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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2010AP000899-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CHAM OKERY 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

REPLY BRIEF OF DEFENDANT-APPELLANT, CHAM OKERY OMOT

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ARGUMENT

I. THE DOCTRINE OF "LEGAL INTENT" IS INAPPLICABLE TO THE FACTS OF THIS CASE AND DOES NOT "CONNECT THE DOTS" AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

The State incorrectly argues that the doctrine of "legal intent" with the law of aiding and abetting leads to the conclusion that "Omot was well aware of Schroedl's drug dealing, and that Omot clearly communicated his willingness to assist . . . ." (Resp't br. 12). The doctrine of "legal intent" is that "[o]ne is presumed to intend natural and probable consequences of his act." *State v. Cydzik*, 60 Wis. 2d 683, 697, 211 N.W.2d 411, 430 (Wis. 1973). The State correctly states that intent can be inferred from the defendant's conduct. *Id.* Infer is defined as, "to conclude from facts or factual reasoning; to draw as a conclusion or inference." BLACK'S LAW DICTIONARY 347(2nd pocket ed. 2001). Inference is defined as, "1. A conclusion reached by considering other facts and deducing a logical consequence from then. 2. The process by which such a conclusion is reached; the process of thought by which one moves from evidence to proof." *Id.* Essentially, legal intent exists when sufficient evidence exists to prove the defendant had the specific intent to commit a crime, but a different crime was committed. *See State v. Grady*, 93 Wis. 2d 1, 7, 286 N.W.2d 607 (Ct. App. 1979); Wis. JI-Criminal 406.

The example found in many cases of "legal intent" being applied is in the context of robberies. *See e.g., Cydzik*, 60 Wis. 2d 683. While the getaway driver may only intend to assist in an armed bank robbery, the same driver may not intend to assist in a murder that occurs during the robbery. However, it is reasonable to infer that the getaway driver has an intention to help the robbers should a murder occur. *See id.* "Legal intent" allows the driver to be liable for the murder.

The cases that discuss "legal intent" are cases in which the facts clearly establish that the defendant was a party to a crime or intended to be, but during said crime that was intended to be committed, a more serious crime or other crime was committed. *See generally id.* (armed robbery leading to murder).

Based upon the facts and evidence in this case, the "legal intent" doctrine is inapplicable to "connect the dots" based upon the five reasons given by the state. The legal intent doctrine does not apply as it must first be shown that Mr. Omot intended to be involved in a crime. The State's argument of using "legal intent" to "connect the dots" and show Mr. Omot's willingness to assist Mr. Schroedl in his crimes is based upon inference-on-inference.

Building a case on inference upon inference is speculation. *Home Savings Bank v. Gertenbach*, 270 Wis. 386, 404, 71 N.W.2d 347 (1955); *see also Foseid v. State*

Bank of Cross Plains, 197 Wis.2d 772, 791, 541 N.W.2d 203 (Ct. App. 1995) (verdict cannot be based on "conjecture and speculation"); *Cudd v. Crownhart*, 122 Wis. 2d 656, 662, 364 N.W.2d 158 (Ct. App. 1985) (verdict cannot be based on "mere speculation"); "inference-on-inference rule" BLACK'S LAW DICTIONARY 347 (2nd pocket ed. 2001) (stating "[t]he principal that a presumption based on another presumption cannot serve as a basis for determining an ultimate fact"). The State's case and argument, and in turn the jury verdict, is built upon inference-on-inference and thus must be rejected.

As to the first reason given by the State, it is agreed that a jury could have reasonably believed that Mr. Omot knew of the drugs being contained in the home and, specifically, his bedroom. This does not lead to the conclusion he assisted or was willing to assist in Mr. Schroedl's illegal actions though. It is speculation that he was willing to aid Mr. Schroedl.

The second reason given by the State, that the jury could reasonably believe Mr. Omot "had to know if Gregerson was smoking marijuana given to her my [sic] Omot's roommate" is unsupported by the record. Its pure speculation what Mr. Omot knew. Ms. Gregerson never testified to smoking or using drugs in Mr. Omot's presence or even at her home. Even if it is reasonable to believe Mr. Omot knew Ms. Gregerson smoked marijuana, it is another step for him to know that it was provided by Mr.

Schroedl. Most importantly, even if Mr. Omot knew Ms. Gregerson smoked marijuana supplied by Mr. Schroedl, it again does not support any inference that he was willing to help Mr. Schroedl in his crimes. Ms. Gregerson testified that sales of marijuana by Mr. Schroedl were not taking place in the house, (R. 49:245, 249; A-Ap. 193, 197) and she did not pay close attention to Mr. Omot and Mr. Schroedl. (R. 49:250; A-Ap. 198). The State's inferences are not supported by the record.

The State's third reason, that the pictures established Mr. Omot and Mr. Schroedl were friends who likely shared personal information, while reasonable, fails to lead to the conclusion Mr. Omot aided or was willing to aid Mr. Schroedl in his criminal endeavors. People share personal information with others all the time. It is a leap to conclude that because it can be inferred that Mr. Schroedl and Mr. Omot shared information that it can then be inferred that Mr. Omot was willing to aid and abet Mr. Schroedl. *See Gertenbach*, 270 Wis. at 404. This is inference-on-inference, also known as speculation. *Id.*

The pictures of Mr. Omot with a gun, with no evidence supporting the context, does not "convey a mentality making it more likely that Omot would have been ready and willing to assist his drug dealing roommate[.]" (Resp't br. 13). The picture was found on Mr. Omot's phone with no supporting context as to when the picture was taken, although the State believed it to be

Halloween (R. 49:312; A-Ap. 222; *but see* R. 49:229; A-Ap. 180 indicating the picture was believed to be from Nov. 4, 2008), as to who took the picture, or as to why the picture was taken. (R. 49:312; A-Ap. 222). The State correctly quotes the jury instruction that a person aids and abets when he knowingly either "assists the person who commits the crime; or is ready and willing to assist and the person who commits the crime *knows* of the willingness to assist." Wis. JI-Criminal 407 (emphasis added). Mr. Schroedl did not testify. It is speculation that Mr. Schroedl knew of the photo on Mr. Omot's phone, speculation that the photo somehow evinced a willingness by Mr. Omot to help Mr. Schroedl commit his crimes and that Mr. Omot would assist him.

The State's last reason, that Mr. Omot's drawings conveyed a willingness to assist Mr. Schroedl's crimes, is not a reasonable inference. The drawings were dated April 2008, well before the evidence showed Mr. Omot and Mr. Schroedl moved into the house together. (R. 49:236, 53: ex. 14-17; A-Ap. 186, 243-46). This assumes, without evidence to support, that Mr. Schroedl knew of the drawings. While the drawings and the evidence of drugs were found in the same dresser, they were in different drawers. This leads to a reasonable inference that each roommate had their own individual drawers. It is also inference-on-inference to infer Mr. Schroedl knew of the

drawings and then to infer that they expressed a willingness to assist in crimes.

The State attempts to distinguish *State v. Rundle,* 176 Wis. 2d 985, 500 N.W. 2d 916 (1993) by arguing Mr. Omot was more involved than the bystander parent because the parent had not "strewn drawings of abusing children around the bedroom he shared with the abusing parent -more analogous to what Mr. Omot did." The State's argument to distinguish *Rundle* fails as it misstates the facts. Mr. Omot had not strewn drawings of drug dealing around the room. The drawings were also dated six months prior and were in a drawer. The parent in *Rundle* watched his own child be abused and did nothing. Mr. Omot shared a bedroom with a roommate involved with illegal drugs and did nothing. The two cases are very similar and analogous in analyzing whether Mr. Omot was a party to the crime.

The evidence does not lead a reasonable jury to draw inferences and "connect the dots" as the State argues without speculating. *See Gertenbach*, 270 Wis. at 404; *Foseid*, 197 Wis.2d at 791; *Cudd*, 122 Wis. 2d at 662. The reasons argued by the State, taken all together, require inferences being built on inferences and speculation. A jury can infer Mr. Omot knew marijuana was in his house, but it is another inference that he was willing to assist Mr. Schroedl in any crime. It could be inferred from the evidence that Mr. Omot and Mr. Schroedl were friends,

but to build upon that inference that Mr. Omot would thus be willing to assist Mr. Schroedl and Mr. Schroedl knew of Mr. Omot's willingness is speculation that cannot support the verdict. The State's argument and case, taken as a whole, is built upon inference-on-inference to "connect the dots" which cannot support the jury's verdict. *See id.*

II. THE STATE FAILED TO REFUTE MR. OMOT'S ARGUMENT THAT EXHIBIT 12 AND 12a, THE PICTURE OF MARIJUANA, WAS IMPROPERLY ADMITTED.

The state failed to address Mr. Omot's argument that exhibits 12 and 12a lacked proper foundation. As the State did not refute the claim, it concedes the point. *See Charolais Breeding Ranches Ltd. v. FPC Securities Corp.,* 90 Wis. 2d 97, 109 279 N.W.2d 493, 499 (Ct. App. 1979).

The other arguments in the Respondent's brief were adequately addressed in Mr. Omot's brief-in-chief.

CONCLUSION

For the reasons stated in this reply brief and the brief-in-chief, Mr. Omot respectfully requests this court reverse the judgment of conviction and/or the trial court's decision on his post-conviction motion and vacate the judgment of convictions and dismiss or, in the alternative, order a new trial.

Dated this 2nd day of September, 2010.

_____

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CERTIFICATION

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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Dated this 2nd day of September, 2010

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CERTIFICATION OF MAILING

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 September 2, 2010. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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Dated this 2nd day of September, 2010

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