STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2011AP1653-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARLOS A. CUMMINGS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR PORTAGE COUNTY, THE HONORABLE THOMAS T. FLUGAUR, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 266-9594 (Fax)
wittwerjj@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. The parties' arguments are fully presented in their briefs, and the case can be resolved by application of established law.

SUPPLEMENTAL STATEMENT OF THE CASE

Carlos A. Cummings was convicted upon a no contest plea of first-degree reckless injury as a party to the

crime, contrary to Wis. Stat. §§ 939.05 and 940.23(1), in the November 18, 2008 shooting of James Glodowski (Glodowski) in Stevens Point, which caused Glodowski to lose sight in one eye and permanently lodged a bullet in the back of his head (2:1, 4; 44:1; 49:45; 56:12).

Cummings, Linda Dietze and the victim's wife, Carla Glodowski, were each initially charged with attempted first degree homicide in the case (2:1). An information filed later against Cummings added a repeater enhancer to his homicide charge, as well as two counts of aiding a felon as a repeater (6:1-2).

The criminal complaint states that Carla Glodowski (Carla) told police that she loved Cummings and wanted to be with him (2:9). According to the complaint, Carla said that she and Cummings had talked one month prior to the shooting about "how [she] needed James Glodowski out of her life" and that Cummings "told [her] that [he] had a friend who could get a gun." (2:9). Carla said she knew this meant that "the plan was to have that friend shoot and kill James Glodowski." (2:9). Carla said she knew that this friend of Cummings would be paid to kill her husband, but did not know who Cummings had in mind to carry out the shooting, or when the shooting would happen (2:9-10).

Linda Dietze was a friend of both Carla and Cummings (2:4-6). In a competency proceeding in Dietze's own criminal case, the court found that she was cognitively impaired, possessing an IQ of between 60 and 70 (56:16). Carla gave substantial financial support to Dietze, and to Cummings as well (2:4). James Glodowski told police that he "didn't know why Carla … gave money to [Cummings] but said he had found receipts" showing that Carla had purchased Cummings "groceries and household supplies" in amounts of $300 and $400 each time (2:4). Glodowski said that these gifts were a source of marital strife, and estimated that Carla had given Dietze and Cummings a total of approximately $10,000 (2:4).

On November 18, 2008, at approximately 2 p.m., James Glodowski received a call on his cell phone from Dietze (2:3). Glodowski told police that Dietze said she wanted to reimburse him $600 for a month he paid her rent, and to give him a video that she said showed that Carla was having an affair with Cummings (2:3). Dietze asked Glodowski to meet her in the parking lot of the Moose Lodge in Stevens Point at around 2:45 p.m. (2:4). On his way there, Glodowski received a call from Cummings (2:4) Cummings told Glodowski that he was late for the meet up with Dietze, and asked him where he was (2:4). Glodowski told Cummings it was none of his business (Glodowski believed that Dietze and Cummings did not get along) and ended the conversation (2:4).

Glodowski told police that, when he arrived at the parking lot, he spotted Dietze and pulled his vehicle up alongside her (2:4). Glodowski opened his driver's side door and Dietze handed him a video tape supposedly containing evidence of his wife's infidelity (2:4). Glodowski set the video down in the middle console of his truck and turned around to see Dietze pointing a gun at him from about three to four steps away (2:4). Dietze shot him in the face. The bullet struck his left cheekbone just under his eye, traveling around his head and lodging itself at the base of Glodowski's brain stem in the back of his head (2:4). Glodowski turned away from Dietze and she fired several more rounds, two of which struck Glodowski in his left shoulder (2:4).

Police located Dietze and took her into custody (2:6). Dietze admitted to shooting Glodowski and provided information implicating Cummings in the crime (2:6-7) Dietze told police that Cummings had picked her up and that they called Glodowski on Cummings' cell phone[1] (2:6-7) Cummings told Dietze to dial *67 before placing the call to block the number from showing up on Glodowski's phone (2:7). The complaint states that Dietze told police she did not know where to meet

[1] Dietz initially told police that Cummings drove her to a pay phone from which they called Glodowski (2:6).

Glodowski so Cummings "whisper[ed] in her ear" the meeting place (2:6). Dietz told police that, after the shooting, she ran from the scene through a wooded area to the road, where Cummings was waiting in his vehicle (2:6). Cummings drove her back to the gas station, where he dropped her off (2:6). Dietze told police that she put the gun and the casings in a backpack, which she left with Cummings to dispose of (2:6-7).

Cummings initially denied any involvement with events related to the shooting (2:5). When confronted with Dietze's statements, Cummings admitted that he drove Dietze to the vicinity of the shooting, but said he was just "running some errands" when Dietze asked him to drive her to this location (2:7). Cummings said he waited in the car smoking cigarettes and listening to music, then "freaked out" when Dietze returned 20 minutes later and told him she had just shot somebody (2:7). Cummings said that he took Dietze over to his house after the shooting, and later said that Dietze was alone in his garage while he was inside the house, and must have hid the gun and bullets in or outside of the garage at that time (2:7-8). Dietze reiterated to police that Cummings had dropped her off at the gas station, and it was his responsibility to dispose of the gun (2:7). Dietze said she never went over to Cummings' house because Cummings' wife "doesn't like her and she would be very angry" if she knew Dietze was with Cummings (2:7). Cummings was then placed on a probation hold (2:8).

Police conducted two searches of Cummings' residence (2:8-9). The first resulted in the recovery of Dietze's gun case, .22 caliber bullets and a magazine clip for a Smith and Wesson .22 caliber pistol (2:8). Confronted with this evidence, Cummings admitted that he had concealed the bullets, gun case and magazine clip in his basement (2:8). The second yielded five .22 caliber bullets hidden in a pipe that led into the floor, a magazine for a .22 caliber Smith and Wesson pistol buried in the front of a window well, and a .22 caliber Smith and Wesson semi-automatic pistol lying in a box in the garage (2:9).

Carla Glodowski told police that she was "not very happy" with Cummings for "choosing Linda Dietze to … be the one to shoot James Glodowski because Linda Dietze was not very smart" (2:10). Carla said that "if she knew [Cummings] was having Linda Dietze do the shooting, [she] would have told him not to and to find someone else" (2:10).

After the criminal complaint was filed, Cummings moved to suppress incriminating custodial statements made after Cummings told the detective, "Well, then, take me to my cell. Why waste your time? Ya know?"[2] (19:Ex.5 at 20 min. 15 sec.). Cummings argued that this statement was an unequivocal invocation of his right to remain silent (16:1-2). The court disagreed, concluding that the statement was merely a part of Cummings' attempt to get information from the detective (54:64). Additional facts relating to Cummings' claim that he invoked his right to remain silent are set forth in the Argument below.

The parties reached a plea agreement. Pursuant to the agreement, the State filed an amended information charging Cummings with first-degree reckless injury without a sentence enhancer and two counts of aiding a felon (29:1-2). Cummings entered a plea of no contest to the first-degree reckless injury charge, and the charges of harboring a felon and aiding a felon were dismissed and read-in (30:1-6; 55:5). The court accepted Cummings no-contest plea at the hearing after conducting plea colloquy and determining that his plea was entered knowingly, intelligently and voluntarily (55:5-17). The court ordered the Department of Corrections to prepare a presentence investigation report, which was submitted to the court (55:18-19).

[2] Cummings also argued that his statements made before the detective read him the *Miranda* warnings should be suppressed (16:1). The court agreed and suppressed these statements (54:62-63). Because the suppression of these particular statements does not substantially harm the State's case, the State has not filed a cross-appeal challenging this ruling.

At sentencing, the prosecutor argued that Cummings was the primary actor among the three defendants, and sought the maximum sentence of 25 years, consisting of 15 years' incarceration and 10 years' extended supervision (56:11). *See* Wis. Stat. § 940.23(1) (classifying first-degree reckless injury as a Class D felony); Wis. Stat. § 939.50(3)(d) (penalty for Class D felony may not exceed 25 years); Wis. Stat. § 973.01(2)(b)4. (term of confinement in prison for a Class D felony may not exceed 15 years). Cummings' attorney disputed the prosecutor's characterization of Cummings as the primary actor, and requested a sentence "similar to" Dietze's sentence (56:28, 33). In a prior proceeding, the court had sentenced Dietze to 20 years, consisting of seven years' incarceration and 13 years' extended supervision (56:36).

The court determined that Cummings was, in fact, the "mastermind" of the "failed plot" to kill Glodowski, and that Cummings had manipulated both Carla to provide him with financial support, and later the cognitively impaired Dietze to carry out the shooting (56:41, 43). The court concluded that Cummings already had been "given considerable consideration" in having his primary charge reduced in the amended information from attempted first-degree homicide to first-degree reckless injury (56:43). The court went on to explain that it "rarely, if ever, gives the maximum sentence," but that "the gravity of [the offense] and this individual's personal characteristics cries out for a sentence that is very close to the maximum" (56:43). The court then imposed a sentence of 24 years, consisting of 14 years' initial confinement and 10 years' extended supervision (56:43). At the conclusion of its explanation of sentence, the court found that Cummings "is not eligible for the Challenge Incarceration Program or the Earned Release Program, and he is not ordered to serve a Risk Reduction Sentence" (56:46). Additional details from the sentencing hearing are set forth in the Argument section.

Cummings filed a motion for postconviction relief, arguing that his near-maximum sentence was unduly harsh

(40:1-2). Cummings also noted that the court rejected a Risk Reduction Sentence for Cummings without determining whether Cummings was willing to participate in risk testing, special programming and treatment while in prison (40:2-3). By his attorney, Cummings asserted that he was willing to participate in these programs, and argued that this information, not previously known to the court, constituted a new factor justifying sentence modification (40:3). Cummings also argued that his trial counsel was ineffective for failing to determine if Cummings was willing to participate in risk reduction programs, and for failing to request a Risk Reduction Sentence at sentencing (40:4).

The court held an evidentiary hearing to address Cummings' allegation of ineffective assistance (57:1). Cummings' trial counsel testified at the hearing that he "never thought of asking for a risk reduction sentence" and that it "would [have been] a complete waste of time" (57:5). Counsel added that he did not believe that there were any grounds for a risk reduction because Cummings "had denied he had a drug habit at the time" and that the PSI was "probably the first time I ever heard" that Cummings had issues with alcohol and drugs (57:5-6).

After taking testimony, the court heard argument regarding Cummings' ineffective assistance and sentencing claims. At this time, Cummings' attorney also requested modification of sentence to waive the DNA surcharge on indigency grounds (57:15-16). At the close of argument, the court granted Cummings' request to waive the DNA surcharge, and denied Cummings' motion in all other respects (57:36-38).

In rejecting the argument that the sentence was unduly harsh, the court reiterated its conclusion that Cummings was "the brains behind" the crime, which left Glodowski blind in one eye and with a bullet lodged in his spine (57:31-32). The court restated that Cummings had manipulated the cognitively-impaired Dietze to carry out the shooting, and had manipulated Carla for financial gain (57:29-30). The court also expanded on its findings at

sentencing with regard to Cummings manipulation of Carla for financial gain (57:29-31). The court noted that, at Carla's competency hearing, it had discovered that she, like Dietze, was of low cognitive ability (57:29-30). The court found that Carla "thought there was going to be" a romantic relationship with Cummings and that they "were going to run away together" (57:30). As a result, Carla "was more than willing to do whatever Mr. Cummings was able to manipulate her into doing," including participating in a plot to kill her husband so that Carla would receive the entire marital estate to share with Cummings (57:31).

Addressing its *sua sponte* decision at sentencing that Cummings was not eligible for a risk reduction sentence, the court agreed with trial counsel that "it would [have been] a waste of time" for counsel to request a risk reduction sentence (57:34). The court concluded that it would not have granted a 25 percent reduction in sentence under the risk reduction program "in a case that was this grave and a fact scenario that was so egregious" (57:34). The court concluded that Cummings' willingness to participate in risk reduction programming did not constitute a new factor for purposes of resentencing (57:36).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY CONCLUDED THAT CUMMINGS' SENTENCE WAS NOT UNDULY HARSH.

On appeal, Cummings abandons his claims that trial counsel was ineffective for failing to seek a risk reduction sentence, and that his willingness to participate in prison programming associated with a risk reduction sentence constituted a "new factor" justifying sentence modification. Instead, his only challenge on appeal to his sentence is that it was unduly harsh under the circumstances. Cummings' brief at 17-18, 20-22.

A. General legal principles and standard of review.

A circuit court may modify a sentence on the basis of a new factor "or when it concludes its original sentence was unduly harsh or unconscionable." *State v. Grindemann*, 2002 WI App 106, ¶ 21, 255 Wis. 2d 632, 648 N.W.2d 507 (citations omitted). A sentence will be deemed harsh or unconscionable only when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). When a defendant alleges that his sentence was unduly harsh in comparison to co-defendants, he "bears the burden of establishing that the disparity in sentences was arbitrary or based upon considerations not pertinent to proper sentencing." *State v. Perez*, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992) (*citing Ocanas*, 70 Wis. 2d at 187).

A circuit court's postconviction conclusion that the sentence it imposed was not unduly harsh or unconscionable will be upheld on review absent an erroneous exercise of discretion. *See State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995) (citation omitted).

B. Court's sentence was not so disproportionate to the offense committed as to shock the public sentiment where the court reasonably determined that Cummings was the lead actor in the plot to kill Glodowski, and that he had manipulated a cognitively disabled person to carry out the shooting.

Cummings argues that the near-maximum sentence of 24 years, with 14 years' incarceration, on his conviction

for first-degree reckless injury was unduly harsh under the circumstances. Cummings' brief at 17-18, 20-22. Cummings' complains his sentence was excessive when compared to that of the shooter, Dietze, who received a sentence of 20 years, with only 7 years' initial confinement. Cummings' brief at 21. For the reasons set forth below, the state submits that the sentence was not unduly harsh, and represented an appropriate exercise of the court's broad discretion in imposing sentence.

At sentencing, the court squarely addressed the fact that the sentence it was imposing approached the maximum sentence for the offense, and thoroughly explained its reasons for the sentence. The court explained that it had imposed the maximum sentence only "rarely, if ever," but "the gravity of [the offense and Cummings' criminal conduct] and this individual's personal characteristics cries out for a sentence that is very close to the maximum" (56:43).

Cummings' offense was indeed grave. While the plea agreement allowed Cummings to plead to first-degree reckless injury, a Class D felony, the facts of the complaint--that Cummings was a party to a criminal plot to kill another person--supported the far more serious original charge of attempted first-degree intentional homicide, a Class B felony. *See* Wis. Stat. §§ 940.01(1), 939.32(1)(a) (attempted homicide is Class B felony); Wis. Stat. § 939.50(3) (maximum penalty for Class B felony is 60 years' imprisonment). Given the seriousness of Cummings' conduct, the court explained that Cummings had already been "given considerable consideration in the charging of the amended charge in this case" (56:43). The State submits that a period of incarceration of 14 years for an offense in which the defendant is alleged to have been a party to a plot to kill another person plainly does not "shock the public sentiment." *See Ocanas*, 70 Wis. 2d at 185.

To the extent that the circuit court was obligated to justify giving Cummings a longer sentence than Dietze, it did so thoroughly and explicitly on the record. "[T]he

overwhelming evidence and the logical conclusion is that [Cummings] was the mastermind behind this failed plot," explained the court, and "[Cummings] is the one who needs to answer more so than Ms. Dietze does" (56:43). Contrary to Cummings' suggestion, he and Dietze were not similarly situated co-defendants who should have received similar sentences. As explained below, the court reasonably concluded, based on facts available to it at sentencing, that Cummings was the lead actor in the plot to take Glodowski's life, and that he had manipulated the cognitively disabled Dietze to carry out the shooting.

The facts alleged in the criminal complaint show that, while Dietze pulled the trigger, Cummings recruited her to do so, and directed her actions throughout. To wit: Carla reported to police that Cummings "told [her] that [he] had a friend who could get a gun," and that Carla knew this meant that "the plan was to have that friend shoot and kill James Glodowski" (2:9). Approximately one month later, Cummings picked up Dietze in his vehicle, and gave her his cell phone to call Glodowski to arrange a meet, instructing her to dial *67 before entering Glodowski's number (2:6-7). When Dietze was unsure where to meet Glodowski, Cummings "whisper[ed]" the meeting place "in her ear" (2:6). When Glodowski was late for the meet, an impatient Cummings called Glodowski to find out where he was (2:4). Cummings was there to pick up Dietze after the shooting, and it was Cummings' responsibility to dispose of the gun and the casings (2:6-7). The gun case for Dietze's .22 caliber Smith and Wesson pistol, the .22 caliber Smith and Wesson pistol, and five bullets freshly hidden in a basement pipe were later found at Cummings' residence (2:8-9).

Based on these facts, the court concluded that "there … [was] really no question that Dietze was taken advantage of" by Cummings (56:40).[3] The court explained that the PSI report likewise concluded that Cummings "ha[d] a cognitively impaired individual carry out the shooting" and was "a high risk to reoffend and [continued] to be a significant risk to the community due to the appearance of premeditation of this offense" (56:41-42).

Two letters intercepted from Cummings to Dietze at the Taycheedah Correctional Institution offered at sentencing further supported the court's conclusion that Cummings had manipulated Dietze to carry out the shooting (56:4). In these letters, Cummings discusses a letter Cummings wants Dietze to send to the sentencing judge in which Dietze will take full responsibility for the crime (35:Ex.1 and Ex. 2; 56:19). Cummings states in his first letter to Dietze that he "made some corrections" to a first letter to the judge, and encloses a corrected version of that letter with instructions for Dietze to copy it in her own handwriting and mail it back to him (35:Ex. 1).

At sentencing, the court noted that it had ultimately received a letter from Dietze taking full responsibility for the offense (56:40). The judge said he "didn't believe a word of it," and found that the intercepted letters showing Cummings' involvement in the production of the sentencing letter demonstrated Cummings' continued manipulation of "somebody who is clearly cognitively disabled" (56:40-41).

The court also determined at sentencing that Cummings had manipulated the other co-actor, Carla, for

[3] Further, even if Dietze had the intellectual functioning to plan the crime, she lacked any discernible motive. In fact, as the prosecutor noted at sentencing, Dietze was dependent on James Glodowski's on-going financial support; for some unknown reason, Carla Glodowski had co-signed Dietze's apartment lease, and James Glodowski had agreed to pay (and was paying) Dietze's monthly rent (56:16).

his own financial gain, further justifying the court's sentence in this case (56:41). As noted, the criminal complaint alleges that Carla had provided Cummings with on-going financial support in the form of regular $300 to $400 purchases for groceries and household supplies, and that Carla's gifts to Cummings and Dietze had totaled $10,000 (2:4). While Carla told police that she loved Cummings and wanted to be with him, Cummings said that Carla was just a friend (2:9; 19:Ex.5 at 22 min. 57 sec.). When asked if there were any "benefits" associated with this friendship, Cummings told detectives that there was one: "[B]eing able to borrow cash every now and then, or to lend the cash" (19:Ex.5 at 23 min.; 17:17). Cummings also acknowledged that Carla had mentioned to him that her husband had a substantial life insurance policy (19:Ex.5 at 56 min. 30 sec.;17:32). From these and other facts in the record, the court reasonably inferred that Cummings had been manipulating Carla for his own financial gain.

Thus, the facts known to the court at sentencing demonstrated that the judge's decision to sentence Cummings to 24 years (14 years' confinement and 10 years extended supervision) while sentencing Dietze to 20 years (7 years' confinement and 13 years' extended supervision) was not "arbitrary or based upon considerations not pertinent to proper sentencing." *See Perez*, 170 Wis. 2d at 144. Further, the court did not misuse its discretion in determining that its sentence was not unduly harsh where Cummings was a party to an attempt to kill another person, and the court reasonably concluded on the facts of record that Cummings had manipulated a cognitively disabled person to carry out the shooting.

C. The circuit court's *sua sponte* denial of a risk reduction sentence for Cummings adds nothing to Cummings' argument that the sentence was unduly harsh.

In taking issue with the court's denial of a risk reduction sentence, Cummings explains that he is *not* arguing that the court's *sua sponte* decision, by itself, constituted a misuse of the court's sentencing discretion. Rather, he "simply points to the denial of a Risk Reduction Sentence as further indication of the undue harshness of the sentence." Cummings' brief at 20. The State submits that the court's denial of a risk reduction sentence in no way demonstrates that the sentence was unduly harsh.

An offender who receives a risk reduction sentence is entitled to be released after completing 75 percent of the initial period of confinement and completing special programming for at-risk offenders. *See* Wis. Stat. § 302.042(4) (2009-10). Prior to the 2011 repeal of risk reduction sentencing, the court could grant a risk reduction sentence within its discretion "if the court determines that [such a sentence] is appropriate." Wis. Stat. § 971.031; *see* 2011 Wisconsin Act 38, §§ 13, 92 (repealing Wis. Stat. §§ 302.042, 971.031).

The State agrees that Cummings was eligible for a risk reduction sentence at the time of sentencing. However, he was not *entitled to* a risk reduction sentence, he did not request a risk reduction sentence, and the court did not err in denying such a sentence *sua sponte*.[4]

[4] *See* Judge Richard J. Sankovitz, "Sentencing Toolbox Department: Q & A: Risk Reduction Sentences," The Third Branch 6 (Winter 2010) (encouraging judges to address *sua sponte* the appropriateness of a risk reduction sentence when not requested by defense in part to head-off potential ineffective assistance of counsel claims).

Regarding Cummings' argument that the denial of a risk reduction sentence contributed to the alleged harshness of his sentence, the State questions the analytical value of focusing on a court's *denial* of risk reduction in determining whether the sentence imposed was unduly harsh. Of course, a court's *grant* of a risk reduction sentence would mitigate against a claim of undue harshness by providing the offender with the opportunity to reduce his or her incarceration period by completing special programming. But the *denial* of a risk reduction sentence *does not add time to an existing sentence*; in fact, it *changes nothing about the existing sentence*. Therefore, the denial of a risk reduction sentence is of little value in assessing the question of whether the sentence is unduly harsh. Accordingly, the State submits that this court should simply examine the sentence imposed in determining whether it was unduly harsh without regard to the court's denial of a risk reduction sentence.

Because the court's denied a risk reduction sentence, the minimum time Cummings would have to serve on his sentence of 14 years' incarceration remained 14 years. As such, the State renews its arguments from Section B above that a sentence of 14 years' incarceration was not unduly harsh where Cummings was the lead actor in the plot to kill another person, and he had manipulated a cognitively disabled person to carry out the shooting.

II. THE CIRCUIT COURT PROPERLY ADMITTED CUMMINGS' STATEMENTS TO POLICE BECAUSE CUMMINGS DID NOT UNEQUIVOCALLY INVOKE HIS RIGHT TO REMAIN SILENT; ALTERNATIVELY, ADMISSION OF SUCH STATEMENTS WAS HARMLESS ERROR.

Cummings argues he unequivocally invoked his right to silence during his second interview with investigators, and that his post-invocation statements must therefore be suppressed. Cummings' brief at 22-26. The State submits that the alleged invocation was not an unequivocal assertion of Cummings' right to silence, but rather was a ploy to coax information out of the detective, akin to the defendant's "fencing" with the investigator in *State v. Markwardt*, 2007 WI App 242, ¶ 36, 306 Wis. 2d 420, 742 N.W.2d 546. Further, even if the court erred in admitting Cummings' *Mirandized* statements, this error was harmless because there is no reasonable possibility that it would have impacted Cummings' decision to plead guilty to the reduced charge.

Cummings does not dispute that he validly waived his *Miranda* rights prior to the second interview. Cummings' claim involves his right to cut off questioning during an interview. Once a suspect invokes the right to counsel during a police interview, "all police questioning must cease, unless the suspect later validly waives that right and initiates further communication with the police." *Markwardt*, 306 Wis. 2d 420, ¶ 25. "A suspect must unequivocally invoke his or her right to remain silent before police are required either to stop an interview or to clarify equivocal remarks by the suspect." Id. ¶ 26 (citing *State v. Ross*, 203 Wis. 2d 66, 75-79, 552 N.W.2d 428 (Ct. App. 1996)). For a statement to be an unequivocal invocation of the right to silence, it cannot support a reasonable competing inference that it was made for some other reason; "there is no invocation of the right to remain

silent if any reasonable competing inference can be drawn." *Markwardt*, 306 Wis. 2d 420, ¶ 36.

Whether Cummings validly invoked his right to remain silent mid-way through the interview is a question of constitutional fact reviewed under a two-part standard. *State v. Jennings*, 2002 WI 44, ¶ 20, 252 Wis. 2d 228, 647 N.W.2d 142. The circuit court's findings of historical or evidentiary fact will be upheld on review unless clearly erroneous, but the ultimate question of whether Cummings validly invoked his right to silence is reviewed de novo. *See id.*

Approximately twenty-one minutes into Cummings' second interview, the discussion turned to the evidence police had against Cummings (19:Ex.5 at 21 min; 17:17). Cummings told Detective Bean of the Stevens Point Police Department that he "*look*[ed] like" he was "frustrated." (19:Ex.5 at 21 min, 10 sec.; 17:17) Moments later, the detective said to Cummings that his story was inconsistent with what Carla and Dietze had told police (19:Ex.5 at 22 min; 17:17). An animated Cummings asked the detective what Carla and Dietze had told him (19:Ex.5 at 21 min; 17:17). When the detective declined to offer up this information, Cummings responded: "Well, then, take me to my cell. Why waste your time? Ya know?" (19:Ex.5 at 22 min; 17:17). The full transcript of these parts of the interview is provided below:

> Cummings: …. Check the phone records. I'm sure you didn't get your hands on those yet.
>
> Detective: Not the phone records. We've got the phones.
>
> Cummings: Well, that'll clear up some of your frustration.
>
> Detective: I don't have any frustration Carlos.
>
> Cummings: You *look* like you're frustrated.

Detective: If I look like I'm frustrated, it's because I've been here since 8:30 this morning. It's because I've been dealing with this case for the last nine hours. It's because I've listened to people lie to me.

Cummings: That's not good.

Detective: It's taken me this long to get to you. There's more people to interview. Okay? I want the gun.

Cummings: I don't have a gun.

Detective: I know you don't. It's gone now. Where did it go? Every … The information we have … The last person that was in possession of that gun was you. Now you got a lot of shit to lose. You've got an eight-month [old] little kid. You gotta wife at home.

Cummings: (Inaudible) I know, I know.

Detective: You've got a lot to lose, and at this point, I'm telling you right now Carlos, no … all bullshit aside, there's enough to charge you right now! Okay? This is your opportunity to be honest with me, to cut through all the bullshit and be honest about what you know.

Cummings: I'm telling you.

Detective: So why then do we got Carla and [Dietze] telling us different?

Cummings: What are they telling you?

Detective: I'm not telling ya! I'm not gonna fuckin' lay all my cards out in front of you Carlos and say, "This is everything I know!"

Cummings: Well, then, take me to my cell. Why waste your time? Ya know?

Detective: Cuz I'm hopin' …

Cummings: If you got enough …

Detective: … to get the truth from ya.

> Cummings: If you got enough to fuckin' charge me, well then, do it and I will say what I have to say, to whomever, when I plead innocent. And, if they believe me, I get to go home, and if they don't …
>
> Detective: If who believes you?
>
> Cummings: … and if they don't, I get locked up.
>
> Detective: And you're okay with that?
>
> Cummings: No! I'm not okay with that! I don't want to be in that predicament, but right now, I'm under arrest. That's how I see it.
>
> Detective: What's your relationship with Carla?
>
> Cummings: You already know.
>
> Detective: Let me hear it from you so I know that you're man enough to say it.
>
> Cummings: She's a friend.

(19:Ex.5 at 21 min., 5 sec; 17:17).

Cummings argues that the statement, "Well, then, take me to my cell. Why waste your time? Ya know?" was an unequivocal invocation of his right to end the questioning and remain silent. The transcript, however, supports a competing reasonable inference--the *most* reasonable inference, in the State's view--that this statement was part of Cummings' attempt to find out from the officer what Carla and Dietze had told police. Cummings had just asked the detective for this information, and the detective had emphatically refused to provide it. Cummings upped the ante, making a strategic threat to end the conversation if the detective did not tell him what Carla and Dietze had been saying. The fact that the statement at issue ended with the questions "Why waste your time? Ya know?" shows that Cummings was seeking continued dialogue with the detective. Cummings subsequent statements about charging him if police had sufficient evidence to do so and challenging the charges in court were also not unequivocal requests to end the interview, but are reasonably viewed as a part of the back-

and-forth Cummings had been engaging in with the detective. In fact, Cummings showed some relish for the thrust-and-parry with the detective. Moments before his strategic threat to end the conversation, Cummings goaded the detective: "You *look* like you're frustrated." This statement is not that of a person who wishes to end an interview.

Cummings' "take me to my cell" comment is nearly identical to the defendant's request in *Markwardt*, "[t]hen put me in jail," which likewise was not an unequivocal invocation of the right to silence. *Markwardt*, 306 Wis. 2d 420, ¶¶ 16-36. There, after over one hour of questioning, Markwardt told investigators: "Then put me in jail. Just get me out of here. I don't want to sit here anymore, alright. I've been through enough today." *Id.* ¶ 16. This court concluded that Markwardt did not unequivocally invoke her right to silence because her comments could reasonably be viewed as verbal "fencing" with the detective as he kept repeatedly catching her providing differing versions of events. *Id.* ¶ 36. Likewise, in Cummings' case a reasonable inference exists Cummings was sparring with the detective, and that his objective in the moment was not to end the interview, but to find out what Carla and Dietze had told him.

Cummings argues that his comments were like those made by the defendant in *State v. Goetsch*, 186 Wis. 2d 1, 519 N.W.2d 634 (Ct. App. 1994), which were found to have been an unequivocal invocation of the right to silence. Cummings' brief at 24-25. Unlike Cummings, however, Goetsch made a direct and unambiguous request to end the questioning, thus plainly invoking his right to be silent: "I don't want to talk about this anymore. I've told you, I've told you everything I can tell you." *Id.* at 7. Cummings' comments are more akin to those in *Markwardt* than to those in *Goetsch*.

Alternatively, even if this court were to conclude that the court erred in admitting Cummings' statements, it should still affirm on harmless error grounds. "In a guilty plea situation following the denial of a motion to suppress,

the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." *State v. Semrau*, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376. Cummings does not discuss how suppression of this evidence would have affected the outcome in his case, and it is apparent that there is no reasonable chance that it would have had any effect. That is, there is no reasonable possibility that suppression of this particular evidence would have changed Cummings' calculus in deciding to enter a plea to the reduced charge.

Cummings provided little (if any) inculpatory information to detectives after making the "take me to my cell" comment. Cummings merely acknowledged that he had picked up Dietze, that Dietze gave him the backpack (which he said did not contain a gun or casings), and that he knew that Glodowski had a substantial life insurance policy--facts that were already known to police (19:Ex.5 at 34 min., 41 min., 56 min. 30 sec.; 17:22-23, 25-26, 32). He maintained that he was only doing a favor for a friend by giving Dietze a ride and did not know that Dietze was going to shoot Glodowski (19:Ex.5 at 34 min.; 17:22-23). The case against Cummings was built on Dietze's and Carla's statements and the physical evidence. It would have been on the weight of this evidence, and on the benefit of being allowed to plead to a greatly reduced charge, that Cummings decided to enter a guilty plea to first degree reckless injury. Thus, even without Cummings' statements, there remained "overwhelming incentives" for Cummings "to plead rather than go to trial." *State v. Rockette,* 2005 WI App 205, ¶ 27, 287 Wis. 2d 257, 704 N.W.2d 382. Admission of Cummings' statements, if erroneous, was therefore harmless.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm the order denying Cummings' motion for postconviction relief, and the judgment of conviction.

Dated this 7th day of February, 2012.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 266-9594 (Fax)
wittwerjj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,148 words.

Dated this 7th day of February, 2012.

_____
JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 7th day of February, 2012.

_____
JACOB J. WITTWER
Assistant Attorney General