STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2013AP358-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK ALAN SPERBER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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On appeal from the Circuit Court
of Brown County, Hon. Marc Hammer,
Circuit Judge, presiding.

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ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO SEEK AN INSTRUCTION CLARYFING THAT THE DEFENDANT HAD TO KNOW THE ACCIDENT INVOLVED ANOTHER PERSON AT THE TIME IT OCCURRED.

The state makes two arguments:

> First, Sperber failed to prove that even in the absence of a supplemental instruction, the jury did not construe the instruction they were given to mean that his knowledge had to be contemporaneous with his departure from the scene of

the accident.

> Second, Sperber failed to prove that a specific instruction on the need for contemporaneous knowledge would have made any difference in the factual findings actually made by the jury.

(State's Brief, p. 4). Each of these will be addressed in turn.

1. The jurors' twice unanswered request for clarification on the proper legal standard was sufficient to undermine confidence in the verdict.

As a threshold matter, the state's prejudice standard has no legal basis. Without citation, the state claims Sperber must prove "the jury *probably* did not construe Wis. JI-Criminal 2670 to require contemporaneous knowledge...." (emphasis added) (State's Brief, p. 9). This wrongly implies a more likely than not probability. What the defendant has to prove is a "probability *sufficient to undermine confidence* in the outcome." (emphasis added). *State v. Harvey*, 139 Wis.2d 353, 375, 407 N.W.2d 235, 246 (1987). Put another way, a defendant need only demonstrate the outcome is "suspect." *State v. Smith*, 207 Wis.2d 258, 275-276, 558 N.W.2d 379, 386 (1997).

The state argues Sperber failed to prove prejudice because: 1) the contemporaneous knowledge requirement is self-evident given the "obvious purpose of the hit-and-run statute"; 2) the fact that the state must prove the defendant failed to stop at the scene and render immediate assistance clearly implies a contemporaneous knowledge requirement; and, 3) the state's theory of the case argument was consistent with contemporaneous knowledge. (State's Brief, pp. 5-9).

The problem with these arguments is that they beg the question. It's certainly true, for any of the reasons the state cites,

that this jury could have ultimately applied the correct legal standard. The state, however, cannot prove they did apply the correct legal standard; and the defendant, likewise, cannot prove they didn't. In fact, the evidence necessary to prove which standard the jury applied (or the standard each juror applied) is expressly off limits. Pursuant to Wis. Stat. § 906.06(2): "..., a juror *may not testify* as to any matter or statement occurring during the course of the jury's deliberations *or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith*,...." (Emphasis added). The universe of potential proof available to a defendant is thus severely restricted by this statute. He cannot interview jurors to find out what happened during deliberations including which legal standard was actually applied. These evidentiary restrictions must be kept in mind. A defendant cannot be held to a standard of proof which can only be met by evidence he cannot legally obtain.

The only admissible evidence providing direct insight into the jury's thinking are the communications between the jury and the court. Regardless of whether this jury *could have* applied the correct legal standard, when their communications with the trial court clearly suggest otherwise, the verdict is more than sufficiently "suspect" to show prejudice for ineffective assistance of counsel purposes.

In this case, the jurors' questions and the context of those questions provide more than enough evidence to undermine confidence in the verdict.

After 1 hour and 11 minutes of deliberation, the jury asked:

> ...does the defendant have to be aware that he hit a person at the time of the accident or in the days following the

> incident in order to fulfill the requirements for the second item (sic) [element]?

(116:672). As the record shows, the trial court responded that it "could not answer this question" and told the jury to "Refer to instruction 2670." More than three hours later, the jury asked again:

> 'Are we trying to determine Mark's guilt of knowing he hit a person or a trash can *immediately after the accident happened or whether or not he knew before or on the day he was taken into custody?'* Signed juror foreperson at 6 o'clock.

(emphasis added) (116:687). The trial court responded, again: "Read 2670 in its entirety." Less than 40 minutes later, the jury returned a guilty verdict. (116:689).

The nature and timing of these inquiries reveal at least two things: 1) the jury was not clear on when the statute required Sperber to know a person was involved in the accident; and 2) at least some of the jurors believed Sperber did not know the accident involved a person until after he left the scene.

There is no denying the jury was confused on the legal standard. There wouldn't have been a second question three hours after the first if the trial court's initial response had clarified matters. One can only assume the jury's confusion persisted up to and including the verdict, moreover, as there is no reason to believe the same re-instruction the jury had already considered for three hours would miraculously clarify matters when given a second time.

In addition, the jury's two inquiries on the legal standard only make sense if at least one or more of the jurors actually believed that Sperber did not know there was a person involved until *after* he left the scene. If all the jurors believed Sperber knew he hit someone at the scene, as the state contends, there would be no point in asking whether Sperber was still guilty if

he found out later.

The sole issue contested at trial was whether Sperber knew he hit someone at the time of the accident. Based on the jury's two inquiries and the significant period between those inquiries, at least some of the jurors believed Sperber did not know the accident involved a person until after he left the scene. Coupled with the jury's express confusion as to *when* Sperber *had to know* the accident involved a person in order to incur criminal liability, Sperber was clearly prejudiced.

The return of a guilty verdict does not help the state's argument either, as such a verdict is perfectly consistent with a knowledge standard much broader than what is statutorily permitted. It would only take one juror to base his or her guilty verdict on Sperber finding out the accident involved a person after he left the scene to violate his due process rights (among others).

In sum, it really makes no difference whether the jury *could have* applied the proper legal standard based on the "common sense" purpose of the statute; or because the elements, as a whole, imply a contemporaneous knowledge requirement; or because, at trial, that is what the state argued. The jury's second inquiry four hours into deliberations leaves no doubt that at least some of the jurors did not understand the correct legal standard, and there is nothing in the record to suggest that changed prior to a verdict being rendered.

When a jury "makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *State v. Hubbard*, 2007 WI App 240, 306 Wis.2d 356, ¶14, 742 N.W.2d 893, *reversed on other grounds*, 2008 WI 92, 313 Wis.2d 1, 752 N.W.2d 839, citing *Bollenbach v. U.S.*, 326 U.S. 607, 612-13 (1946). See also *State v. Anderson*, 2006 WI 77, ¶ 109, 291 Wis.2d 673, 717 N.W.2d 74 ("a circuit court *is obligated* to respond to a jury inquiry with sufficient specificity to clarify the

jury's problem.") (emphasis added).

The state effectively concedes deficient performance by relying exclusively on the prejudice prong in its argument. Based on the trial court's obligation to clarify a jury's "difficulties," it follows that trial counsel has a corresponding duty to make sure the trial court's response is adequate. This is especially true when, as here, the trial court based its response on the mistaken belief the instructions given did, in fact, "tell them that they have to make a finding that he was aware that he hit a vehicle [sic] at the time of the accident[]" (116:674-675).Trial counsel's failure to perform, moreover, prejudiced Sperber, in that it left the jury with the mistaken belief Sperber could be found guilty of this offense without contemporaneous knowledge that he hit someone.

2. A juror could have reasonably found Sperber was guilty based on the wrong legal standard.

The state concedes "there was evidence on which a jury might have made...a finding" Sperber "did not know he hit another person...." (State's Brief, p. 10). The state argues, nonetheless, that there is no evidence to support a finding he learned that he hit someone after he left the scene. Therefore, re-instruction on the contemporaneous knowledge requirement would not have made any difference.

The state's argument ignores reality. If there was no evidence to support a finding that Sperber learned he hit a person after he left the scene, why would the jury focus on this issue nearly the entire deliberation, twice asking the trial court whether it could convict if Sperber learned he hit someone "in the days following the incident" or "before or on the day he was taken into custody[]"? (116:672, 687). As argued above, the jury's inquiries only make sense if at least one or more of them actually believed that Sperber did not know there was a person involved until *after* he left the scene.

The state nonetheless declares that no juror could reasonably infer from this record that Sperber "did in fact" learn about the details of the accident after the fact. (State's Brief, p. 11). To the contrary, the record contains repeated references to the extensive media coverage of the accident, and with it the clear implication that Sperber should have at least heard about it in the days after the accident and put two and two together. (see e.g. 114:306, 311; 115:406, 485; 116:631-632). It was a co-worker's exposure to the media coverage that ultimately led the police to Sperber. (116:310-315). In jury voir dire, the trial court acknowledged "it would be naive of me to think that some of you may not have heard about this case or read about this case." (113:36).[1] The state fails to develop this argument or offer anything resembling a persuasive justification. In fact, the media saturation was such that a juror could have easily found it was unlikely Sperber went an entire week without having heard about the accident.

II. ALTERNATIVELY, THE REAL CONTROVERSY WAS NOT FULLY TRIED WHEN THE TRIAL COURT FAILED TO RE-INSTRUCT THE JURY THE STATE MUST PROVE THE DEFENDANT WAS AWARE THE ACCIDENT INVOLVED ANOTHER PERSON AT THE TIME IT OCCURRED.

The state does not present any arguments which are not addressed in Sperber's brief-in-chief or in the preceding section of this reply brief.

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1 Surprisingly, there was no voir dire on the question of media exposure.

CONCLUSION

This Court should reverse the conviction and remand for a new trial with proper jury instructions.

Respectfully submitted this 18th day of July, 2013.

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CERTIFICATION

As to Form and Length

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

The Statement of the Case; Statement of Facts; Argument; and Conclusion sections of this brief contain 2475 words.

CERTIFICATE OF COMPLIANCE WITH 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 s. 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 18th day of July, 2013.

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CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on July 18, 2013. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 18th day of July, 2013.

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