up" Navigato. Navigato got out of the car first and went up to the side door with his shotgun, and when Leydel answered the door, they started fighting. Suchecki and Bieker got out of the car and went to the side door, following Navigato as he pushed Leydel into the house and up a stairwell.

¶23 Suchecki said that when they reached the kitchen at the top of the stairway, he noticed that Leydel was bleeding from the shoulder. Suchecki could not remember hearing a shot but remembered seeing Bieker emerge from the threshold into the kitchen with his gun held high. Leydel started going down, and Navigato reached down to help him to the floor.

¶24 When Susan emerged from upstairs, Suchecki said he "snapped and … yelled at her," demanding drugs and money, because "that's what [Navigato] wanted." He went upstairs to rummage around and found some marijuana, and he also took some prescription pills from downstairs. Soon after he came back downstairs, Navigato said "let's go," and the men left.

¶25 On cross-examination, Suchecki said that to his knowledge, Bieker "had no reason" to shoot Leydel. He confirmed what he told police about why Bieker fired the shot: "[I]t was just an accident."

¶26 Reichardt testified for the State regarding Bieker's alleged out-of-court statements to him in jail that the crime was "a home invasion ... [that] went bad" and that Beeter "told him if he got balls to pull the trigger." Bieker's attorney attempted to impeach Reichardt with the suggestion that his statement would benefit him in his own criminal case or as a paid informant.

¶27 During the defense case, Bieker testified on his own behalf. His story was similar to what he had told the investigators the night of Leydel's death but with more detail. He met Navigato because he knew Navigato's daughters, and he had moved in with Navigato when he lost his job and needed a place to stay, a few months before the crimes. In October he had started a construction job, but on the day of the crimes he did not have to work. He left the house at 11 or 11:30 a.m. to get his paycheck. Navigato called while he was out to ask him for money and to pick up some liquor and cigarettes, which Bieker did. He dropped off those items around 3 or 4 p.m., and then left again to visit his girlfriend, but while he was on the way there, they got into an argument and he decided to return home. He got back to Navigato's by 5:30 or 6 p.m.

¶28 He said that when he got back, Navigato was on the phone, and Suchecki and Bieker decided to go get some beer. They got home with the beer in less than an hour, and then sat down and started drinking. Navigato was "yelling" about how someone needed "to make things right." He, Navigato, and Suchecki spent the evening watching football, with Navigato on and off the phone throughout the night and continuing to say things like, "[H]e needs to make things

right." Bieker claimed he did not know whom or what Navigato was talking about until later that night.

¶29 Finally, Bieker stated, "[A]t one point in the night [Navigato] said we're going there tonight, we're going to [Leydel's]…. I'm going to confront him. He needs to make this right." Navigato said they would take guns, which Bieker claimed "shocked" him. Bieker testified, "I don't remember if it was myself or Brian Suchecki but somebody asked why do we need to take guns. [Navigato's] reply was 'cause I know Robin. I don't know how many people are going to be there. It's just to make sure we are safe." Bieker further testified that he did not know what the dispute was between Navigato and Leydel and that he never heard anything about Leydel selling drugs to his daughters or stealing marijuana.

¶30 Once Beeter arrived with his car, Navigato said, "[G]rab the guns, we are going." Bieker asserted that Suchecki handed him the .22 rifle, and that he assumed it was loaded because there were "always weapons in the front room" of Navigato's home and "they [were] always loaded." He had fired the .22 rifle before and knew that it, in particular, was always loaded.

¶31 Bieker claimed at trial that as they left Navigato's house he still was not "even sure of why" they were going. He got into the car along with Navigato and Beeter and they started driving. When they arrived, Navigato got out first and went to the door, which was blocked from Bieker's view. Suchecki said, "[L]et's go," and got out of the car; Bieker did the same and followed him toward the door. Suchecki stopped in the doorway, with Bieker behind him, and Bieker could now see that Navigato and Leydel were at the bottom of a stairwell, "in each other's faces." They seemed to be "shoving each other back and forth." Then, he

testified, "I remember hearing what sounded like a gunshot." Leydel and Navigato moved up the stairs, and Suchecki and Bieker followed them, entering the kitchen. He saw Leydel lying on the ground in the kitchen and heard Suchecki demanding drugs and money. A woman came into the kitchen and was yelling and appeared to be on the phone. Finally Navigato said, "[L]et's go," and the men left.

¶32 Bieker said that he learned Leydel had been shot and killed in his police interview and that he felt shocked and sick and threw up shortly after finding that out. He claimed that when they left Navigato's home there was no plan to rob anyone, or to break into anyone's home, or to kill anyone. He said that he made no decision to kill or to fire the weapon and that he does not recall pulling the trigger, though he has to assume that he must have because it fired. He denied making the statements Reichardt attributed to him. He acknowledged meeting Reichardt in his cell block but said that when Reichardt asked why he was in, he replied that it was "something serious" that he did not want to talk about. He added that other prisoners told Reichardt, "[M]an, you know what he's in for; it was just on the news."

¶33 In his testimony, Bieker acknowledged that during his police interview he had told police he did not remember much and that his testimony at trial was based on a much clearer recollection. He claimed that he had been "trying to answer" police during the interview but that he remembered better after time passed and he became sober. Blood tests taken that night suggested that at the time of the shooting, Bieker's blood alcohol level was .238, or about three times the legal limit.

¶34 The defense also presented testimony of a firearms expert that the .22 Marlin rifle that killed Leydel was an "extremely unsafe" weapon because of modifications that had been made to it—the stock had been removed and the trigger guard no longer had its original assembly and instead was held in place with a wood screw and some tape. According to the expert, "[T]he floating trigger guard prevents the proper control of the trigger," such that "you do not always know when it will discharge." On cross-examination, however, the expert admitted he was unable to cause the gun to misfire or to fire without pulling the trigger.

¶35 After the close of evidence, the defendants requested that the jury be instructed regarding multiple lesser-included offenses for the first-degree intentional homicide charges. The court determined that only one of the lesser-included charges, first-degree reckless homicide, was appropriate in view of the evidence. The instructions given included that lesser offense, and also included an instruction concerning Reichardt's status as a prisoner and its bearing "on the credibility of the witness." Despite the pretrial discussions about the potential Confrontation Clause issue for Bieker if Navigato did not testify, Bieker did not renew his objection to the joint trial or to the admission of Navigato's out-of-court statements and did not request any special instructions to the jury concerning that evidence.

¶36 In its closing argument, the State repeatedly emphasized Suchecki's word, "payback," as the motive for the crimes. Navigato's desire for payback, getting money from Leydel, provided the logical connection to infer the defendants' intent to rob the Leydels, the State argued. As for the intent to kill, the State pointed out, it was sufficient if Bieker formed that intent right at the moment of pointing the weapon and pulling the trigger. In addition to arguing that

Bieker's intent could be inferred from the shooting itself, the State repeated Navigato's statement to the sheriff that Bieker was the shooter and emphasized what Navigato had told other officers—that Bieker was protecting Navigato.

¶37 After the defense presented theories of accident and recklessness, the State, in its rebuttal, repeated Reichardt's testimony, using it to support the State's theory and characterizing Reichardt's testimony as "the truth of the matter, what was said by Bieker to Mr. Reichardt."

¶38 The jury found Bieker and Navigato guilty of all of the charges. Bieker was sentenced to life imprisonment on the first charge and ten years on each of the three other charges, each sentence consecutive to the others.

The Postconviction Proceedings

¶39 Bieker filed a postconviction motion raising four issues: (1) denial of his severance motion and his prosecution by joint trial violated his rights to due process under the state and federal constitutions and WIS. STAT. § 971.12(3); (2) failing to disclose information about Reichardt's "recent prior lies to law enforcement" violated ***Brady v. Maryland***, 373 U.S. 83 (1963);[4] (3) ineffective assistance of counsel in failing to discover the impeaching information about Reichardt, failing to impeach Reichardt, and failing to object to admission of Navigato's out-of-court statements when Navigato failed to testify; and (4) new evidence (the impeachment evidence against Reichardt) justifying a new trial.

[4] While preparing a postconviction motion, Bieker's appellate counsel learned that Reichardt, the jailhouse informant, had a conviction for obstruction of justice based on lying to law enforcement officers and that trial counsel failed to use that evidence to impeach Reichardt. This is one of the issues raised on appeal. We would dwell at length on this issue, but there is no need.

¶40 At the ***Machner***[5] hearing, Bieker's trial counsel stated that he believed exclusion of Navigato's statements to be crucial to Bieker's defense and that he had not realized, at the time of the hearings on the severance issue, that the "interlocking confessions" law was overturned. As for his failure to renew his request for severance, or to at least request limiting instructions to the jury concerning Navigato's statements, he had no strategic reason for doing so and simply did not think of doing it.

¶41 The circuit court denied the postconviction motion on all grounds. As for the severance issue and defense counsel's failure to object to introduction of Navigato's statements or to renew the severance motion, the court asserted that the defendants' statements were "identical" and that there was "plenty of evidence," such that "[e]ven if [those statements] should not have been allowed," there was no prejudice to Bieker. In other words, the court determined that "even if there was error, it was harmless."

¶42 Bieker appeals.

Analysis

¶43 The "interlocking confessions" doctrine that was the basis for denying Bieker's severance motion was abrogated in 1987. ***Cruz***, 481 U.S. 186. The doctrine, ***Cruz*** announced, is actually the opposite of the law, because similarity between two codefendants' out-of-court statements is at least as damaging to the defense as antagonism between the defenses and therefore at least

[5] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

as problematic under the Confrontation Clause. ***Id.*** at 192. The State concedes that the law required the circuit court to grant Bieker's motion for a separate trial.

¶44 As a threshold issue, though, we note that contrary to the circuit court's labeling these statements "identical," and the State's argument that Navigato's statements "echoe[d] Bieker's trial testimony," these codefendants' statements were not actually identical. They were very similar in all the ways that did not matter, i.e., as to those facts that Bieker admitted himself. But they were materially different on the only question that really mattered: Why Bieker pulled the trigger. Bieker consistently disclaimed any memory of pulling the trigger and insisted he must have done so by accident in the commotion in the stairwell. Suchecki likewise said that he could only surmise that the shooting was an accident. Navigato, on the other hand, beginning with his unsolicited statements to the sheriff, repeatedly speculated that Bieker shot Leydel to defend him—i.e., intentionally.

¶45 Navigato's belief that Bieker shot Leydel to protect him was support for the State's argument that Bieker fired the shot on purpose. Navigato's statements also corroborated the jailhouse informant's claim that Bieker confessed the intentional shooting to him. Thus the situation was just the same as the one described in ***Cruz***:

> In such circumstances a codefendant's confession that corroborates the defendant's confession significantly harms the defendant's case, whereas one that is positively incompatible gives credence to the defendant's assertion that his own alleged confession was nonexistent or false.

Id. Problems such as these are why our state law directs circuit courts to sever trials like this one. WIS. STAT. § 971.12(3).

¶46 The State urges that, despite the fundamental violation of statutory and constitutional law, we should affirm because the error "was harmless beyond a reasonable doubt." If this trial had been about *whether* Bieker shot Leydel, we would agree. Bieker has never denied that fact himself. The defendants were caught red-handed, fleeing the scene, the weapon that fired the fatal shot was beside Bieker's seat in the getaway car, and Bieker admits carrying that weapon to and from the scene. It is no surprise, in view of the evidence, that Bieker all along admitted that the fatal shot came from his weapon. Indeed, had the charge been anything less than first-degree intentional homicide, one wonders if there would have been any trial at all because Bieker might have pled to what he agreed happened.

¶47 But intent to kill Leydel is what Bieker does not admit. And as to that issue, the error here was not harmless. Constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty anyway. ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189. In determining whether an error was harmless, we must consider:

> (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case.

State v. Jorgensen, 2008 WI 60, ¶45, 310 Wis. 2d 138, 754 N.W.2d 77.

¶48 The error here (reliance on the nontestifying codefendant's statements) was not only frequent, it was continuous, infecting every portion of the trial, from the opening statements, through the presentation of evidence, and throughout the closing arguments. It makes sense that the evidence was referred

to so frequently, given that it was important evidence on the only real issue in the case—intent.

¶49 On the issue of Bieker's intent when he pulled the trigger, there was evidence[6] going both ways.[7] On the one hand, there was evidence for the State's theory that Bieker must have pulled the trigger intentionally that night. He went along for the ride to the Leydels' home, loaded rifle in hand, for some sort of confrontation between Navigato and Leydel. His rifle fired the fatal bullet, and even Bieker's own expert said that in his testing he was unable to make the

[6] In this harmless error analysis, we assume for the sake of argument that the State is correct that Bieker's testimony at his trial may be taken into account, despite Bieker's assertion that he was compelled to testify by the Confrontation Clause violation. Neither the United States Supreme Court nor the Wisconsin Supreme Court have determined whether a defendant's trial testimony, at a trial at which he was forced to defend against a nontestifying codefendant's incriminating out-of-court statements, is "illegally obtained" evidence within the meaning of ***Harrison v. United States***, 392 U.S. 219 (1968). Since we conclude that Bieker's testimony does not help the State's harmless error argument, we need not decide this issue.

Similarly, we assume without deciding that we can consider, as well, Suchecki's testimony regarding hearsay statements of Navigato about Bieker. As the State points out, the Supreme Court has clarified that the Confrontation Clause concerns testimonial statements, i.e., statements made during interrogation or other quasi-testimonial situations, rather than in private conversations. ***Crawford v. Washington***, 541 U.S. 36 (2004). This holding has been understood to mean that ***Bruton*** does not apply to nontestimonial statements either. *See, e.g.,* ***United States v. Castro-Davis***, 612 F.3d 53, 65-66 (1st Cir. 2010). Because the error here was prejudicial even if we consider Suchecki's testimony, we need not determine whether some or all of that hearsay would have been admissible against Bieker in a separate trial under the rules of evidence.

The problem is that even if the State is correct that we need not consider whether Bieker was compelled to testify by the ***Bruton*** violation, or how much of the nontestimonial hearsay of Navigato would have come in at a separate trial, the fundamental constitutional error here was still prejudicial.

[7] Which is why, on remand, there can be no double jeopardy issue. *See* ***United States v. DiFrancesco***, 449 U.S. 117, 131 (1980) (retrial of defendant after he overturns conviction on procedural grounds on appeal raises no concerns under the Double Jeopardy Clause).

weapon fire without pulling the trigger. According to Reichardt,[8] he admitted at jail that he shot Leydel, at Beeter's urging: "He won't die unless you shoot him right on."

¶50 On the other hand, if the jury believed Bieker, he never said any such thing to Reichardt. And the evidence established that Bieker was out of the house for most of the day, while Suchecki and Navigato were having their discussions about "payback." Once Bieker got home, he began drinking alcohol, and he drank heavily for hours, while Navigato raged on and off about "making things right" with somebody. When Navigato told him to leave, he took the rifle Suchecki handed him, and he left too. That rifle had a trigger assembly that floated loosely and had to be held steady with the hand. He stood nearby as Navigato and Leydel fought in the entryway, in close quarters, and he heard a shot, not even realizing that it was his own gun.

¶51 On this record, the whole case boiled down to credibility. Who, the jury must decide, should be believed? In that context, the admission of Navigato's testimonial statements to police, that he believed Bieker pulled the trigger to defend him, could have tipped the scales against Bieker.

¶52 The same reasoning applies to the other three convictions also,[9] because although the error was most prejudicial on the issue of Bieker's scienter

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[8] For purposes of this harmless error analysis, we assume for the sake of argument that Reichardt's unimpeached testimony would have been admitted at Bieker's separate trial as well, or that, as the State asserts, the jury would not have thought Reichardt any less credible if it learned that he had the year before been successfully prosecuted for making false accusations against fellow inmates.

[9] As the State points out, a Confrontation Clause violation like this may be harmless error as to some counts while prejudicial as to others. ***State v. Lopez***, 168 P.3d 743 (N.M. 2007).

as to the shooting, his credibility was the key to the jury verdicts on all four crimes. And the error makes the jury's judgment as to his credibility unreliable. Where credibility is a key issue, a constitutional error that undermines credibility "infects" the whole trial. ***State v. Pitsch***, 124 Wis. 2d 628, 646, 369 N.W.2d 711 (1985). This is not a case where we can disentangle some of the verdicts from the others. Bieker's defense depended upon his credibility with the jury. There is no way to disentangle the jury's determination of Bieker's credibility, and the Confrontation Clause violation here undermined him.

¶53 There is no law to be made here. It is indeed unfortunate that the attorney general's office has been left to try to clean up the mess left behind at trial. We have a hard time understanding how law that had been abrogated twenty years before, with the law since then having been codified in our statutes, was relied upon in this trial. The only argument left to the attorney general was that the error was harmless. As we have explained, we cannot come to that conclusion. We must reverse and remand with directions that Bieker be retried.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.