STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2012AP863-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OMAR J. SMITH,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE REBECCA F. DALLET AND THE HONORABLE DENNIS R. CIMPL, PRESIDING

AMENDED BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the amended brief of defendant-appellant Omar J. Smith, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.[1]

ARGUMENT

Smith was convicted following a jury trial of first-degree reckless homicide by use of a dangerous weapon, as a party to a crime, two counts of first-degree recklessly endangering safety by use of a dangerous weapon, as a party to a crime, possession of a firearm by a felon, and felony bail jumping (47:1; A-Ap. 151). The charges arose from an incident in which three men opened fire on group of people who were standing outside a house (2:2-5). Three people were shot, one of them fatally (2:3). Smith admitted to police that he was one of the men who fired the shots (2:4-5).

Smith argues on appeal that the circuit court erred when it denied his motion to suppress his statement to the police, that his confrontation rights were violated by the prosecutor's questioning of one of the State's witnesses, and

[1]The court of appeals granted Smith's request to file an amended appellate brief that adds a claim of ineffective assistance of trial counsel. In its previously filed response brief, the State had argued that Smith had abandoned that claim on appeal. In this brief, the State withdraws that argument because Smith's amended brief now makes that claim.

that his sentences violate the Eighth Amendment and reflect an erroneous exercise of discretion. Because none of those claims has merit, this court should affirm the judgment of conviction and the order denying Smith's motion for postconviction relief.[2]

I. SMITH DID NOT UNAMBIGUOUSLY INVOKE HIS RIGHT TO COUNSEL.

Smith argues that the trial court should have suppressed statements that he made to Milwaukee detectives after he purportedly invoked his right to counsel. He contends that the trial court erred when it determined that his reference to a lawyer was not an unequivocal invocation of that right. Only Smith's second request for a lawyer is at issue on appeal; he does not challenge the trial court's finding that he reinitiated discussion with detectives after his first request for counsel. *See* Smith's amended brief at 19.

"[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). A suspect's request for counsel "must be unambiguous – in

[2]The Honorable Rebecca F. Dallet presided at the suppression hearing and issued the oral ruling denying Smith's suppression motion (80:18-26; A-Ap. 107-15). The Honorable Dennis R. Cimpl presided at trial and the postconviction proceedings.

other words, the suspect 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *State v. Linton*, 2010 WI App 129, ¶8, 329 Wis. 2d 687, 791 N.W.2d 222 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)). "If the suspect makes an ambiguous or equivocal reference to an attorney, officers need not stop questioning the suspect and may clarify the comment." *Id.* If the statement alleged to have invoked counsel is ambiguous or equivocal such that "a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," officers are not required to cease questioning or clarify the statement. *State v. Jennings,* 2002 WI 44, ¶36, 252 Wis. 2d 228, 647 N.W.2d 142.

The sufficiency of a defendant's invocation of his right to counsel is a question of constitutional fact that an appellate court reviews under a two-part standard. *State v. Berggren*, 2009 WI App 82, ¶35, 320 Wis. 2d 209, 769 N.W.2d 110. The reviewing court will uphold the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. It reviews independently the circuit court's application of constitutional principles to those evidentiary facts. *Id*.

In his brief, Smith cites the transcript of his interview with the detectives that was provided to the jury at trial. *See* Smith's amended brief at 19-20. However, he also states that "he does not challenge the trial court's findings of historical fact," *id*. at 19, and he does not argue that the trial

court's findings differ in any significant way from the transcript provided to the jury.

The trial court did not have the transcript at the suppression hearing; it based its factual findings on its review of the audio recording of the interview (80:23; A-Ap. 112). These are the trial court's findings:

> And then at that point I think Detective Kopcha says, at five minutes and 50 seconds: Do you want to tell us what about your part, what was your part? And the defendant says: I want to talk to you. I kind of want a lawyer present, but I don't want it to look worse. And that's the part that's a little harder to hear. But I got the same thing that both attorneys got out of that, was: I don't want it to look worse for me if I ask for a lawyer, or something to that effect. And in response Detective Kopcha says: This is your decision. I can't help you with that. You can answer some questions. It's your decision. You can not answer all the questions. And he explains it again. And then at that point, at six minutes and 38 seconds in, the defendant says: Fire away with your questions. And Detective Kopcha clarifies again: Do you want to tell us what happened? Six minutes and 45 seconds in: Fire away with your questions. Detective Kopcha says: Does that mean yes? And the defendant says: Go right ahead.

(80:23-24; A-Ap. 112-13.)

Based on those factual findings, the trial court ruled that Smith had not unambiguously invoked his right to counsel. The court held:

> So I think that they never had to stop based on the first statement. I don't think they had to stop based on the statement that says: I wanna talk to you but I kind a want a

> lawyer present, but I don't want it to look worse for me. If that's not ambiguous and equivocal, I don't know what is. I don't even think the officers had to, according to the case law, clarify that. Though it's good that they do, because I think it's better for everyone to be clear about rights and about the defendant knowingly doing this. But they clarified it. Detective Kopcha clarified it to the point where the defendant said: Yes, go right ahead. Yes, I will talk to you. He was given every opportunity after the clarifications to say: I want a lawyer, or no, I don't want to talk to you, or forget, or to be more clear. And he didn't. And what he did say was not clear at all. I think it's much less clear than what was said in *Davis* and *Jennings*, and those were thought to be ambiguous. I think even taking into -- the fact that he initially said he thought he wanted a lawyer, even taking that factor into account, there was not a clear, unambiguous waiver of his or assertion of his right. So I am gonna find that it was a valid waiver of his right to have an attorney here and to talk to officers, and it was not violated in any way, his right to counsel.

(80:24-25; A-Ap. 113-14.)

The trial court's analysis was correct. Smith's statement that he wanted to talk to the detectives and that he "kind of" wanted a lawyer but that he did not want it to look worse was not an unambiguous request for a lawyer.

The trial court compared Smith's statement to the defendant's statements in *Davis* that "[m]aybe I should talk to a lawyer," *Davis*, 512 U.S. at 455, and in *Jennings* that "I think maybe I need to talk to a lawyer," *Jennings,* 252 Wis. 2d 228, ¶24, finding Smith's request to be even less clear than those statements, which were found to

be ambiguous (80:25: A-Ap. 114). The State agrees.

Indeed, in his brief, Smith states that his request that "I kind of want a lawyer but I don't want it to look worse" was "not as ambiguous as . . . it may appear here upon first glance." Smith's amended brief at 20. If, as Smith concedes, his statement "may appear" ambiguous "upon first glance," it is hard to characterize that statement as one that a reasonable officer should have recognized as an unambiguous request for a lawyer.

In a case that is factually very close to this case, the Seventh Circuit held that the defendant's assertion of his right to counsel was ambiguous. In *United States v. Hampton*, 675 F.3d 720 (7th Cir. 2012), the defendant, after waiving his rights and agreeing to speak with the police, changed his mind and requested a lawyer. *Id.* at 724. The officers stopped the interview. *Id.* The defendant changed his mind again and asked to talk with the officers without an attorney present. *Id.* The following exchange then took place:

> [Officer] Passwater: Alright. Earlier, you told us you—you—you were gonna talk about getting a lawyer or whatever . . . *do you want a lawyer at this time?*
>
> Hampton: *Yeah, I do, but you . . .*
>
> Passwater: Then I can't talk to you, alright? We can't—I can't take a statement from you if you want a lawyer.
>
> * * *
>
> Hampton: But see, I'm askin' you is this gonna effect what's goin' on [?]

> Passwater: To be honest, I don't know—I mean . . .
>
> Hampton: What does—what does me—my attorney bein' present has to do with it—you know what I'm sayin'? That's what I . . . I don't . . . that's what ya'll don't understand . . . you makin' me [. . .]
>
> Passwater: If you want a lawyer then we need to stop the deal, okay?
>
> Hampton: See, I'm—
>
> Passwater: It's one way or another. OK?
>
> Hampton: Yeah, come on man.
>
> Passwater: All right.
>
> [Officer] Nicholos: Wanna go on?
>
> Hampton: Go ahead.

Id. (emphasis added).

The Seventh Circuit held that given his pattern of equivocation and his use of the "hedge" word "but," the defendant's statement "yeah, I do, but you . . ." was not an unambiguous request for a lawyer. The court explained:

> Here, Hampton had already signed a *Miranda* waiver and agreed to talk to the officers without a lawyer, only to change his mind just as the interview was getting underway. The officers immediately stopped the interrogation and summoned a guard to take Hampton back to his cell. When the guard arrived, Hampton changed his mind again and reinitiated the interview, asking to talk to the officers without an attorney present. The officers paused and took the precautionary step of bringing in audiorecording equipment. When Passwater renewed the *Miranda* warnings, Hampton

> hesitated again and appeared to have another change of heart. Based on this pattern of equivocation and because Hampton's reference to a lawyer used the hedge word "but," we agree with the government that a reasonable officer would have understood only that Hampton *might* want an attorney present, not that he was clearly invoking his right to deal with the officers only through counsel.

Id. at 727.

In this case, Smith, like the defendant in *Hampton*, initially made an unambiguous request for a lawyer, which the detectives honored by immediately ceasing their questioning (79:13-14). In this case, Smith, like the defendant in *Hampton*, reinitiated the discussion and told the detectives that he would speak to them without a lawyer present (79:16). And in this case, as in *Hampton*, after Smith reinitiated the discussion, he said he wanted a lawyer – actually, that he "kind of" wanted a lawyer – but immediately qualified that statement with a "but": that he kind of wanted a lawyer but that he didn't want it to look worse (80:24; A-Ap. 113).

There is a difference between this case and *Hampton*, but it works against Smith. In *Hampton*, the defendant, before adding the "but" qualifier that made his reference to counsel ambiguous, uttered an unambiguous "[y]eah, I do" in response to the officer's question about whether he wanted a lawyer. *Hampton*, 675 F.3d at 724. Smith, in contrast, waffled even before adding the "but" phrase, saying that he "kind of" wanted a lawyer present (80:23; A-Ap. 112).

In *Hampton*, the Seventh Circuit concluded that based on the defendant's "pattern of

equivocation" and "because Hampton's reference to a lawyer used the hedge word 'but,'" a "reasonable officer would have understood only that Hampton *might* want an attorney present, not that he was clearly invoking his right to deal with the officers only through counsel." *Id*. at 727. This court likewise should conclude that given Smith's similar pattern of equivocation and his use of the hedge words "but I don't want to make it look worse for me," a reasonable officer would have understood only that Smith might want an attorney present, not that he was clearly invoking his right to deal with the police only through counsel. And although they were not required to do so, *see Jennings*, 252 Wis. 2d 228, ¶36, the detectives immediately clarified with Smith that he did want to talk with them without a lawyer present (80:23-25; A-Ap. 112-14).

The circuit court correctly found that Smith did not unambiguously invoke his right to counsel. Accordingly, this court should affirm the circuit court's order denying Smith's motion to suppress his ensuing statements to the detectives.

II. SMITH IS NOT ENTITLED TO A NEW TRIAL BASED ON THE UNANSWERED QUESTIONS POSED TO THE PROSECUTION WITNESS.

Smith argues that the trial court erred when it denied his motion for a mistrial based on the State's questioning of Alfonzo Treadwell. That claim was not preserved for review because Smith did not timely object to Treadwell's testimony and move for a mistrial. Even if the claim were preserved, however, Smith is not entitled to relief

because any error in initially permitting the prosecutor to question Treadwell was cured when the circuit court, in response to Smith's belated objection, struck the challenged testimony and instructed the jury not to consider it and because any possible lingering prejudicial effect of the stricken testimony was harmless in light of the strong evidence of Smith's guilt, including, most importantly, his confession.

Smith argues in the alternative that his lawyer was ineffective for failing to object to the questioning. That claim fails because, for these same reasons, Smith was not prejudiced by counsel's failure to object.

A. Smith did not preserve his objection.

The State called Treadwell as a witness in its case in chief on the morning of the third day of trial (102:58). Treadwell testified that he had entered a guilty plea and been sentenced to prison for the shooting that was the subject of this trial (102:58-59). He also testified that he and Smith were friends (102:59-61).

The questioning took an unexpected turn when the prosecutor asked Treadwell if he and Smith were involved in a shooting that occurred on April 17, 2009 (102:61). After several nonresponsive answers, Treadwell answered "[n]o," but he then acknowledged that he was involved in the shooting (102:61-62). When Treadwell refused to answer any more questions (102:63-64), the court said that it would "pass" the witness (102:65).

The court, apparently directing its remarks to the prosecutor, then stated that "[o]ne of the things that you could certainly do is you can ask me to declare him unavailable because of his refusal to testify and then you can have his statement admitted into evidence under 908.045(4), a statement against interest" (102:65). The prosecutor responded that he hoped that Treadwell would cooperate "but that is something I may request shortly" (*id.*). Defense counsel then told the court, "I'm sure the Court is aware of this, but we would strongly object to that. My client does have a right to face his accusers" (102:66).

That afternoon, Treadwell was recalled as a witness (93:59). The prosecutor asked Treadwell a series of questions about statements he had made to a detective about the shooting incident (93:62-77). Treadwell did not respond to those questions (*id.*). As Smith notes in his brief, *see* Smith's amended brief at 12, his counsel did not object to the prosecutor's questions (93:62-77). Defense counsel also tried without success to question Treadwell about his statements to the police (93:77-89). Defense counsel did not assert any objections or request any relief from the court (*id.*). It was not until the next afternoon that defense counsel moved for a mistrial based on Treadwell's refusal to testify (95:3-5).

Unobjected-to errors, including errors of constitutional dimension, are forfeited by the absence of a contemporaneous objection. *See State v. Davis*, 199 Wis. 2d 513, 517, 545 N.W.2d 244, 245 (Ct. App. 1996). The contemporaneous objection rule "gives the trial court an opportunity to correct its own errors, and thereby works to avoid the delay and expense incident to appeals, reversals and new trials which might have been

unnecessary had the objections been properly raised in the lower court." *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (citations omitted). Similarly, a motion for a mistrial must be made promptly to preserve a claim that the trial court erred by denying a mistrial. *Mulkovich v. State*, 73 Wis. 2d 464, 469, 243 N.W.2d 198 (1976).

In his brief, Smith states that his lawyer "objected on confrontation grounds at the end of Treadwell's morning testimony (102:66), but did not lodge a standing or continuing objection and did not freshly object when Treadwell was brought back for the afternoon session." Smith's amended brief at 24. As discussed above, however, the objection to which Smith refers was to the court's suggestion that Treadwell's statement to the police might be admitted as a statement against interest (102:65-66). That objection was not to the State's questioning of Treadwell about Treadwell's statement to the police, nor could it have been, as the State did not pose those questions to Treadwell until court resumed in the afternoon (93:63-77). As Smith correctly states, "[t]he afternoon questioning of Treadwell proceeded without objection." Smith's amended brief at 24.[3]

In his postconviction motion, Smith asserted that "defense counsel was ineffective for failing to promptly object to the confrontation clause violation and promptly request a mistrial" (59:4; A-Ap. 157). He acknowledged that "[o]bjections to questioning and motions for mistrial must be made immediately, otherwise they are deemed waived" (59:5; A-Ap. 158). He further

[3]Notwithstanding the court's suggestion, the State did not seek to introduce his statements to the police other than through its questioning of Treadwell.

acknowledged that "[t]hat did not happen in this case, as defense counsel failed to object to the questioning of Treadwell and did not request a mistrial until the next day" (*id.*).

Smith's only explanation as to why he now believes that he preserved his objection is that the postconviction court noted that trial counsel voiced an objection during the morning session and that the court "seemingly considered the original objection as covering Treadwell's return to the witness stand that afternoon." Smith's amended brief at 28-29. Smith does not explain, however, why his objection to the court's suggestion that Treadwell's statement to the police might be admitted as a statement against interest may be construed as an objection to the State's later questioning of Treadwell.

"The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Smith has not shown that he preserved his confrontation claim by making a contemporaneous objection to the questioning of Treadwell. This court should conclude, therefore, that Smith has not preserved his claim for direct review.

B. Even if Smith had preserved his Confrontation Clause claim, he would not be entitled to relief on appeal.

The State does not dispute that Smith's right to confrontation would have been violated had the jury been allowed to find, based on the prosecutor's unanswered questions, that

Treadwell made the statements to the police that were the subject of the prosecutor's questions. Because Treadwell's statements appear to have been the product of a police investigation, those statements were testimonial. *See Crawford v. Washington*, 541 U.S. 36, 52 (2004). Treadwell's refusal to answer any questions about those statements on cross-examination deprived Smith of the opportunity to cross-examine Treadwell. *See Soto v. State*, 677 S.E.2d 95, 99 (Ga. 2009) (finding a confrontation violation because the defendant "was given no opportunity whatsoever to cross-examine [the witness] because [the witness] 'shut down' in the midst of direct examination and refused to answer further questions posed by either the prosecution or the defense").[4]

However, the jury was not permitted to find that Treadwell made the statements to the police that were the subject of the prosecutor's unanswered questions. That is because, after Smith belatedly objected and moved for a mistrial (95:5; A-Ap. 118), the court gave the jury the following instruction:

> [T]he court has ordered struck all testimony of Alfonzo Treadwell from the afternoon of Wednesday, November 4th.[5] The jury is

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[4]Smith argues that the prosecutor's questions about Treadwell's statements to the police violated the confrontation clause. *See* Smith's amended brief at 22-23. This court need not decide whether the prosecutor's unanswered questions, standing alone, violated Smith's right to confrontation because Treadwell remained mute when defense counsel questioned him about those statements (93:77-89).

[5]The court's reference to November 4 was mistaken. The court gave the jury this instruction on November 4 (95:1, 21-22). Treadwell was on the witness stand the previous day (93:1, 61).

> ordered to disregard what occurred during the afternoon of November 4th regarding the testimony of Treadwell. In particular, all questions and comments by the attorneys and the Court and any responses given by Treadwell because there is no evidence on this record that any of those questions, comments, and responses were based in fact. His testimony from the morning of November 4th is not affected by this order and it is in evidence.
>
> Remarks of the attorneys are not evidence. If the remarks suggested certain facts in evidence, disregard that suggestion.

(95:21-22; A-Ap. 134-35.)

When it gave the jury its final instructions, the court reiterated its admonition to disregard the questioning of Treadwell.

> The Court has struck all of the testimony of Alfonzo Treadwell from the afternoon of Wednesday November 3rd. The jury is ordered to disregard and not consider in any manner whatsoever during your deliberations what occurred during the afternoon of November 3rd regarding the testimony of Treadwell, in particular all questions and comments by the attorneys and the Court and any response given by Treadwell, because there is no evidence on this record that any of those questions, comments and responses were based in fact. His testimony from the morning of November 3rd is not affected by this order, and it is in evidence. Remarks of the attorneys are not evidence. If the remarks suggested certain facts in evidence, disregard the suggestion.

(96:94-95.)

Jurors are presumed to follow the court's instructions. *See State v. Truax*, 151 Wis. 2d 354,

362, 444 N.W.2d 432 (Ct. App. 1989). The instructions in this case were as clear and unequivocal as possible: the jury was "ordered to disregard and not consider in any manner whatsoever during your deliberations what occurred during the afternoon of November 3rd regarding the testimony of Treadwell" and was told that there was "no evidence" that the attorneys' questions "were based in fact" (96:94).

Smith argues that this "limiting instruction" was ineffective under *Bruton v. United States*, 391 U.S. 123 (1968), and *Cruz v. New York*, 481 U.S. 186 (1987), to protect his right to confrontation. There are, however, significant differences between this case and those decisions.

In *Bruton*, Bruton and a codefendant were convicted following a joint trial at which the codefendant's confession was admitted. *See Bruton*, 391 U.S. at 123-24. The jury was instructed that although the codefendant's confession was competent evidence against the codefendant, it was inadmissible hearsay against Bruton and should be disregarded when determining Bruton's guilt. *See id*. at 125.

Overruling *Delli Paoli v. United States*, 352 U.S. 232 (1957), the Supreme Court held that "[d]espite the concededly clear instructions to the jury to disregard [the codefendant's] inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." *Bruton*, 391 U.S. at 137. The Court noted that "[t]he basic premise of *Delli Paoli* was that it is 'reasonably possible for the jury to follow' sufficiently clear instructions to disregard the

confessor's extrajudicial statement that his codefendant participated with him in committing the crime." *Id*. at 126. The *Bruton* Court concluded, contrary to *Delli Paoli*, that "the risk that the jury will not, or cannot, follow instructions" was too great "where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." *Id*. at 135-36.

In *Cruz*, the Court applied the *Bruton* rule to a joint trial in which both codefendants confessed. The Court held that "where 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*, 481 U.S. at 193 (citation omitted). The Court further held, however, that the defendant's own confession may be considered on appeal in assessing whether any confrontation violation resulting from the admission of the codefendant's confession was harmless. *See id*. at 194.

The Supreme Court has described the *Bruton* rule as a "narrow exception" to "the almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 205-06 (1987). The Court held in *Richardson* that *Bruton* does not "require[] the same result when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." *Id*. at 202, 211.

The circumstances that led the court in *Bruton* to create a narrow exception to the assumption that jurors follow their instructions were not present in this case. Unlike *Bruton* and *Cruz*, this was not a joint trial of codefendants Smith and Treadwell. As a result, and again unlike *Bruton* and *Cruz*, the court here did not admit Treadwell's statements subject to a limiting instruction – that is, an instruction that allowed the jury to consider the evidence, but only for a limited purpose. Rather, the court struck the entire line of questioning about Treadwell's statements to the police, told the jury that it was not evidence, and ordered the jury "not [to] consider in any manner whatsoever during its deliberations" the questioning of Treadwell (96:94-95). The risk present in *Bruton* and *Cruz* that the jury would be unable to follow an instruction limiting the use of the evidence to only one of the defendants simply was not present in this case.

C. Any possible confrontation violation was harmless.

Even if the trial court's actions in striking the testimony and instructing the jury to disregard it had not been sufficient to prevent a Confrontation Clause violation, Smith would not be entitled to a new trial because any error was harmless. "The determination of a violation of the confrontation clause 'does not result in an automatic reversal, but rather is subject to harmless error analysis.'" *State v. Weed,* 2003 WI 85, ¶28, 263 Wis. 2d 434, 666 N.W.2d 485 (citation omitted).

Our supreme court has articulated the test for harmless error two ways: (1) error is harmless

if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error,'" *State v. Mayo*, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115, (quoting *State v. Harvey*, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)); and (2) the error is harmless if the beneficiary of the error proves "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,'" *id.* (quoting *State v. Anderson*, 2006 WI 77, ¶114, 291 Wis. 2d 673, 717 N.W.2d 74 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Under either formulation, any error by the trial court in the handling of Treadwell's testimony was harmless.

There was no dispute at trial that three men opened fire on a group of people standing outside a house on West McKinley Avenue on April 17, 2009; that three people, Jordan Alvarez, Brittany Alvarez, and Jennifer Langoehr were shot; and that Jordan Alvarez died at the scene from a bullet wound to the heart. The primary issue for the jury was whether Smith was one of the shooters (89:84-89 (defense counsel's opening statement); 96:132 (defense counsel's closing argument that "the issue here, has the State proved beyond a reasonable doubt that my client has been or was involved in these cases, and we submit they have not proved that")).

The most damning evidence against Smith came from his confession to the police. *See Cruz*, 481 U.S. at 194 (even when there has been a *Bruton* violation, the defendant's own confession may be considered in assessing harmless error). Smith told detectives that several days before the shooting on McKinley Avenue, shots had been

fired at his mother's house by members of the "Deuce Squad" (103:6, 21-22). On the evening in question, Smith told detectives, he and two other men were dropped off by another man at 22nd and Vliet (103:5-7).[6] Smith said that that happened "late in the eight o'clock hour" and that the man who dropped them off was on his way to a liquor store (103:7). Smith refused to identify any of the other men (103:4).

Smith and his two companions walked towards 26th and McKinley (103:7-8). They saw a crowd of people on the sidewalk outside a house across the street, and one of Smith's group said that the people across the street might be with the Deuce Squad (103:8, 10, 25). Smith said that the next thing that happened was that he "just started shootin'" (103:8). He said that he had a nine-millimeter gun that held thirteen to fourteen rounds and that he fired above the crowd until he ran out of bullets (103:8-9). Smith said that after they finished firing, they ran off (103:11).

Smith, who did not testify (96:32), did not provide the jury with any plausible reason to disregard his confession. His lawyer suggested to the jury in closing argument that it should not believe Smith's confession because it was contradicted by Treadwell's trial testimony (which was not stricken) that Smith was not involved in the shooting (96:123). But given Treadwell's refusal shortly after giving that testimony to answer any more questions by the prosecutor or defense counsel (102:61-64; 93:61-88), the jury was hardly likely to find Treadwell a credible witness. Defense counsel also suggested that Smith's confession was prompted by concern for his

[6]Later in the interview, Smith said they were dropped off at 24th and Vliet (103:24).

brother, who also had been arrested (96:124). But that argument gave the jury no reason to doubt the truthfulness of Smith's confession because Smith said nothing that would exonerate his brother – he refused to identify any of the other men who were involved that evening (103:4). In short, the jury had no reason to doubt that Smith was telling the truth when he confessed to being one of the shooters.

Smith's confession was corroborated by other trial evidence. Harold Conner testified that he is a friend of Smith and that he knew Treadwell (93:91). Conner testified that on the evening of the shooting, he gave Smith, Treadwell, and a third man a ride in his car (93:100). He dropped them off at 21st and Vliet around 8:30 p.m. and then headed to a liquor store (93:106). Conner's testimony thus corroborated Smith's statement that he and two other men were dropped off in that neighborhood after 8:00 p.m. by a man who was going to a liquor store after he dropped them off (103:7).

Smith said that he and his two companions were across the street from the group standing outside the house when he began to fire (103:10). Several witnesses testified at trial that the shots were fired by three men who were across the street (90:54-56; 102:15-16, 81-83, 87). Witnesses testified that at least one of the shooters had a hood covering his head (90:54; 102:82). Smith told the detectives that he was wearing a hoodie that night (103:13).

Investigating officers recovered fired cartridge casings in the area witnesses said the shooting came from (91:68-78). They found thirteen nine-millimeter casings, eight .45-caliber

casings, three .25-caliber casings, and one .22-caliber casing (91:78; 96:20). Ballistics testing revealed that all of the nine-millimeter casings had all been fired from a single gun (93:39-40) and that the bullet recovered from Jordan Alvarez's body was a nine-millimeter bullet (93:34-35; 96:20). That evidence was consistent with Smith's statement that he had a nine-millimeter pistol with a capacity of thirteen or fourteen rounds and that he fired all of the rounds that were in the gun (103:8-9).

In addition, a letter that Smith sent to Treadwell was read to the jury (95:75-79). (The letter, which was signed "Omar," had Smith's thumbprint on it (95:38, 44; 96:12).) In that letter, Smith assured Treadwell that he would not testify against Treadwell and told Treadwell that Treadwell "better not" testify against him even if Treadwell were offered a deal (95:77) He told Treadwell that he "would appreciate if you and your lawyer would write up an affidavit saying that you refuse to testify against me because it would save me a lot of time and that way my lawyer will stop saying you gonna testify" (*id.*). He concluded the letter by telling Treadwell that he "bet [sic] not take no kinda deals" and that they should "stick together thick and thin" (95:78).

Smith's confession, coupled with the corroborating witness testimony and physical evidence, made for a compelling case against Smith. There is no doubt that a rational jury would have convicted Smith even if it had not heard the stricken questions posed to Treadwell. Accordingly, even if Smith had preserved his objection to Treadwell's questioning, and even if the jury failed to follow the court's instruction to

disregard that questioning, any error in the court's handling of Treadwell's questioning was harmless.

D. Smith's counsel was not ineffective.

Because Smith did not preserve his objection, his confrontation claim is properly reviewed in an ineffective assistance of counsel framework. *See State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 ("The absence of any objection warrants that we follow the normal procedure in criminal cases, which is to address waiver within the rubric of the ineffective assistance of counsel.") (internal quotations omitted). A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

The conclusion that an error in admitting evidence was harmless subsumes a claim that counsel was ineffective for failing to object to its admission. *See State v. King*, 205 Wis. 2d 81, 97, 555 N.W.2d 189 (Ct. App. 1996) ("We have already established that the admission of . . . statements implicating King was harmless beyond a reasonable doubt. Therefore, King was not denied effective assistance of counsel."). The State has already explained that Smith was not prejudiced by Treadwell's questioning because the circuit court struck the challenged testimony and instructed the jury not to consider it. The State also has explained why, in light of the other

evidence of Smith's guilt, any possible lingering effect of the stricken testimony was harmless. Accordingly, the court should conclude that Smith was not prejudiced by his lawyer's failure to object to Treadwell's questioning.

III. SMITH HAS NOT SHOWN THAT HIS SENTENCE VIOLATES THE EIGHTH AMENDMENT OR THAT THE SENTENCING COURT ERRONEOUSLY EXERCISED ITS DISCRETION.

A. Smith's sentence does not violate the Eighth Amendment.

Smith asserts, and the State does not contest, that he will be 82 years old when he completes the confinement portion of the consecutive sentences imposed in this case. *See* Smith's amended brief at 32. He argues that his "*de facto* life sentence" violates the Eighth Amendment's prohibition against cruel and unusual punishment. *See id.* at 31. The court should reject that claim.

"The test for whether a sentence violates the Eighth Amendment and whether a sentence was excessive are virtually identical in Wisconsin." *State v. Davis,* 2005 WI App 98, ¶21, 281 Wis. 2d 118, 698 N.W.2d 823. "In addressing the Eighth Amendment claim, [the court] look[s] to whether the sentence was '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.'" *Id.* (quoted source omitted). Likewise, a sentence is unduly

harsh "only when it is 'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment or reasonable people concerning what is right and proper under the circumstances.'" *Id*. (quoted source omitted).

Smith's brief does not cite this standard, much less attempt to apply it to his sentence. Instead, he relies exclusively upon the Supreme Court's decision in *Graham v. Florida*, 130 S.Ct. 2011 (2010), to support his constitutional objection to his sentence. *See* Smith's amended brief at 31. Smith says that "*Graham* held that the Constitution prohibits the sentencing of a juvenile to life without parole or probation for a non-capital crime." *Id*.

Graham provides no support for Smith's Eighth Amendment claim. First, as Smith acknowledges, he was not a juvenile when he committed these crimes. *See id*. He argues that the *Graham* rule should apply to him because he was twenty when he committed his crimes, but he cites no authority to support the proposition that *Graham* applies to younger adults. The court need not and should not consider this unsupported argument. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

Second, Smith's argument is based on a misstatement of *Graham*'s holding. *Graham* did not hold, as Smith states, that "the Constitution prohibits the sentencing of a juvenile to life without parole or probation for a *non-capital* crime." Smith's amended brief at 31 (emphasis added). Rather, *Graham* held that the Eighth

Amendment prohibits sentencing a juvenile to life imprisonment without parole for a *non-homicide* offense.

The defendant in *Graham* was a juvenile convicted of armed burglary with assault or battery, a charge that carried a maximum penalty of life imprisonment without the possibility of parole. *See Graham*, 130 S. Ct. at 2018. The issue before the Supreme Court in *Graham* was "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a *nonhomicide* crime." *Id.* at 2017-18 (emphasis added). The Court held that such a sentence violates the Eighth Amendment: "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender *who did not commit homicide*." *Id.* at 2034 (emphasis added).

Throughout its opinion, the Court distinguished between juveniles who commit homicide and those who commit non-homicide offenses. *See, e.g., id.* at 2023 ("Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide."); *id.* at 2027 ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."); *id.* at 2030 ("penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders"); *id.* at 2032 ("a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform").

Smith was convicted of a homicide (47:1; A-Ap. 151). Indeed, although Smith was convicted of being a party to the crime of first-degree reckless homicide (*id.*), the sentencing court said that the evidence showed that Smith was the person who fired the shot that killed Jordan Alvarez (98:30; A-Ap. 139). Smith does not take issue with that conclusion.

Accordingly, even if he had been a juvenile when he killed Ms. Alvarez, *Graham* would not bar Smith's "*de facto* life sentence" because Smith was convicted of a homicide offense. Because Smith's Eighth Amendment argument relies solely on *Graham*, this court should summarily reject his claim that his sentence is unconstitutional.

B. The sentencing court properly exercised its discretion.

Sentencing is committed to the circuit court's discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has the burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. *See State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). An appellate court starts with a presumption that the circuit court acted reasonably. *Id.* The reviewing court will not interfere with a sentence if discretion was properly exercised, *see id.* at 418-19, and does not substitute its preference merely because it might have imposed a different sentence, *see Gallion*, 270 Wis. 2d 535, ¶18.

In its exercise of discretion, the circuit court is to identify the objectives of its sentence. *Id.*,

¶40. These objectives include but are not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Id.* In determining the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the circuit court's discretion. *Id.*

Although it is an erroneous exercise of discretion for the circuit court to give an inadequate explanation for the sentence it imposes, an appellate court "will not, however, set aside a sentence for that reason. . . ." *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). Rather, the reviewing court is "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." *Id.* "It is not only [the appellate court's] duty not to interfere with the discretion of the trial judge, but it is, in addition, [the court's] duty to affirm the sentence on appeal if from the facts of record it is sustainable as a proper discretionary act." *Id.*

The supreme court in *Gallion* left undisturbed the independent appellate review doctrine established in *McCleary*. *See Gallion*, 270 Wis. 2d 535, ¶18 n.6. The *Gallion* majority noted that it would "neither decide nor address the application of the independent appellate review doctrine." *Id.* Justice Wilcox noted in his concurring opinion that "[a]lthough the majority states that it is not deciding the application of the independent review doctrine, . . . this doctrine constitutes an integral part of *McCleary*. Clearly, if the majority is reaffirming *McCleary*, this

doctrine should continue to apply." *Id*., ¶80 (Wilcox, J., concurring); *see also Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

Smith says that his crimes, "while serious, involved reckless conduct, not the more aggravating element of intent." Smith's amended brief at 32. Smith's crimes were extraordinarily serious. He fired thirteen shots, including the shot that killed Jordan Alvarez, at a group of people because he thought some of them had fired at mother's house; his accomplices fired a total of eleven additional shots. Two other young women, Jennifer Langoehr and Brittany Alvarez, were shot by Smith and his companions (90:86; 102:24). Ms. Langoehr was inside the house and getting her son ready for bed when she was hit by a bullet (102:19-20). Whether Smith or one of the other shooters fired the shot that injured Ms. Langoehr likely will never be known, as the bullet that struck her remains lodged in her spine (102:25). Ms. Langoehr testified that she was unable to walk for a long time after she was shot and that she continues to suffer back pain (102:26). Brittany Alvarez was shot in the knee and the bullet damaged a nerve in her leg (90:86, 95).

While it would not mitigate the seriousness of the offenses if the three victims had, in fact, been involved in the prior incident at Smith's mother's house, it is certainly an aggravating factor that there is nothing in the record to suggest that they were. Many of the people in the group at which Smith and his accomplices fired were attending a party for fifteen-year-old girls (90:47). Smith's willingness to fire his gun at

people against whom he had no basis whatsoever to retaliate makes an already senseless tragedy even that much more senseless and tragic, an already serious crime that much more serious.

In his sentencing argument, the prosecutor asked the court to impose consecutive maximum sentences (98:8). The prosecutor urged the court to do so based on "the severe harm that was actually caused, the severed danger and risk that was caused to others who, fortunately, were not physically injured" and "the overall impact that something like this has on our community (98:8).

The prosecutor argued that in addition to forty years of initial confinement for the homicide conviction, the court should impose substantial consecutive sentences for the non-fatal shootings to reflect the fact that those victims had been put at risk of dying (98:8-9). He also argued that the felon-in-possession charge was serious enough to warrant a consecutive sentence because Smith fired those shots when he was not even permitted to possess a gun (98:9). The prosecutor further argued that the court should impose a consecutive sentence on the bail jumping charge because Smith was out on bail on a felon-in-possession charge when he committed these crimes (*id.*).

The prosecutor summed up his argument for consecutive sentences by saying that "[t]here's no reason to give concurrent sentences when these incidents, while related, all have separate victims, separate interests in the community in terms of abiding by laws, rules and what is just the right thing to do" (*id.*). Any other disposition, he argued, would seriously depreciate the seriousness of the crimes (98:9-10).

The prosecutor noted the senselessness of these crimes, that "for whatever real or perceived problem [Smith] and his associates believed they had with this household or this neighborhood, certainly, had nothing to do with these victims. But [Smith] thought he and his buddies would just go up and shoot this place up, just walking down the street, pulling out three different guns and firing shot after shot after shot" (98:11).

The prosecutor also noted that Smith had not accepted any responsibility for his crimes despite his taped confession and asked the court to hold it against Smith if Smith showed no remorse at sentencing (98:7-8). The prosecutor said that Smith had smirked and smiled throughout the trial and had laughed when his statement to police had been played (98:12). He also noted that Smith had attempted and apparently had succeeded in convincing Treadwell not to cooperate (98:13).

Defense counsel argued that Smith had great potential because he had obtained a high school equivalency degree while incarcerated and read at an advanced level (98:22). He asserted that he understood why other people perceived Smith's demeanor as they did but that that perception was wrong because "he always has this smile, laugh on him" (98:21). He urged the court not to punish Smith for exercising his right to go to trial (98:23). Defense counsel asked the court to impose a sentence "in the neighborhood of 20, 25 years" of initial confinement with a substantial period of extended supervision (98:25).

In its sentencing remarks, the court said that it needed to punish Smith, to "send a message to you and to everybody out there in this

community that this gunplay has got to stop[,]" and "to set a goal to rehabilitate you" (98:25). The court began by discussing Smith's adult criminal history. It noted that in January, 2009, Smith pulled a gun and threatened a bartender who told Smith not to go behind the bar (98:27-28; A-Ap. 136-37). The court said that Smith was so drunk that the bartender and the patrons were able to subdue Smith until the police came and arrested him (98:28; A-Ap. 137). Smith told the authorities at the time that he had found the gun, but told the presentence writer that he had taken the gun from someone (*id*.).

The court noted that as a result of that earlier incident, Smith was charged with being a felon in possession of a firearm,[7] intentionally pointing a firearm at a person, and carrying a concealed weapon and that Smith had been released on bond in that case just a few months before the events in this case occurred (98:28-29; A-Ap. 137-38). The court discussed the facts of this case at length (98:29-32; A-Ap. 138-41) and concluded that "if that isn't utter disregard of life of another human being, I don't know what is" (98:32; A-Ap. 141).

The court observed that while Smith claimed that he did not intend to hurt anyone, he did not surrender and explain what had happened (98:33; A-Ap. 142). It also noted that while Smith told police that he was sorry for the girl who was killed and her family and would take responsibility for what he did, he did not want to be a rat and tell on the two other men who were involved (*id*.). The court said that "[t]hat's about the only apology you folks are gonna get. That's

[7]Smith had a felony-level juvenile adjudication (98:11).

written in the complaint. I can't think of many more circumstances that are even worse about it" (*id.*).

At that point in its remarks, the court stated that "the record should reflect he's smirking now" (*id.*).

The court next addressed the needs of the community. It said that "[t]he community wants the guns to get off the damn streets of Milwaukee, and I'm powerless to do anything about that" (98:33-34; A-Ap. 142-43). The court observed that "it appears that despite the severe sentences that we're giving out on homicides involving guns, it appears to do nothing" (98:34; A-Ap. 143). The court said that "[i]t's frustrating, but yet I'm not gonna give it up. I am gonna continue by my sentences to say . . . you use a gun to kill somebody, you get it from me" (*id.*).

The court said that it was not punishing Smith for taking the case to a jury trial. It observed, however, that "the evidence was pretty overwhelming that you were the guy with the 9" (*id.*).

The court noted that in the PSI, Smith's mother had described him as "a caring, loving and helpful individual and one who is very family oriented" (*id.*). The court allowed that Smith was "family oriented" in that he "went over [to] 24th and McKinley in defense of your family or at least that you perceived to be that," but said that "you sure weren't caring, loving and helpful that day" (98:34-35; A-Ap. 143-44).

The court then discussed Smith's juvenile record. That record included punching a high

school teacher in the jaw with his fist, which resulted in a consent decree, selling marijuana, which resulted in the revocation of the consent decree and Smith's placement on probation, and a subsequent arrest for selling cocaine (98:35-36; 144-45).

The court noted that Smith was a tenth grade dropout, apparently because he was in jail "600-some days" (98:36; A-Ap. 145). It noted that Smith had obtained his GED, was two tests away from earning an HSED, and that he wanted to go to college (*id*.). The court said that Smith, who was twenty-two years old, "never had any stable employment," that he had been using alcohol and marijuana since he was twelve or thirteen, and started drinking hard liquor on a daily basis beginning at age sixteen (98:36-37; A-Ap. 145-46).

The court said that Smith needed intensive AODA treatment and that "they have programs in prison, and that's what you're gonna get" (98:37-38; A-Ap. 146-47). The court said that "[t]o even think about" probation would unduly depreciate the seriousness of the offense (98:38; A-Ap. 147). After discussing the rules of supervision and ordering Smith to pay a DNA surcharge and imposing a sentence in the original felon-in-possession case (98:39-40; A-Ap. 148-49), the court imposed the following sentences:

► On the first-degree reckless homicide by use of a dangerous weapon count, sixty years of imprisonment, consisting of forty years of initial confinement and twenty years of extended supervision, consecutive to the sentence imposed in Smith's other case (98:40; A-Ap. 149). Because Smith's conviction included a penalty enhancer that exposed him to an additional five years of

imprisonment, that sentence was five years less than the maximum sentence that the court could have imposed (6:1).

► On the two counts of first-degree recklessly endangering safety by use of a dangerous weapon, consecutive sentences of twelve years in each case, consisting of seven years of initial confinement and five years of extended supervision (98:40-41; A-Ap. 149-50). Because both counts included penalty enhancers that exposed Smith an additional five years of imprisonment on each count, the sentences that the court imposed on these counts were ten years less than the maximum sentences that the court could have imposed (6:1-2).

► On the conviction for possession of a firearm by a felon, a consecutive sentence of ten years of imprisonment, consisting of five years of initial confinement and five years of extended supervision (98:41; A-Ap. 150). This was the maximum sentence that the court could have imposed (6:2).

► On the felony bail jumping count, a consecutive sentence of six years of imprisonment, consisting of three years of initial confinement and three years of extended supervision (98:41; A-Ap. 150). This, too, was the maximum sentence that the court could have imposed (6:2).

Smith challenges his sentences on several grounds. He argues that under *State v. Tew*, 54 Wis. 2d 361, 367, 195 N.W.2d 615, 619 (1972), *overruled on other grounds by Byrd v. State*, 65 Wis. 2d 415, 222 N.W.2d 696 (1974), a defendant's age "is among the factors that *must* be considered by the court at sentencing." Smith's amended brief

at 32 (emphasis added). That is wrong. The court in *Tew* listed the defendant's age as a factor that the sentencing court *may* properly consider, not one that it *must* consider. *See Tew*, 54 Wis. 2d at 367 ("Some of the factors this court has recognized as properly considered in sentencing have been: . . . the defendant's age, educational background and employment record"); *see also State v. Stenzel*, 2004 WI App 181, ¶12, 276 Wis. 2d 224, 688 N.W.2d 20 ("We agree with Stenzel that his age is a factor that the circuit court *may consider* as an aggravating or mitigating factor when imposing sentence.") (emphasis added).

Smith argues that the court erroneously exercised its discretion by imposing a sentence that exceeds his life expectancy. However, this court held in *Stenzel* that "the defendant's life expectancy, coupled with a lengthy sentence, while perhaps guaranteeing that the defendant will spend the balance of his or her life in prison, does not have to be taken into consideration by the circuit court." *Stenzel*, 276 Wis. 2d 224, ¶20. The court affirmed what the defendant had characterized as a "de facto life sentence," *id.*, ¶10, as a proper exercise of sentencing discretion, *see id.*, ¶¶10-23. In other cases, this court likewise has affirmed sentences against challenges that they were unreasonable because they were effectively life sentences. *See, e.g.*, *Berggren*, 320 Wis. 2d 209, ¶38 ("Berggren points out that the thirty-six years of initial confinement to which he was sentenced makes him eligible for release when he is approximately seventy-six years old, which he describes as a near "death penalty" effect."), ¶¶39-49 (affirming that sentence as a proper exercise of discretion); *State v. Ramuta*, 2003 WI App 80, ¶24, 261 Wis. 2d 784, 661 N.W.2d 483 ("Ramuta contends that given his age

and health, the thirty-five years amounts to, in effect, a life sentence. That may be true. But it was certainly within the trial court's discretion to see that as essential to the public's protection.").

Smith contends that the court did not adequately explain his sentence. The foregoing summary of the court's sentencing remarks demonstrates that the court considered and explained why a variety of relevant and material sentencing factors justified those sentences.

Smith further argues the sentencing court erroneously exercised its discretion "by running all of the sentences consecutive without offering any justification or displaying a process of reasoning." Smith's amended brief at 35. Citing *State v. Hall,* 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41, he argues that the court was required to provide "a statement of reasons for the selection of consecutive terms." Smith's amended brief at 35.

As this court has held, however, *Hall* "did not . . . establish a new procedural requirement at sentencing that the trial court state separately why it chose a consecutive rather than a concurrent sentence." *Berggren*, 320 Wis. 2d 209, ¶45. In *Berggren*, the defendant, citing *Hall*, argued that the trial court erroneously exercised its sentencing discretion because it failed to articulate its reasoning in imposing consecutive sentences. *See id*. This court held that *Hall* did not require a separate explanation for the imposition of consecutive sentences:

> In *Hall,* we held that the trial court erroneously exercised its discretion by providing inadequate reasons for the consecutive sentences imposed, in contravention of *McCleary*. *See Hall,* 255 Wis.

> 2d 662, ¶5, 648 N.W.2d 41. *Hall* did not, however, establish a new procedural requirement at sentencing that the trial court state separately why it chose a consecutive rather than a concurrent sentence. Rather, *Hall* emphasized the well-settled right of defendants to have the relevant and material factors influencing their sentences explained on the record.

Id. The court further held that "[a] trial court properly exercises its discretion in imposing consecutive or concurrent sentences by considering the same factors as it applies in determining sentence length." *Id*., ¶46.

In this case, the sentencing court provided a sufficient explanation for the sentences it imposed. It was not required to state separately why it chose consecutive rather than concurrent sentences. *Id*., ¶45. Moreover, under the independent review doctrine, the reason for imposing consecutive sentences is readily apparent. Smith killed one young woman and participated in the shooting of two other young women. Had the court not imposed sentences on the convictions arising from the two injury-producing shootings that were consecutive to the sentence on the fatal shooting, Smith would suffer no consequence for those two shootings and there would be no justice for those victims. Consecutive sentences on the felon-in-possession and bail jumping convictions also were warranted because those offenses were aggravated by the fact that at the time of this incident, Smith was out on bail on a prior felon-in-possession charge (98:28-29; A-Ap. 137-38).

Smith has not carried his burden of demonstrating an unreasonable or unjustifiable basis in the record for his sentences. *See Lechner*,

217 Wis. 2d at 418. This court should affirm those sentences.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 17th day of May, 2013.

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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 10,105 words.

_____
Jeffrey J. Kassel
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 17th day of May, 2013.

_____
Jeffrey J. Kassel
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