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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2010AP000899-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CHAM OMOT,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND THE DENIAL OF DEFENDANT'S POST-CONVICTION MOTION ENTERED IN DUNN COUNTY CIRCUIT COURT
CASE NO. 08 CF 261
HONORABLE WILLIAM C. STEWART, JR, PRESIDING

BRIEF OF DEFENDANT-APPELLANT, CHAM OMOT

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ISSUES PRESENTED

I. Whether there was insufficient evidence to support the jury's guilty verdicts of maintaining a drug trafficking place as a party to a crime and possession with intent to deliver THC as a party to a crime

The circuit court answered the evidence was sufficient.

II. Whether the trial court properly admitted several exhibits as evidence despite the Defendant's objections.

The circuit court answered yes based on its discretion and reasoning during the trial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Omot would welcome oral argument in this case if the court determines it would be helpful but does not believe it is necessary.

Mr. Omot believes this case can be settled on well-established legal principles to the specifics facts of this case. Therefore, publication is not warranted.

STATEMENT OF THE CASE

On November 10, 2008, a criminal complaint was filed in Dunn County charging Cham Omot with 1.) Maintaining a drug trafficking place as a party to a crime, Wis. Stat. § 961.42(1), and 2.) Possession with intent to

deliver THC as a party to a crime (two hundred grams or less), § 961.41(1m)(h)1. (R. 2). On December 23, 2008, an Amended Information was filed that included the two charges above plus a charge of possession of a firearm by a felon. § 941.29(2)(a). (R. 15; A-Ap. 101-102).

A jury trial was held on January 13, 2009 and Mr. Omot was found guilty of the two drug related counts and not guilty of the felon in possession of a firearm. On March 27, 2009, a Judgment of Conviction was entered and Mr. Omot was sentenced to nine months in jail on each count. (R. 33; A-Ap. 103-04). Mr. Omot filed a motion for post-conviction relief seeking a dismissal, or in the alternative, a new trial. (R. 39, A-Ap. 105-10) On March 16, 2010, Mr. Omot's motion was denied and this appeal follows. (R. 40: A-Ap. 111-12)

Mr. Omot is appealing the judgment of conviction and denial of his post-conviction motions on the grounds that the evidence was insufficient to prove his guilt beyond a reasonable doubt and, in the alternative, that evidence was improperly admitted by the trial court and said evidence undermines the outcome of the case requiring this Court to reverse the judgment of conviction.

STATEMENT OF FACTS

The facts of this case stem from the evidence and testimony admitted at Mr. Omot's jury trial. Credibility of

witnesses was not an issue at the trial. The issue was whether the State had sufficient evidence. The essential facts revolve around a police raid on the residence that several people lived or stayed at, including Mr. Omot. The State's theory was that Charles Schroedl, Mr. Omot's roommate, was the principal actor in regards to the two drug related charges, and Mr. Omot helped him as a party to the crime. (R. 49:10; A-Ap. 126).

The State called four police officers: Thomas Roemhild, Mark Pieper, Andrew Crouse, and Martin Floczyk; and one resident of the home, Britni Gregerson. Mr. Omot did not call any witnesses.

During the police raid, police discovered scales, small bags of marijuana, a gun, pictures, and other items from the residence Mr. Omot stayed at and shared a room with Charles Schroedl. Neither Mr. Omot nor Mr. Schroedl were on the lease but paid rent to Ms. Gregerson. (R. 49: 238-39, 251; A-Ap. 186-87, 199). Others occasionally stayed in the home. (R. 49:237-38; A-Ap. 185-86). The tenants on the lease to the residence were Britni Gregerson and Janell Peterson. (R. 49:251; A-Ap. 199).

While many exhibits were objected to and form a basis for this appeal, some facts are not disputed. The parties stipulated that Mr. Omot was a convicted felon, the items tested by the State Crime lab tested positive for THC, and that no suitable fingerprints were found on the gun. (R. 49:20-25). The gun alleged to have been

possessed by Mr. Omot was in the basement of the residence.[1] (R. 49:168-70). A pair of pants were found in the living room that contained a glass pipe with a burnt marijuana smell and a wallet. The wallet had a Wisconsin ID for Charles Stanton, Jr. and a credit card for Roshida Williams. (R. 49:164-65; A-Ap. 144-45). Pills were also found in the living room. (R. 49:165; A-Ap. 145).

In a bedroom, shared by Charles Schroedl and Mr. Omot, police discovered Mr. Schroedl, Mr. Omot, and Heather Pitzer. (R. 49:178, 272; A-Ap. 211). Britni Gregerson was also present during the raid, but in another room. Mr. Omot's and Mr. Schroedl's bedroom contained two beds and had a built in dresser. (R. 49:194; A-Ap. 162). The items found in the bedroom were sandwich bags, scales, a bag with marijuana residue, cell phones, and drawings. (R. 49:179-80; A-Ap. 147-48,). Exhibits 4-8 depict where the scales, bags, and what appeared to be marijuana were found in the drawers. (R. 49:180-83; A-Ap. 148-151). Exhibits 14-17, photocopies of the drawings subject to the motion in limine, were also found in a drawer in the same room, but not in the same drawer as the other items and with nothing else. (R. 49:184, 194-95; A-Ap. 152,162-63). Mr. Omot denied any

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[1] It was a different gun than that depicted in exhibit 1.

knowledge of the contraband found in the residence. (R. 49:256-57, A-Ap. 200-01).

The drawers that the contraband were located in were closed when the police entered. (R. 49:274; A-Ap. 213). Britni Gregerson testified, with immunity, that she had seen the items depicted in exhibit 5 (the items in the drawers) once before but never being used. (R. 49:244; A-Ap. 192). Police had found a pipe and marijuana in her purse during the raid, and she stated "Charles" gave her the marijuana. (R. 49:245; A-Ap. 193). She had never purchased marijuana from Mr. Schroedl, never saw Mr. Schroedl sell it, but had heard he had. (R. 49:245, 249; A-Ap. 193, 197). She stated she was not aware of any marijuana sales in the house and never saw any sales. (Id.).

Ms. Gregerson never testified as to Mr. Omot ever having marijuana, selling marijuana, or in any other way helping anyone possess marijuana or maintain a drug house. She also was not aware of whether Mr. Omot even knew what Mr. Schroedl was allegedly doing. (R. 49:250; A-Ap. 198).

No money was located on Mr. Omot during the raid nor was he ever involved in a controlled buy according to Investigator Peiper. (R. 49:196-97; A-Ap. 164-65). Money would have been indicative of drug sales. (R. 49:197; A-Ap. 165). Also, no notes regarding drug debts or other transactions were recovered. (Id.).

Exhibits 1, 9, 10, 11, were found in a blackberry that belonged to Mr. Omot. (R. 49:215,272-73; A-Ap. 211-12). Exhibits 12 and 13 were pictures found on a phone identified as the Charles Schroedl phone (although it was never established that it was in fact Mr. Schroedl's phone). (R. 49:222-23; A-Ap. 174-75). Mr. Omot objected to these pictures for lack of probative value compared to the unfair prejudice, and for a lack of foundation, but the objections were overruled. (R. 49:217-221; A-Ap. 169-73).

Sgt. Crouse testified that he could determine the time and date of the pictures based on metadata from the pictures taken from the alleged Omot phone, but not the alleged Schroedl phone. (R. 49:228, 231; A-Ap. 179, 182). This is depicted in the exhibit #-a. Sgt. Crouse could not put any pictures into the context of when they were taken either. (R. 49:233; A-Ap. 184). Mr. Omot objected to questions regarding Exhibit 12 and it being received by the court as the date and time the picture was allegedly taken was never established, but was overruled. (R. 49:267; A-Ap. 206). Also, the State could not supply any additional foundation as to when the picture was taken, where the picture was taken, who was present, or whether Mr. Omot even knew the picture existed. (R. 49:274; A-Ap. 213).

The State asked Officer Folcyzk to identify the item depicted in exhibit 12. (R. 49:267; A-Ap. 206). The Officer stated the picture appeared to be a one pound brick of

compressed marijuana. (R. 49 268; A-Ap. 207). He could not supply any additional foundation as to when the picture was taken, where the picture was taken, who was present during the picture, or that Mr. Omot knew the picture existed as it was conceded it was not on his phone. (R. 49:274; A-Ap. 213).

Exhibit 13 was another picture of Mr. Schroedl and Mr. Omot. The exhibit 13 objections were that there were already pictures showing Mr. Omot and Mr. Schroedl knew each other and this was a back door way to imply gang ties. (R. 49:224; A-Ap. 175). The trail court decided that 13 was relevant to show an association between Mr. Schroedl and Mr. Omot for the party to a crime elements, but allowed no more pictures. (R. 49:226; A-Ap. 177). As to 12, the court allowed it subject to proper foundation, which Mr. Omot asserts was never presented and is a basis for this appeal. (Id.).

As to the gun found in the residence, Officer Folczyk testified that a gun, similarly wrapped to the one recovered during the raid, was discovered at a Josh Arbuckle's residence, and Mr. Arbuckle had previously been to the raided residence and seen by one of Ms. Gregerson's children with a gun. (R. 49:277-78). The gun was tested for fingerprints (none found), but the scales and other evidence were not tested due to being found in a room Mr. Omot shared with Charles Schroedl. (R. 49:281-82; A-Ap. 217-18). Additionally, the empty vacuum bag

field tested positive for marijuana residue. (R. 49:279-80; A-Ap. 215-16).

Prior to the trial, Mr. Omot filed a motion in limine to exclude drawings, received exhibits 14-17, purportedly made by Mr. Omot. (R. 19: A-Ap. 113). The State argued that the drawings were relevant as it showed that the purpose for firearms in the mind of Mr. Omot is for protection and intimidation against people who might provide evidence against drug trafficking. (R. 49:7; A-Ap. 123). The state further contended the pictures showed "a cooperative mentality" between Mr. Omot and Charles Schroedl in terms of drug trafficking and offered that the evidence would show that the drawings used the word "Showtime" which was a nickname of Mr. Schroedl. (R. 49:9; A-Ap. 125). No evidence in the record supports this assertion nor was any ever presented. Further, the State conceded the drawings were dated April 2008, well before the raid, and before Mr. Omot and Mr. Schroedl moved into the raided residence. (R. 49:9, 238; A-Ap. 125, 186). The motion was made based on the drawings being irrelevant, but if found relevant, any probative value was substantially outweighed by their unfair prejudice and ability to mislead the jury. (R. 19: A-Ap. 113).

The trial court denied the motion because it found, although prejudicial, it should not trump the potential probative value the drawings may have because they were found as part of the search warrant, the picture with a

gun was relevant to the gun possession charge, and the terms snitch and informant are terms used in cases like Mr. Omot's. (R. 49:16-18; A-Ap. 132-34). The court made this decision after viewing exhibit 1, a picture of Mr. Omot with an alleged gun, which factored into its decision. (R. 49:19; A-Ap. 135). The State later acknowledged that exhibit 1 did not contain the gun found during the raid, although the State originally believed it was. (R. 49:157, 258; A-Ap. 142, 202).

During opening arguments, the State made several comments about exhibit 1. (R. 49:142-43, 150; A-Ap. 141). At the time the statement was made, the State believed the gun in the picture and gun recovered at Mr. Omot's residence were the same. (R. 49:157, A-Ap. 142). The State's theory was Mr. Omot had a fascination with guns and that the gun was evidence that Mr. Omot was the "enforcer" in drug dealing with Charles Schroedl. (R. 49 :146; A-Ap. 138). However, the State, before the first witness was called, conceded that the gun in the picture was not the gun found during the execution of the search warrant (R. 49:157; A-Ap. 142). Mr. Omot moved for a mistrial but the motion was denied. (R. 49:157-58; A-Ap. 142-43). The Court did review the opening statement and found that the State did not directly, although it could be inferred, that the gun in exhibit 1 and the gun found at the resident were the same. (R. 49:213; A-Ap.167).

After the trial, the jury returned verdicts of guilty on Counts 1 and 2, but found Mr. Omot not guilty of being a felon in possession of a firearm. (R. 24-26). Mr. Omot filed a post-conviction motion requesting the convictions be vacated due to insufficient evidence or in the alternative, for a new trial based on improperly admitted evidence. (R. 39; A-Ap. 105-110). The motion was denied. (R. 40; A-Ap. 111-12).

ARGUMENT

I. The evidence was insufficient to prove the Defendant's guilt beyond a reasonable doubt as to each count when viewed in the light most favorable to the State as no evidence showed Mr. Omot knew of the existence of THC, no witness ever saw Mr. Omot with drugs, help people with drugs, or conspire with anyone regarding drug dealing.

The State has the burden to prove all elements of a crime beyond a reasonable doubt. *State v. Sartin*, 200 Wis. 2d 47, 53, 546 N.W.2d 449 (1996); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Mr. Omot asserts that no trier of fact, acting reasonably, could have found him guilty beyond a reasonable doubt of maintaining a drug trafficking house and possession of THC with the intent to deliver, both as parties to a crime.

> [T]he standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the

> conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Due process requires reversal if, after viewing the light most favorable to the prosecution, no "rational trier of fact could find all the elements beyond a reasonable doubt." *Piaskowski v. Bett*, 126 F.3d 687, 691 (7th Cir. 2001)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

On appeal, the standard of review is often called the "reasonable doubt standard of review." *Poellinger*, 153 Wis. 2d at 504. Under this standard:

> The burden of proof is upon the state to prove every essential element of the crime charged beyond reasonable doubt. The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted....

Id. at 503-04 (quoting *Johnson v. State*, 55 Wis.2d 144, 148, 197 N.W.2d 760 (1972)).

When a case is built upon circumstantial evidence, the test is whether "it is strong enough to exclude every reasonable hypothesis of innocence." *State v. Johnson*, 135 Wis. 2d 453, 456, 400 N.W.2d 502 (Ct. App. 1986) (citing *State v. Koller*, 87 Wis. 2d 253, 266, 274 N.W.2d 651 (1979)). To put another way:

> The test for determining when circumstantial evidence satisfies the reasonable doubt burden of proof is as follows:
>
> > [T]hat all the facts necessary to warrant a conviction on circumstantial evidence must be consistent with each other and with the main fact sought to be proved and *the circumstances taken together must be of a conclusive nature leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty* that the accused and no other person committed the offense charged. [Emphasis added.]

Id. at 456-57 (citing *State v. Charbarneau*, 82 Wis.2d 644, 655-56, 264 N.W.2d 227, 233 (1978) (quoting *State ex rel. Hussong v. Froelich*, 62 Wis.2d 577, 586, 215 N.W.2d 390, 396 (1974)), *compare with Poellinger*, 153 Wis. 2d at 504-05.

The elements of maintaining a drug trafficking place, as defined in § 961.42, are that 1.) the defendant kept or maintained a structure or place, and 2.) such place was used for keeping or delivering drugs, in this case, THC. WI JI-CRIMINAL 6037. The first element requires the Defendant to have management or control of the place in

question. *Id.* Keeping, in the second element, requires the drugs "be kept for the purpose of warehousing or storage for ultimate manufacture or delivery" and more than simple possession. *Id.* Deliver is further defined as transferring, or attempting to transfer, something from one person to another. *Id.*

The elements of possession of a controlled substance (THC) with intent to deliver, as defined in § 961.42, are 1.) the "defendant knowingly had actual physical control of the substance[,]" 2.) the substance was a controlled substance (THC), 3.) the defendant knew or believed the substance was a controlled substance (controlled substance meaning it is prohibited by law, in this case, THC), 4.) the defendant intended to deliver, i.e. transfer or attempt to transfer to another, a controlled substance. WI JI-CRIMINAL 6035.

To be a party to a crime, a person must directly commit the crime, intentionally aid and abet the person who directly committed the crime, or be a member of a conspiracy to commit the crime. WI JI-CRIMINAL 402. Aiding and abetting contains two elements: "(1) that the defendant undertook some conduct (either verbal or overt) that as a matter of objective fact aided another person in the execution of a crime; and (2) that the defendant had a conscious desire or intent that the conduct would in fact yield such assistance." *State v. Rundle*, 176 Wis. 2d 985, 990, 400 N.W.2d 916 (1993). A conspiracy is when two or

more people, with the intent a crime be committed, agree or join together to commit the crime. WI JI-CRIMINAL 402.

In *Rundle*, the defendant was charged with aiding and abetting the physical abuse of his child. *Rundle*, 176 Wis. 2d at 994. The state presented evidence that he was present at two incidents of abuse of his child by his wife. *Id.* No evidence was presented that he actually assisted his wife, intended to do so, or encouraged her. *Id.* Witnesses in that case never saw Mr. Rundle physically strike his child, but acknowledged he knew his wife abused the child and did not do anything. *Id.* at 993. The court of appeals, affirmed by the supreme court, concluded, "while the evidence might show that he was passively involved in the abuse, it is insufficient to establish his guilt as a party to the crimes as charged." *Id.* at 993-94 (quoting *State v. Rundle*, 170 Wis.2d 306 (Ct. App. 1992)). While the state argued it met its burden, the Supreme Court rejected this argument and held that the state failed to meet its burden. *Id.* at 995.

In this case, the credibility of witnesses was not at issue. It is not contended by Mr. Omot that any witness gave false or inconsistent testimony. The issue was and is whether the evidence was sufficient to prove Mr. Omot's guilt beyond a reasonable doubt.

There was no evidence that Mr. Omot directly committed either offense. The State conceded during

arguments that Mr. Omot was not the principal actor of these crimes, but rather believed that Charles Schroedl was. (R. 49:10, 146; A-Ap. 126,138). Britni Gregerson testified that she never saw Mr. Omot use the scale, sandwich bags, or marijuana. (R. 49: 244; A-Ap. 192). She also testified that she got marijuana from Charles Schroedl, not the defendant, and sales never occurred in the house. (R. 49: 245; A-Ap. 193). Ms. Gregerson testified that she never saw Mr. Schroedl or Mr. Omot sell marijuana. (Id.). Ms. Gregerson testified that Mr. Omot was not on the lease but paid rent and that he could have had a job. (R. 29: 248, 250; A-Ap. 196, 198).

No personal belongings of Mr. Omot were found in the drawers with the scales, marijuana, and sandwich baggies nor was there any evidence he ever used or opened those drawers with the scales, bags, and marijuana. No fingerprints were obtained from the drawers or the dresser. The police did not find any contraband on Mr. Omot during his arrest. *No* witness testified that Mr. Omot ever possessed THC, much less sold or delivered it, or assisted Mr. Schroedl in anyway.

The element that the defendant exercise management or control over a structure was not proven beyond a reasonable doubt. Mr. Omot was not on the lease. (R. 49: 245; A-Ap. 195). He paid rent to Britni Gregerson, not the owner. (Id.). Ms. Gregerson could have thrown him out of her home at anytime. Mr. Omot

did not have the authority to evict Mr. Schroedl, his roommate, either. The evidence was that he paid his rent for a place to live. Not only is it reasonable, but expected, that people will pay rent to have shelter, especially in Wisconsin's cooler climate as winter approaches. The idea that Mr. Omot's rent was to intentionally aid or abet Mr. Schroedl's illegal activities, as argued by the State in its closing arguments, is not supported by the evidence. (R. 49:315, A-Ap. 225). The evidence supported each paid their own rent. (R. 49:240, A-Ap. 188). The state failed to prove an essential element of the crime.

The evidence did not support that Mr. Omot intentionally aided and abetted the person who directly committed the crime or was a member of a conspiracy to commit a crime beyond a reasonable doubt. Like *Rundle*, the defendant in this case was nothing more than a passive bystander, except in this case, no evidence was presented that Mr. Omot knew what Mr. Schroedl was doing. The State's theory was that because the two knew each and shared a room, they must have known what each other were doing. (R. 49:316, A-Ap. 226). However, no witness testified about having personal knowledge that Mr. Schroedl ever sold marijuana, although Ms. Gregerson did receive marijuana from him once. (R. 49:245, A-Ap. 195). No evidence was presented that Mr. Omot paid rent with the intent to aid in the commission of a crime or that the rent actually assisted, as a matter of

objective fact, in Mr. Schroedl committing the crimes. *Rundle*, 176 Wis. 2d at 990. The pictures of Mr. Omot and Mr. Schroedl together do not contain any marijuana, large amounts of cash, or other items indicative of dealing marijuana, nor are they indicative of anything more than the two being friends.

The State's theory was that Mr. Omot was the intimidator or enforcer. (R. 49:146; A-Ap. 138). The drawings that were allegedly Mr. Omot's showing a person shooting a "snitch" were dated well before Mr. Omot moved into 1220 Wilson Ave, #4, Menominee, Wisconsin. (R. 53: Ex. 14 – 17; A-Ap. 243-46). Although Mr. Peterson argued that one of the drawings was of Mr. Schroedl due to the name "Showtime," he failed to present any evidence that Mr. Schroedl had that nickname. (R. 49:9, 146: A-Ap. 125, 138). No evidence existed that Mr. Omot undertook any type of affirmative conduct to assist Mr. Schroedl in committing a crime, that his conduct actually assisted Mr. Schroedl in committing a crime, or that he conspired with Mr. Schroedl to commit the alleged crimes. *See Rundle*, 176 Wis. 2d at 990. Someone's mere presence while a crime is committed, even if the person knows a crime is being committed, does not make someone guilty of the crime. *Id.* The drawings did not aid Mr. Schroedl in the execution of the crimes, and thus cannot be viewed as aiding and abetting. *See Piaskowski v. Casperson*, 126 F.Supp.2d 1149, 1155 (E.D. Wis. 2001)

(citations omitted), aff'd, *Piaskowski v. Bett*, 126 F.3d 687 (7th Cir. 2001).

To show a conspiracy, the state must prove that two or more persons had an agreement to accomplish a criminal objective and "an individual intent to accomplish that objective." *Id.* at 1153 (citing *State v. Hecht*, 116 Wis. 2d 605, 625, 342 N.W.2d 721 (1984)). There was no evidence that Mr. Omot or Mr. Schroedl had an agreement to accomplish a criminal objective. The testimony of the officers only place Mr. Omot in the room where drug contraband was seized. Ms. Gregerson's testimony only established that Mr. Omot and Mr. Schroedl were associates and each paid a share of rent. No evidence exists that Mr. Omot aided Mr. Schroedl in committing any crime or conspired with him to commit a crime.

The critical question is did Mr. Omot do anything to make him guilty of the crimes charged. *See Piaskowski*, 126 F.Supp. 2d at 1155. Essentially, the State proved Mr. Omot shared a room with his friend, Mr. Schroedl, and he paid rent for the room. In that room, evidence of marijuana, scales, and bags to package marijuana were found. That Mr. Schroedl has had marijuana in the past and given it to another.

There is no evidence that any acts by Mr. Omot proved a conscious intent that his conduct assist Mr. Schroedl in the crimes. *Rundle*, 176 Wis. 2d at 990. "The settled law of Wisconsin provides that 'mere presence and

ambivalent conduct' at the scene of a crime does not prove that a defendant is a conspirator or an aider and abetter." *Piaskowski*, 126 F.Supp.2d at 1154 (citations omitted). Paying one's own rent, being present, and retaining old drawings does not show intent to assist in a crime by a roommate. The pictures of Mr. Omot and Mr. Schroedl together show no crimes and the photos did not aid in a crime. The drawings also did not aid in the charged crimes.

Viewing all the evidence, including the evidence Mr. Omot contends should have been excluded, in the light most favorable to the State, the State did not meet its burden to prove each element, of each crime, beyond a reasonable doubt.

II. The picture of an alleged brick of marijuana and drawings allegedly drawn by Mr. Omot should not have been received due to a lack of foundation and their probative value was outweighed by the unfair prejudice to Mr. Omot, requiring the verdicts to be set aside, and the judgments vacated.

Evidence is to be generally admissible if it is relevant. Wis. Stat. § 904.01-.02. Evidence is relevant if the fact it is offered to support is of consequence to the determination of the case. § 904.01. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury . . . ." § 904.03. "Evidence is prejudicial if it has 'a tendency to influence the outcome by improper means' or if it 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish' or otherwise causes a jury 'to base its decision on something other than the established propositions in the case.'" *Gonzalez v. City of Franklin*, 137 Wis.2d 109, 138 403 N.W.2d 747 (1987)(quoting *Lease America Corp. v. Ins. Co. of North America*, 88 Wis.2d 395, 401, 276 N.W.2d 767 (1979)). "A court's rulings on evidentiary issues will be upheld absent an abuse of discretion." *Id.* at 139.

"The general rule is that photographs are admissible in evidence when they are accurate reproductions of persons or situations, are not remote in time, and are not likely to give the wrong impression or create undue sympathy or prejudice on the part of the jury." 11 TED WARSHAFSKY & FRANK T. CRIVELLO II, WIS. PRAC., TRIAL HANDBOOK FOR WIS. LAWYERS § 19.11 (3d ed.) (Thomson Rueters, 2009)(citing *Commerce Ins. Co. v. Badger Paint & Hardware Stores, Inc.*, 265 Wis. 2d 174, 60 N.W.2d 742 (1953)).

If the error in allowing improper evidence undermines the confidence in the verdicts, the conviction must be reversed. *See State v. Dyess*, 124 Wis. 2d 525, 545, 370 N.W.2d 222 (1985). In analyzing whether improper evidence affected the outcome, the reviewing

court must analyze the error in the context of the entire case. *State v. Grant*, 139 Wis.2d 45, 54, 406 N.W.2d 744 (1987). The error in this case was harmful and undermines the outcome, thus requiring a reversal.

The trial court improperly received Exhibit #12 and #12a over defense counsel's objections. (R. 49: 223, 226, 267; A-Ap. 174, 177). Exhibit #12 was a photograph of what appeared to be a marijuana brick that was allegedly recovered from the phone of Charles Schroedl, although Mr. Schroedl never testified to confirm the phone was his. (A-Ap. 241). No foundation was laid as to when the photograph was taken, where the photograph was taken, who was present when the photograph was taken, or what, other than speculation, is in the photograph. (R. 49:224, 267-68, 274; A-Ap. 206-07, 213). There was no evidence Mr. Omot knew the picture existed. The only testimony regarding the picture was that it was found on the phone, (R. 49:231; A-Ap. 182), and it appeared to be marijuana. (R. 49:267-68; A-Ap. 206-07). Despite the lack of foundation, the court received the exhibit. (R. 49:271; A-Ap. 210). The exhibit should not have been received due to having little, if any, probative value, was unfairly prejudicial, and most importantly, lacked proper foundation. *See* §§ 904.03, 909.01.

The trial court erred when it received exhibits 14, 15, 16, and 17 over trial counsel's objections. (R. 19; 49:6-18, 263; A-Ap. 113, 122-34, 205). The drawings were

unfairly prejudicial and offered little, if any, probative value to the case. The drawings did not help prove any fact of consequence but rather were used to improperly appeal to the jury's sense of horror, fear, and desire to punish someone who may draw arguably violent pictures.

In the state's argument to admit the evidence, the State asserted the pictures contain the word "Showtime" which evidence would show is the nickname of Charles Schroedl. (R. 49:9, 146; A-Ap. 125, 138). However, no evidence was submitted regarding any nickname of Mr. Schroedl. The State also used exhibit 1 to assist in the admittance of the drawings, which the court admitted factored into its decision to allow the drawings. (R. 49:19, 157; A-Ap. 135, 142). After relying on exhibit 1 in its decision to admit the drawings, the State later informed the court that it was the wrong gun in the picture, thus weakening the probative value of exhibit 1 and undermining the trial court's use of it in its decision regarding the drawings. (R: 49:157; A-Ap. 142). The trial court thus relied upon erroneous information and assertions that were never proved in denying the motion in limine and objections.

Additionally, the only evidence to support that Mr. Omot drew these pictures were they were found in his room and they contained his name (not authenticated signature though). (R. 49:184; 53: ex. 14-17; A-Ap. 152, 243-46). The alleged date of the pictures is April 2008,

approximately seven months before Mr. Omot's arrest and approximately six months before Mr. Omot moved into the room the pictures were recovered from, drastically reducing any probative value that may have attached to them. During the motion in limine and opening arguments, the State argued that the pictures would show that Mr. Omot was an intimidator in drug trafficking but never presented evidence to corroborate that theory. (R. 49:146-147; A-Ap. 138-39). There was no evidence these drawings were ever shown or otherwise viewed by anyone either. These pictures did not help establish any element of any offense and served no purpose but to prejudice the jury against Mr. Omot by implying that he is a violent person and arousing a sense of fear of Mr. Omot.

As the alleged picture of marijuana and drawings lacked foundation and were unfairly prejudicial, they should not have been admitted into evidence. These errors, individually and together, undermine the outcome of the trial requiring the convictions be reversed.

CONCLUSION

For the reasons stated in this brief, Mr. Omot respectfully requests this court reverse the judgment of conviction and/or the trial court's decision on his post-conviction motion.

Dated this 17th day of June, 2010.

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I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

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I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail, on June 17th, 2010. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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