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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2013AP1111 CR
Circuit Court Case No. 2009CF792

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JIMMY L. POWELL,
Defendant-Appellant.

APPEAL FROM THE CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN DANE COUNTY CIRCUIT COURT, HON. STEPHEN E. EHLKE, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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The circuit court ordered the all $30,000 to be paid to the victim towards restitution.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant, Jimmy L. Powell, does not request oral argument as the briefs will adequately present the case. Publication is requested.

STATEMENT OF THE CASE

Jimmy L. Powell, ("Powell") was charged in a Complaint dated May 12, 2009 with Count 1: Attempt - First Degree Intentional Homicide contrary to Wis. Stat. §940.01(1)(a), Count 2: First Degree Reckless Injury contrary to Wis. Stat. §940.23(1)(a), and Count 3: Attempt – Armed Robbery contrary to Wis. Stat. §943.32(2). (R.1.)

At the initial appearance on May 9, 2009, bail was set by the court commissioner:

> "The lowest bail that I would be willing to consider under these circumstances would be – oh, Lord, $10,000 on each of the three counts for a total of $30,000. (R.102, p.6.)

The amended bail/bond states $10,000 per count. (R.26, A-Ap.101.)

A preliminary hearing was held on June 30, 2009 at which Powell was bound over for trial on the matters. (R.105.)

Powell posted bail for three bonds at $10,000 each. The first bond was for Count 1 with offense number 416482. Five bond receipts totaling $10,000 were credited towards Charge: 940.01 - Homicide 1st Deg Intentional. The surety

who signed the bond receipts was Freida Brown. (R.135, A-Ap.103-107.)

The second bond was for Count 2 with offense number 416483. Six bond receipts totaling $10,000 were credited towards Charge: 940.23(1)(a) – 1st Deg Reckless Injury. The surety who signed the bond receipts was Karen Garcia. (R.135, A-Ap.108-113.)

The third bond was for Count 3 with offense number 416484. Six bond receipts totaling $10,000 were credited towards Charge: 943.32(2) Armed Robbery. The sureties who signed the bond receipts were Freida Brown and Karen Garcia. (R.135, A-Ap.114-119.)

On each bond receipt is the following:

> SURETY CERTIFICATION:
>
> I, the undersigned surety, do hereby acknowledge receipt of a copy of this bond and a copy of the Surety Notification. I do further declare that I understand all the conditions of this bond as set forth in the General Conditions of Bond. (R.135, A-Ap.103-119.)

On April 15, 2010, the circuit court held a motion hearing on trial and evidentiary issues. (R.110.) The State's motion in limine, item 9 stated:

> Determination regarding the admissibility of evidence regarding the prior relationship between the defendant and the victim Robert Rabe. (A footnote then appears stating: Over an approximate ten-year period, the defendant and the victim engaged in an estimated thirty to forty previous drug transactions during which the victim purchased drugs from the defendant without incident or violence.) The present case is steeped in the context of a drug deal. Rabe telephoned the defendant to buy cocaine. The defendant and Rabe agreed on a location, remote and dark. The drug deal went "bad." The victim alleges that the defendant was the primary physical aggressor, threatening to cut him, stealing his money and cutting his throat. The defense alludes to a self-defense claim. The fact that these two conducted "peaceable" drug transactions in the past is not only

> relevant, but provides an essential context for the crime, demonstrating the previous relationship between the parties, which a jury must consider when making credibility determinations regarding what occurred on 05/01/2009. Furthermore, in the absence of evidence of this prior relationship, Mr. Rabe's unflinching identification of the defendant from a sequential photo lineup is not only without explanation but also lacking in terms of credibility. (A footnote appears here stating: The opportunity the witness had for observing and for knowing the matters the witness testified about. Wisconsin JI 300.) (R.34, p.3, A-Ap.120)

Trial counsel Steven Cohen argued:

> I understand some context might be appropriate, but I think it should be limited. I think, you know, telling the jury that they've had a substantial relationship based on drugs for the last 10 years might be prejudicial to Mr. Powell and not probative of anything. I know they'll want to show that Mr. Rabe would have a good basis to identify Mr. Powell, but I don't think we need to go back 10 years to do that. So I think that maybe some limiting parameters would be appropriate. (R.110, p.46, A-Ap.121.)

The circuit court stated:

> Well, I'm going to allow that testimony because I think it does set the stage for what happened here. I think the jury would be like totally in the dark in terms of, like, why in the world does somebody go out on this night to meet this person and meet with them for this transaction. I mean, the State is allowed to put the case into context and to explain the nature of the relationship of the parties.
>
> So Number 9 in granted. The State can put in their past dealings with each other. I don't think that in the context of this particular case that it would be overly prejudicial. To some extent I suppose it's prejudicial to the victim and the defendant; the jury's going to hear that both of them were involved with drug dealing. But I think that from what I know of the case the drug dealing aspect of this is not going to be really what they're focusing on, and I don't think that the -- Well, let's put it this way, its relevance is not outweighed by its prejudicial nature. (R.110, pp.46-47, A-Ap.121-122.)

A five-day jury trial was held between April 19, 2010 through April 23, 2010. The jury found Powell not guilty on Counts 1 and 3 and guilty on Count 2. (R.111-R.116.)

Powell was sentenced on Count 2 to twenty-three (23) years in the Wisconsin State Prison System with thirteen (13) years of initial confinement followed by ten (10) years of extended supervision. (R.71, R.73.) After a restitution hearing, Powell was ordered to pay Rabe restitution of $65,456. (R.119, R.93.) Bail money was ordered held until further order of the court on June 8, 2010. (R.65.)

Powell filed a motion for postconviction relief on October 31, 2012.[1] (R.127.) A hearing on the motion was held on February 22, 2013. (R.142.)

The circuit court gave its oral ruling denying the motion on April 29, 2013. (R.143, A-Ap.136-163.) On April 30, 2013, the circuit court ordered all $30,000 posted for bail be released to the victim, Robert Rabe for payment towards restitution. (R.140, A-Ap.165.)

STATEMENT OF FACTS

On April 30, 2009, Robert Rabe, ("Rabe") and his friend Ryan Ryckman, ("Ryckman") got together at Rabe's auto shop to do some repairs and later to drink some beer. (R.113, pp.153-154, R.112, pp.118-119.) Around 6:00 p.m., the two drove to the liquor store to buy some beer. At that time, Rabe testified he had over $900 in his wallet. (R.113, p.154.) Rabe testified he drank between 6 to 8 beers. (R.113, pp.156, 206.) Later, Ryckman returned to the liquor store to purchase more beer with his own money. (R.112, p.121.) Ryckman indicated that his intoxication level was such that

[1] Appellate counsel originally filed a No-Merit report in Case No. 2012AP254CRNM and subsequently withdrew it.

most of the evening after 9:00 p.m. is blacked out. (R.112, p.122.)

Rabe testified he called Powell sometime before midnight, left a message indicating he wanted to purchase cocaine. At trial, the parties stipulated that Rabe called Powell at 12:26 a.m., 1:29 a.m., 1:43 a.m., 2:13 a.m., 2:14 a.m., and 2:16 a.m. (R.113, p.205.)

Rabe stated he had previously purchased cocaine from Powell at least 35 to 40 times, perhaps more. (R.113, pp.157, 188, 190, 205.) Powell testified that Rabe bought cocaine from him at least once per week for the past ten years. (R.114, p.252, R.115, p.6.)

Powell returned the phone call and arranged to meet Rabe. (R.113, p. 158, R.114, p.253.) Rabe and Ryckman drove to Eagle Crest Tavern to meet Powell. (R.113, p.159-160, 191.) Upon arriving at Eagle Crest, Powell rolled down his car window and told Rabe to follow him in his vehicle. (R.113, p.160 R.114, pp. 255-256.) They drove to a parking lot at Proscapes Landscaping two blocks away on County Road T. (R.113, pp.161, 193, R.114, p.55.) It was dark in the area where they parked. (R.113, p.163.) Rabe did not find it unusual to be in a dark location. (R.113, p.164.) Rabe testified he did not have a knife on him and never carries a weapon. (R.113, p.164.) Rabe testified that there had never been any hostility between himself and Powell. (R.113, p.165.) Rabe understood the price for the cocaine was $100 and he took cash from his wallet and put it in his right front pants pocket. (R.113, p.166.) Rabe then walked to Powell's vehicle and got in the passenger seat. As soon as Rabe got in the vehicle, Powell handed him either two or three rocks of cocaine. (R.113, pp.167-168, R.114, p.261, R.115, p.8.) Rabe said Powell turned the radio up loud. (R.113, pp.169, 197.) Powell testified he had turned the radio turned up when Rabe got in the vehicle. (R.114, p.261.)

Rabe testified that after he received the cocaine from Powell that Powell said "[g]ive me the money or I'm going to cut your throat." Rabe thought Powell was joking and that Powell had a knife. (R.113, pp.169, 213.)

Powell testified that after he gave Rabe the cocaine, that he was playing with his phone when he was suddenly struck in the face by Rabe. (R.114, p.262, R.115, pp.14-15.) Powell testified he saw stars when he was hit and was injured by the blow. (R.115, p.15.) As Rabe attempted to get out of the vehicle, Powell grabbed him by the shoulder and the top of his head. (R.114, p.263.) Rabe then moved with sufficient force to leave his hair in Powell's hand causing a bald spot. Powell testified that Rabe never gave him any money for the drugs and that he had no reason to believe Rabe had a lot of money on him. Powell stated that Rabe continued to fight with him and so he got out of his vehicle, that the vehicle went forward, and he returned to the vehicle to put it in park. (R.114, pp.264-265.) Powell then asked Rabe for the drugs and told him he would call the police if Rabe did not comply. Powell testified Rabe attacked him again with another hit to the face. (R.114, p.267, R.115, p.16.) Powell then dropped his phone and Rabe grabbed his shirt at the shoulders and kneed him in the rib area. (A cell phone was found at the scene in the open position.) (R.112, pp.201, 245, R.113, pp.30, 33, 36.) Rabe ripped Powell's shirt and a button popped off. Powell fell down on his hands and knees while Rabe was still kneeing him. Powell said that once he pushed Rabe away and was back on his feet, Rabe pulled a knife from his right front pocket. (R.114, pp.268-269, R.115, p.16.) Powell, feeling threatened, then tried to pull the knife away, but could not get the knife away from Rabe. (R.114, p.270, R.115, pp.16-18, 51.) Powell had a cut on his thumb that he assumed he got during the struggle. (R.115, p.18.)

Powell jumped back into his vehicle which was still running. The headlights were off according to Powell and the passenger door was still open. (R.114, p.271.) Powell's vision was blurry from the altercation as he threw the vehicle into gear. (R.114, pp.272-273.) Powell's main concern was to leave so he would not be hurt any further. Powell testified about injuries to both his eyes, his nose, and cheek area. (R114. pp.259-260.) Powell tried to leave the scene quickly and hit the gas. Powell testified he drove straight ahead and all he was thinking about was hitting the gas. (R.114, p.273.)

Rabe testified he was on the passenger side of the vehicle when Powell pulled forward. (R.113, p.224.) Powell said he then felt a bump and thought he had gone in the ditch or possibly ran someone over. (R.114, p.273.) Powell did not try to hit Rabe with his vehicle. (R.114, p.274.) Powell testified he did not see Rabe before hitting him with the vehicle. Later on cross-examination, Powell stated Rabe was standing when he was leaving the parking lot. (R.115, p.18.) Powell left the parking lot with his headlights off. (R.115, p.19.) He drove for about ten or twenty seconds before he returned to the scene with his headlights still off. (R.114, p.274, R.115, p.19.) When he returned, Powell saw someone standing over someone on the ground. Powell testified he felt shocked and questioned whether he had hurt somebody by running them over. (R.114, p.275.)

Powell acknowledged his voice was on the 911 recording saying, "[h]old still or I'm calling the police." He testified that he was speaking to Ryckman because Ryckman was walking towards him and he did not know where the knife was. Ryckman was on the cell phone. Powell is heard on the 911 recording saying, "[i]s he okay?" and was referring to Rabe when saying "he." Also, Powell is heard saying, "[d]id you call the police first...," and "[c]all the police." Later, Powell was

the one who said, "I'm not playing" on the 911 recording and that it was probably directed at Ryckman. Powell testified the only thing that was going on in his head was to tell Ryckman to call the police. Powell thought Ryckman had Powell's cell phone having picked it up where Powell dropped it. (R.47, R.48, R.114, pp.275-276, 278 R.115, pp.21-23, A-Ap.123-124.) A struggle for the phone ensued during which the phone broke. (R.115, p.26.) Powell then left the scene again. (R.115, p.29.)

Rabe testified he had the passenger door open and had one foot on the ground outside the vehicle as he tried to get the money out of his pants pocket. (R113, p.170.) Rabe testified that the vehicle lunged forward and he fell on the ground. Powell then got out of the vehicle and Rabe got back up. Although Rabe's memory is fuzzy as to the events, he remembered a scuffle as he tried to give Powell the money. (R.113, pp.171-173, 222.) Rabe stated that he did not see a knife when Powell was outside the vehicle. (R.113, p.174.) Rabe testified there was a tussle outside the passenger's side of the vehicle and that his wallet contents flew in front of the vehicle. (Cards were found strewn about the scene.) (R.113, p.20.) Rabe was on the ground when Powell's vehicle ran over his head with the right rear tire. (R.113, pp.176, 223-224.) Rabe remembered yelling to Ryckman to call 911, but has no other memories. (R.113, p.178.) First responders arrived at the scene at approximately 2:33 a.m. (R.114, p.101.)

Rabe was questioned by law enforcement at the hospital. (R.113, pp.179-180.) He indicated to detectives that Powell had cut his throat, but he did not remember being attacked from behind. (R.113, pp.181-182, 236.) Rabe stated he did not recall ever punching Powell in the face or eye area. (R.113, pp.186, 219.) Rabe testified he never saw the money he had with him after that night. (R.113, pp.187, 232.) When law enforcement

showed Rabe a photo of the knife recovered on County Road T, Rabe said he had never seen that knife before. (R.114, p.124.)

Ryckman testified he sat in the vehicle while Rabe went to get the cocaine from Powell. (R.112, pp.126-127.) Ryckman does not recall how he got out of the vehicle but that he saw Rabe underneath Powell's vehicle and then being run over by a passenger's side tire. (R.112, pp.128, 154.) Ryckman was standing outside Rabe's vehicle. (R.112, pp.145-146.) Ryckman also testified he saw Powell and Rabe in a boxing stance. (R.112, pp.146, 149, 169-170.) At trial, Ryckman did not remember if Rabe was standing or prone prior to getting run over, however on redirect examination he states he told law enforcement Rabe was prone when the vehicle ran over him. He also told law enforcement that he saw Rabe fall to the ground. (R.112, pp.82, 187, 212.) Ryckman also told law enforcement that he thought someone intentionally drove over Rabe. (R.112, pp.205, 215, R112, p.82.) Ryckman remembers making the 911 call. (R.112, pp.129, 166-167.) Ryckman testified that after Rabe got run over, a man drove up in a dark-colored SUV while he was on the phone with 911. He further testified that this man shoved him and snatched the phone out of his hand breaking the phone in two. (R.112, pp.79-80, 139-142, R.113, p.80.) Ryckman testified he told the 911 operator he saw his friend get run over, but did not mention seeing a knife. (R.112, p.155.) Ryckman likewise testified he did not see Rabe be attacked with a knife while he knelt down and was holding Rabe. (R.112, p.160.) Ryckman further did not see anyone go through Rabe's pockets. (R.112, p.161.)

A three-inch blade knife found at the scene in the middle of Highway T, revealed Rabe's DNA, (although no blood,) on the knife blade with Powell and Ryckman as contributors to a mixture of DNA detected. (R.112, p.258, R.113, pp.35, 70, 261,

263.) The handle of the knife revealed both Powell's and Rabe's DNA. (R.113, pp.262-263.) Three cell phones were found at the scene, one was broken, one was open, and one was in the pockets of a jacket. (R.113, p.14.)

Rabe's injuries included a fractured right mandible and a laceration about the jaw line on his right side. Powell's expert Dr. Bentz, a plastic surgeon, opined that the laceration most likely occurred as a result of blunt force trauma. (R.114, pp.288-289.) The State's medical expert, Dr. Kudsk described Rabe's injuries to also include facial fractures, two fractured ribs, and a fracture near the spinal column. (R.113, pp.43, 47.) Dr. Kudsk also opined the laceration was a product of blunt force. (R.113, pp.53-54.)

Detective Anderson, who was investigating the case, testified he spoke with Powell via telephone on May 2, 2009. Anderson asked Powell if he knew why he was being contacted and Powell responded, "[n]o. My mind ain't right." (R.114, pp.165-166.) Ten minutes later, Powell called Anderson and told him he would give him a statement when he was in the Dane County Jail the following week for an OWI sentence. (R.114, pp.167-168.) On May 5, 2009, Anderson met Powell in the lobby of the Public Safety Building. (R.114, pp.169-170.) Powell knew who Anderson was because he had found his name on the Wisconsin Association of Homicide Investigators' website. Powell indicated to Anderson that he thought Anderson was there to talk to him about a homicide. (R.114, p.171.) When Anderson told Powell he was not there to talk about a homicide, Powell reacted by dropping his head, crying, and breathing very heavily and rapidly. He eventually dropped to the floor with his back up against the wall. (R.114, p.172.) Anderson noticed discoloration under both eyes. Powell's right thumb was also cut. (R.114, pp.173, 178.)

A photograph taken at 12:50 a.m. on May 1, 2009 depicts Powell wearing a button down shirt and having no black eyes. (R.114, pp.249-250.) Willie Peat, Powell's friend, testified he saw him on the afternoon of May 1, 2009 and Powell had two fresh black eyes. (R.114, pp.241-242.) On May 5, 2009, Powell's friend, Erica Wyrick picked him up to take him to jail so he could serve an OWI sentence. She noticed Powell had black eyes and asked him about them, but Powell did not want to talk about it. (R.114, pp.48-49.)

Powell's phone records revealed calls were made to Meriter, St. Mary's, and University of Wisconsin hospitals' patient room information numbers on May 2, 2009. (R.114, pp.115-116.) There were also calls made to Detective Anderson. On May 3, 2009, Powell replaced the tires on the vehicle he had driven on the night Rabe was injured. (R.115, p.36.)

At the jury instruction conference, the circuit court declined to instruct the jury on Powell's requested jury instruction on mistake. (R.115, pp.133-140, A-Ap.125-132.)

During jury deliberations, the court announced the jury had submitted two questions to the court. The first question read:

> Please provide us with a definition of 'utter disregard for human life.' (R.49, R.115, p.234, A-Ap.133.)

The second question was:

> Is there a time element associated with the utter disregard? (before, during, and after.) (R.49, R.115, p.235, A-Ap.133.)

To the first question, the court and parties agreed the answer should be:

> Utter disregard for human life has already been provided to you. There is no additional legal guidance on this definition. (R.115, p.235, A-Ap.134.)

To the second question, the court answered:

> In this case, the crime of first degree reckless injury involves the period of time while Mr. Powell is engaged in conduct relating to operating his motor vehicle. It does not include conduct by Mr. Powell after Mr. Rabe had been run over. (R.115, p.235, A-Ap.134.)

Powell's trial counsel did not object to this second instruction. The jury returned not guilty verdicts on Counts 1 and 3 and a guilty verdict on Count 2, the First Degree Reckless Injury count. (R.115, p.237.) The court then revoked bail on Count 2, First Degree Reckless Injury and Powell was remanded to custody. (R.115, p.241.)

A presentence investigation was prepared by the Department of Corrections. (R.66.) Sentencing was held on June 7, 2011 at which Powell was sentenced to twenty-three (23) years in the Wisconsin State Prison System with thirteen (13) years initial confinement followed by ten (10) years of extended supervision. (R.71, R.73, R.118.)

A restitution hearing followed on November 8, 2010 at which Powell was ordered to pay $65,456 to Rabe. (R.93.)

At the postconviction motion hearing, trial counsel Steven Cohen testified he had been licensed to practice law in Wisconsin since 1996 and that his primary focus of practice was criminal law. Attorney Cohen also testified he had handled over one thousand cases. (R.142, p.8.)

As to his handling of the Powell case and specifically, the evidence of a ten-year drug dealing relationship, Attorney Cohen initially asked that the evidence be limited, but then thought he might want to use that information at trial. The main reason he would want to present that evidence was to adversely impact the victim's credibility. Ultimately, he thought the evidence would be helpful to the case. Attorney Cohen thought he could demonstrate that Rabe was being less than honest when testifying about how many times he actually bought drugs form Powell.

He also in that he could use it to bolster Powell's credibility. (R.142, pp.19-21.) Attorney Cohen also knew that should Powell testify and the jury learned he had prior convictions, that the jury may assume that some of those prior convictions were for drug transactions. (R.142, p.23.) Attorney Cohen later testified he researched other acts evidence case law and thought the court would allow the evidence for context. Attorney Cohen also thought he made the appropriate argument to the court to keep the evidence out. (R.142, p.38.) He also testified he argued to the court that the evidence would establish Powell as a professional drug dealer. (R.142, p.39.) Attorney Cohen did not ask that the jury be instructed that other acts evidence be considered with caution. He testified the instruction focuses the bad act on the defendant. He did not want the ten-year drug dealing history to be focused on Powell, rather he wanted the evidence in to impeach Rabe's credibility. (R142, pp.40-41.)

When the question came from the jury regarding the time frame for the First Degree Reckless Injury count, Attorney Cohen testified he was surprised the court limited it to the time period when Powell was inside the vehicle and did not object, but instead felt it was favorable to the case. (R.142, pp.36, 45.) Attorney Cohen also testified he liked that the court was limiting the time to when Powell was operating his vehicle, because:

> "… there were things that happened that injured Mr. Rabe before and after. So if we're limiting it to just the time that Mr. Powell is operating his vehicle, I felt that was the best possible result for Mr. Powell." (R.142, p.46.)

In its oral ruling on the motion for postconviction relief, the circuit court found that Attorney Cohen practiced primarily criminal law in Wisconsin since 1996. The circuit court also found that Attorney Cohen reviewed approximately 1,500 pages of discovery, scheduled a meeting to review

the physical evidence, hired an investigator, and conducted legal research. (R.143, p.6, A-Ap.141.)

The circuit court also found that Attorney Cohen filed a motion to limit or exclude evidence of the long-term relationship of drug dealing between Rabe and Powell.[2] (R.143, p.7, A-Ap.142.) The court found that Attorney Cohen adequately explained his reasoning in objecting to the evidence, but that he also had a good fallback position which was to set up this comparative credibility between Rabe and Powell. (R.143, p.16, A-Ap.151.) The court also found Attorney Cohen's decision not to ask for a curative instruction on the other acts evidence was a strategic decision and not defective. (R.143, p.17, A-Ap.152.)

As to the supplemental jury instruction, the circuit court found the State was arguing that the First Degree Reckless Injury pertained to the time Powell was operating his vehicle. Expanding the time period would not be beneficial Powell. (R.143, pp.19-20, A-Ap.154-155.)

The court reaffirmed its decision to not instruct the jury on mistake. (R.143, p.20, A-Ap.155.) The court also found evidence was sufficient to support the conviction. (R.143, p.26, A-Ap.161.)

The court denied the motion for postconviction relief and ordered all $30,000 of bail money posted be released to Rabe. (R.139, R.140, R.143, pp.21-25, A-Ap.156-160.)

ARGUMENT

I. WHETHER THE COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN ADMITTING AS

[2] The motion filed by Attorney Cohen does not address the issue of the ten-year drug dealing relationship between Rabe and Powell. (R.28.)

OTHER ACTS EVIDENCE POWELL'S HISTORY OF DRUG DEALING.

1. The Circuit Court Failed To Adequately Examine The Prejudicial Effect Of The Proposed Evidence.

Appellate court will sustain an evidentiary ruling if it finds that the circuit court examined relevant facts, applied proper standard of law, and using demonstrative rational process, reached conclusion that a reasonable judge could reach. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). A circuit court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion. *State v. Hunt*, 2003 WI 81, ¶¶34, 44, 263 Wis. 2d 1, 666 N.W.2d 771. When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. *Sullivan,* 216 Wis. 2d at 780. When reviewing a circuit court's determination for erroneous exercise of discretion and appellate court may consider acceptable purposes for the admission of evidence and may affirm the circuit court's decision for reasons not state by the circuit court. *Hunt,* 203 WI 81 at ¶52.

In 1967, the Supreme Court of Wisconsin set forth reasons to exclude other acts evidence. *Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967). The Supreme Court listed:

> 1) [T]he overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do those acts;
>
> 2) [T]he tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses;
>
> 3) [T]he injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and
>
> 4) [T]he confusion of issues which might result from bringing in evidence of other crimes. The exclusion of

> other acts evidence is based on the fear that an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged. *Id*.

The proponent of other acts evidence must clearly articulate their reasoning for seeking its admission. Admission of other acts evidence is governed by Wis. Stat. §904.04(2) which states:

> (2) OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake to accident.

The Supreme Court set forth a three-step analytical framework for the admission of other acts evidence:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. (Rule)§904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. §(Rule)904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more or less probable than it would without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of evidence? *See* Wis. Stat. §(Rule)904.03. *Sullivan*, 216 Wis. 2d at 772.

The Supreme Court went on to hold that if the evidence was erroneously admitted in the case, the second issue is whether the error is harmless or prejudicial. *Sullivan*, 216 Wis. 2d at 772.

The proponent and opponent of the other acts evidence must clearly articulate their reasoning for admission or exclusion of the evidence and must apply the facts of the case to the analytical framework. The circuit court must similarly articulate its reasoning for admitting or excluding the evidence, applying the facts of the case to the analytical framework. Without careful statements by the proponent, opponent, and the circuit court regarding the rationale for admitting or excluding the other acts evidence, the likelihood of error at trial is substantially increased. The proponent of the evidence bears the burden of persuading the circuit court that the three-step inquiry is satisfied. *Sullivan*, 216 Wis. 2d at 774.

Sullivan was convicted of battery to a woman he had a romantic relationship with and disorderly conduct. The other acts evidence admitted was testimony by Sullivan's ex-wife and a neighbor that 14 to 26 months earlier the defendant had verbally abused his ex-wife through insults, intimidating words and threats to assault her in ten separate episodes. *Id.* at 771, 778. The *Sullivan* circuit court gave a cautionary instruction to the jury that the other acts evidence is to be considered only on the issues of motive, intent, knowledge, absence of mistake or accident, or credibility. *Id.* at 780.

In *Sullivan*, the Supreme Court held that despite referring to the three-step analysis, the prosecutor and circuit court failed to relate the specific facts of the case to the analytical framework. The Supreme Court further held that the prosecutor and the circuit court did not carefully probe the permissible purposes for the admission of other acts evidence; they did not carefully articulate whether the other acts

evidence relates to a consequential fact or proposition in the criminal prosecution; they did not carefully explore the probative value of the other acts evidence; and they did not carefully articulate the balance of probative value and unfair prejudice. *Sullivan*, 216 Wis. 2d at 773-774.

Other acts evidence is permissible to show context of the crime and to provide a complete explanation of the case. *Hunt*, 2003 WI 81 at ¶58. In *Hunt*, the defendant was charged with sexual assaulting two female children in a six-count complaint. After the charges were filed, the alleged victims recanted their statement to police and refused further cooperation with the prosecution. *Id.* at ¶14. The State sought to introduce as other acts evidence, that Hunt had physically and sexually abused his wife, that he had sexually abused a step-daughter, that he had molested his own daughter, and that he was physically abusive to the victims named in the complaint. *Id.* at ¶15. The State proposed the evidence of prior sexual assaults was relevant and probative of the defendant's intent and motive and the evidence of physical abuse was relevant to the context in which the sexual assault occurred. *Id.* The State also sought the introduction of Hunt's constant drug use to provide the necessary background for understanding Hunt's behavior and to provide an independent source of information about the credibility of the victims' stories. *Id.* at ¶16. The circuit court in *Hunt* allowed some of the other acts evidence the state requested after conducting a pretrial motion hearing in which it specifically referred to the test in *Sullivan*. *Hunt*, 2003 WI 81 at ¶19. The circuit court in *Hunt* allowed evidence of: 1) reports to the police about Hunt's drug use, 2) that his wife had sought restraining orders against him, 3) that Hunt had verbally threatened his wife and other members of the household, and 4) that Hunt had physically abused both his wife and one of the named victims. *Id.* at ¶21.

The *Hunt* circuit court gave Wisconsin Jury Instruction – Criminal 275 stating that the jury could use the evidence for specific purposes, such as Hunt's opportunity, intent, the absence of mistake or accident, motive, and preparation or plan, but it did not mention context. *Hunt*, 2003 WI 81 at ¶22. The Court of Appeals reversed the convictions concluding the circuit court erred in admitting the other acts evidence. *Id.* at ¶1. The Supreme Court reversed the decision having held the evidence was for a permissible purposes and was relevant and probative. *Id.* at ¶5. In addition, the Supreme court held that the circuit court's cautionary instructions on the other-acts evidence mitigated any potential danger of causing unfair prejudice, confusion, misleading the jury, or undue delay. *Id.* However, the Supreme Court did mention that the circuit court in *Hunt* could have provided a more detailed or exhaustive Sullivan analysis. *Id.* at ¶3.

In the instant case, the State proposed to use the evidence of Powell and Rabe having a ten-year drug dealing relationship for the purpose of establishing context. The motion also states that absent this evidence, Rabe's identification of Powell would lack credibility. (R.34, p.3.) The State did not argue the motion at the pretrial hearing, rather the circuit court cut them off and gave its ruling. (R.110, pp.46-47, A-Ap.121-122.) The circuit court did not refer to the *Sullivan* analysis in rendering its decision. *Id.*

Using the analytical framework from *Sullivan* to the facts of the instant case starting at step 1, the evidence did not relate to a fact or proposition that was of consequence to determination of the action. Powell was not charged with drug crimes. Identification was proven by Rabe's prior identification of Powell in a photo line-up and his identification of Powell at trial. Credibility itself is not a delineated purpose for admitting other acts evidence.

As to step 2, whether the evidence is probative, it was held in *Whitty* that the probative value of other acts evidence depends on the other incident's nearness in time, place, and circumstances to the alleged crime or the fact or proposition to be proved. *Whitty*, 34 Wis. 2d at 294. The probative value lies in the similarity between the other acts and the charged offense. The greater the similarity, complexity, and distinctiveness of the events, the stronger the case is for admission of the other acts evidence. *Sullivan*, 216 Wis. 2d at 787. In the instant case, evidence of prior drug deals was not similar to Powell's charged offenses. The other acts evidence admitted did not address the improbability of a like result. In other words, the other acts evidence was not probative to any issue at trial.

Step 3 addresses unfair prejudice. Unfair prejudice results when the proffered evidence tends to influence the outcome by improper means, appeals to the jury's sympathy, arouses its sense of horror, provokes an instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. *Sullivan*, 216 Wis. 2d at 789-790. In the instant case, the danger of unfair prejudice greatly exceeded any probative value of the other acts evidence. Presenting evidence that for ten years Powell sold drugs to Rabe would unduly influence the jury to convict Powell for his uncharged crimes.

If the other acts evidence was erroneously admitted, the next issue is whether the error is harmless or prejudicial. *Sullivan*, 216 Wis. 2d at 773. The test for harmless error is whether there is a reasonable possibility the error contributed to the conviction. The conviction must be reversed unless the court is certain the error did not influence the jury. *Id.* at 792, *Hunt*, 203 WI 81, ¶77.

The burden is on the beneficiary of the error. *Id.* In *Sullivan*, the State had to establish that there was no reasonable possibility the error contributed to the conviction. *Id.* at 792-793. In the instant case, the erroneously admitted evidence of ten years of drug dealing by Powell, prejudiced his defense. There is a reasonable possibility that the error in admitting the evidence contributed to the conviction. The conviction must be reversed.

At the motion hearing held April 15, 2010, the State made no comments in support of its reasoning for proposing the admission of the other acts evidence. The circuit court did not use the analytical framework in rendering its decision to admit the other acts evidence. Although Attorney Cohen requested the instruction, no curative instruction was given to the jury.

A cautionary instruction can cure any adverse effect attendant with the admission of other acts evidence. *Sullivan*, 216 Wis. 2d at 791. In *Sullivan*, the Supreme Court concluded that the prosecutor's repeated references to the other acts evidence and the fact that the jury instruction was not limited to evidence of the defendant's intent or absence of accident meant that the cautionary instruction was insufficient to cure the prejudicial impact of the other acts evidence. *Id.* at 790. In the instant case, no cautionary instruction as given to the jury and Powell was prejudiced by this lack of instruction. Attorney Cohen purposely did not pursue the instruction and for reasons that will follow, contributed to Powell's receiving ineffective assistance of counsel.

In the instant case, the jury was given evidence of Powell's long time drug dealing career and learned he had two prior convictions, one being an OWI. In its opening statement, the State refers to 8-10 years of drug deals between Powell and Rabe constituting 30-40 transactions. (R.112, p.23.) Testimony was received that Rabe bought

drugs from Powell for up to ten years. (R.113, pp.187-191.) The State in its closing argument referenced 520 prior drug deliveries. (R.115, p.198.) Attorney Cohen stated in his closing that he believed Powell sold drugs to Rabe over 500 times. (R.116, p.9.) The jury, not instructed on the proper use of the other acts evidence, would have been influenced to punish Powell for his numerous uncharged crimes spanning ten years.

It matters not that Powell was acquitted of the other two counts. In *Sullivan*, the Supreme Court was not persuaded that acquittal of two charges demonstrated that the jury was not influenced by the other acts evidence. The Supreme Court reversed the conviction even though Sullivan had been acquitted of two of the four charges against him. *Sullivan*, 216 Wis. 2d at 790-791. The fact that Powell was acquitted of two of the charges is immaterial.

In the instant case, the probative value of the other acts evidence was substantially outweighed by unfair prejudice. There was no mitigation effect of the unfair prejudice because no cautionary instruction was given. In all, because the admission of the other acts evidence was without careful analysis and because no curative instruction was given, it is not clear beyond a reasonable doubt that the jury would have found Powell guilty absent the evidence. The circuit court erred in admitting the evidence without a proper purpose, the prejudicial effect of the evidence exceeded its probative value, and no curative instruction was given to mitigate the prejudice. The error is not harmless and the conviction should be reversed.

II. WHETHER THE COURT ERRONEOUSLY RULED THE INSTRUCTION ON MISTAKE DID NOT RELATE TO POWELL'S DEFENSE.

1. Instruction On Mistake Was Related To Powell's Defense And Should Have Been Given To The Jury.

A trial court has broad discretion in instructing a jury but must exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law. *In re the Commitment of Sanders*, 2011 WI App 125, 337 Wis. 2d 231, 244, 806 N.W.2d 250. Discretionary act will be upheld on review if trial court examined relevant facts, applied proper view of law, and, using demonstrated rational process, reached a conclusion that reasonable judge could reach. *State v. Schmitt*, 145 Wis. 2d 724, 729, 429 N.W.2d 518 (Ct. App. 1988). A criminal defendant is entitled to jury instruction on a theory of defense if the defense relates to a legal theory of a defense as opposed to interpretation of evidence, request is timely made, defense is not adequately covered by other instructions, and defense is supported by sufficient evidence. *State v. Coleman*, 206 Wis. 2d 199, 556 N.W.2d 701 (1996). Neither the trial court nor an appellate court may look to the "totality" of the evidence, in determining whether the instruction was warranted. *State v. Mendoza*, 80 Wis. 2d 122, 152, 258 N.W.2d 260 (1977).

The question in *Mendoza* was not what the "totality of the evidence" revealed but rather, whether a reasonable construction of the evidence will support the defendant's theory viewed in the most favorable light it will reasonably admit of from the standpoint of the accused. If this question is answered affirmatively, then it is for the jury, not for the trial court or this court, to determine whether to believe defendant's version of events. *Id.* at 153.

A mistake of fact is where one makes an erroneous perception of the facts which actually exist. *State v. Bougneit*, 97 Wis. 2d 687, 693, 294 N.W.2d 675. A mistake of fact exists if: 1) The facts exist; 2) The sense impressions of facts are different from the real facts; 3) The impressions fit the facts, and 4) the erroneous impressions are accepted as true. *Id.* If the mistake is real and it negates a state of mind essential to the crime, the actor is entitled to the defense even though the mistake is unreasonable. *Id.* at 692.

In the instant case, the fact that was mistaken was the location of Rabe before being run over. Powell's sense impression was that Rabe was not in the way of Powell's vehicle and that he was still at the side of the vehicle where he saw him last. The impression fits the facts since that is where the altercation had occurred.

The circuit court denied the requested instruction having viewed Powell's sense impression as "metaphysical." (R.115, pp.136-139, A-Ap.129.) Powell's defense was that his driving over Rabe was inadvertent because Rabe was not where Powell had seen him last. The jury should have been instructed on mistake since the issue was whether Powell had a correct impression of Rabe's location. The evidence when viewed in the light most favorable to Powell's defense supported the giving of the instruction.

III. WHETHER THE SUPPLEMENTAL INSTRUCTION TO THE JURY MISSTATED THE LAW AND CREATED A MANDATORY PRESUMPTION.

1. The Circuit Court's Misstatement Of The Law Violated Powell's Right To Due Process.

It is presumed that the jury follows the instructions given to it. *State v. Truax*, 151 Wis.2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Whether the jury instructions given by the circuit

court violated a defendant's right to due process is a question of law. *State v. Zelenka,* 130 Wis. 2d 34, 43, 387 N.W.2d 55 (1986). Questions of law are decided independently without deference to the decision of the lower courts. *Id.*

In an analysis of whether a defendant acted with utter disregard for human life, the fact-finder should consider the totality of the circumstances, including all relevant evidence of a defendant's conduct *before, during, and after the crime*. *State v. Burris*, 2011 WI 32, ¶12, 333 Wis. 2d 87, 797 N.W.2d 430 (emphasis added).

Utter disregard was obviously a concept the jury had trouble understanding in light of their first question. They wanted further instruction on utter disregard and the circuit court was correct to respond that they had been given instruction on the meaning of utter disregard already. Their second question shows that the jury was confused on whether they should consider all the circumstances surrounding the crime of First Degree Reckless Injury, or limit it to a certain time frame. It was incorrect to limit the time frame to just when Powell was operating his vehicle, because his actions before and after are also relevant to the issue of utter disregard. The jury could not consider, therefore, Powell's reason for operating his vehicle, namely to get away from the attack nor could it consider the fact that he had returned to see if he had in fact run Rabe over and to ensure help was summoned.

The circuit court's supplemental instruction that the jury was only to consider Powell's actions while operating his vehicle misstated the law on First Degree Reckless Injury. The correct statement of the law is that the jury should consider all of the evidence *before, during, and after* the alleged crime. In that the jury received incorrect instruction on the law, there is a reasonable likelihood that the jury applied the instruction in an unconstitutional manner. The

jury was misled into believing it could not consider Powell's relevant conduct before and after the operation of his vehicle in its determination of utter disregard for human life.

Unlike *Burris*, where the circuit court instructed that after-the-fact conduct does not negate utter disregard otherwise established by the circumstances, the circuit court in the instant case cut off any analysis of conduct occurring both before and after Powell operated his vehicle. This misstatement of the law instructed the jury that Powell's conduct both before and after he operated his vehicle was not significant. The evidence both before and after Powell operated his vehicle was vital to the analysis on utter disregard. The circuit court should have given an answer in that correctly stated that all conduct, before during, and after Powell operated the vehicle was relevant to their analysis of utter disregard for human life. Because the given supplemental instruction misstated the law, this court should reverse the conviction.

2. The Circuit Court's Supplemental Instruction Created A Mandatory Presumption Which Relieved The State's Burden.

In addition, the circuit court's answer created a mandatory presumption by stating that the First Degree Reckless Injury involved the time period when Powell was operating his vehicle.

Evidentiary presumptions in a jury charge that relieve the state of its duty to prove each element beyond a reasonable doubt violate the due process rights of the accused. *State v. Kuntz*, 160 Wis. 2d 722, 736, 467 N.W.2d 531 (1991).

A mandatory presumption instructs the jury that it must find the elemental fact if the state proves certain predicate facts. A mandatory presumption that is irrebuttable is conclusive. Thus, a mandatory conclusive presumption

relieves the state of its burden of persuasion by removing the presumed element from the case entirely if the state proves the predicate facts. If a specific portion of the jury charge, considered in isolation, could have been understood by reasonable jurors as creating a conclusive presumption, the potentially offending words must be considered in the context of the instruction as a whole to discern if other instructions adequately explain the infirm language and negate the unconstitutional presumption. *Kuntz,* 160 Wis. 2d at 737.

By referencing First Degree Reckless Injury in its answer to the jury, the circuit court gave the jury the impression that it had concluded the crime of First Degree Reckless Injury had occurred during the operation of Powell's vehicle. Additionally, the circuit court completely negated Second Degree Reckless Injury by so doing.

Where it is concluded that the disputed language constitutes mandatory conclusive presumptions, the question is whether the court complied with the requirement of Wis. Stat. §903.03(3) to include limiting language in the instruction directing the jury that it may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. *State v. Schultz*, 306 Wis. 2d 598, 612, 743 N.W.2d 823 (2007). In the instant case, the court did not so instruct.

Given the improper statement of the law, namely that utter disregard should be determined when viewing Powell's operation of the vehicle, not before or after, and the creation of a mandatory presumption, that is, that Powell's operation of the vehicle constituted First Degree Reckless Injury and not Second Degree Reckless Injury, there is a reasonable likelihood the jury unconstitutionally applied the instruction.

Jury instruction errors are a question of law and are subject to harmless error analysis on appeal. Harmless error analysis requires an appellate court to determine, based on the totality of the circumstances, whether it is clear beyond a reasonable doubt that a rational jury, properly instructed, would have found the defendant guilty. *State v. Beamon*, 2013 WI 47, ¶3, 347 Wis. 2d 559, 830 N.W.2d 681.

The circumstances before and after Powell's operation of the vehicle were essential to his defense. The jury was given a verdict form for Second Degree Reckless Injury and was instructed that if it did not find Powell acted with utter disregard, that it may still find him guilty of the lesser crime. Reasonable doubt exists whether the jury, if properly instructed, would have found Powell guilty of First Degree Reckless Injury. Thus, the error is not harmless.

3. This Court Should Use Its Discretionary Power Under Wis. Stat. §752.35 To Reverse The Conviction, Because The Real Controversy Was Not Fully Tried.

An appellate court may use its discretionary reversal power under Wis. Stat. §752.35 if the real controversy was not fully tried without finding the probability of a different result on retrial. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Further, this court may reverse if jury instruction obfuscates the real issue or arguable cause the real controversy not to be fully tried. *Sanders*, 2011 WI App 125, ¶13.

By giving the erroneous supplemental instruction to the jury, the real controversy, namely, whether Powell acted with utter disregard for human life was not fully tried. This court should reverse the conviction and need not find the probability of a different result on retrial.

IV. WHETHER POWELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

1. Counsel's Performance In Regards To The Other Acts Evidence And The Supplemental Jury Instruction Was Deficient And Prejudiced The Defense.

To claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Whether an attorney rendered ineffective assistance or not is focused not on the trial outcome, but rather on the reliability of the proceedings. *State v. Love*, 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62. The court cannot consider the deficiency of counsel's performance on its own, but must consider the totality of evidence when assessing prejudice. An assessment of prejudice resulting from the deficiency in counsel's performance (meaning a reasonable probability that but for counsel's professional errors the outcome would have been different) requires a review of the effect counsel's acts or omissions have on the reliability of the trial's outcome. Certainty of a different outcome at trial is not required. *State v. Jeannie M.P.*, 2005 WI App 183, 286 Wis. 2d 721, 703 N.W.2d 694. On the other hand, the courts may decide an ineffective assistance of counsel claim based on prejudice without a review of counsel's performance. *State v.*

Roberson, 2006 WI 80, 292 Wis. 2d 280, 717 N.W.2d 111.

First, Attorney Cohen failed to properly argue against the admission of other acts evidence. Evidence of Powell's ten-year span of drug dealing to Rabe was highly prejudicial against Powell and not probative of any issue at trial. The circuit court did not even allow the state to make its argument for the admission of the evidence, rather it summarily allowed the evidence as being probative of the context of the events on the night in question. The fact that prior drug transactions were "peaceable" was not relevant to any of the crimes alleged. Attorney Cohen should have ensured that the court used the *Sullivan* analysis and that the State properly put forth its argument for the admission of the evidence. An attorney well versed in criminal law would have ensured that the proper reasoning was put on the record for potential appellate review.

Second, Attorney Cohen counsel failed to request a cautionary instruction for other acts evidence. Knowing that the other acts evidence was going to come in against Powell, Attorney Cohen should have ensured that the jury instruction he requested was read to the jury. Defense counsel initially requested Wisconsin Jury Instruction 275, but agreed to not have it read at during an unreported informal jury instruction conference. (R.115, pp.121-124.) Evidence of Powell's prior drug deals with Rabe was highly prejudicial and the jury should have been instructed on the limited use of such evidence. Failure to ensure this instruction was read to the jury was deficient performance on the part of defense counsel. His reasoning that he did not want the curative instruction to focus on Powell is unfounded.

Finally, Attorney Cohen also failed to object to the supplemental instruction which misstated the law. An attorney well-versed in criminal law

would have objected to an instruction which misstated the law. It cannot be a strategic decision to have the court instruct the jury in a manner contrary to the law. This was deficient performance on Cohen's part.

Attorney Cohen's failure to ensure the other acts evidence was admitted only after a careful *Sullivan* analysis, his failure to renew his request for a limiting instruction on other acts evidence, and his failure to object to a supplemental instruction which misstated the law all constituted ineffective assistant of counsel.

Powell's defense was prejudiced by the deficient representation in that the jury heard evidence of a purported 500 plus uncharged drug transactions, was not cautioned as to the use of this evidence, and was erroneously instructed they could not consider Powell's conduct before and after the operation of his vehicle. This court should find Attorney Cohen rendered ineffective assistance of counsel and that the deficiencies in Cohen's representation prejudiced Powell's defense.

V. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE UTTER DISREGARD ELEMENT NECESSARY FOR CONVICTION.

1. Evidence Was Not Sufficient To Support The Conviction For First Degree Reckless Injury.

Appellate court may not reverse conviction unless evidence, viewed most favorable to State, is so insufficient in probative value and force that it can be said as matter of law that no trier of fact, acting reasonably, could have found guilt beyond reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite

guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it. *Poellinger*, 153 Wis. 2d at 507.

Utter disregard for human life, for purposes of offense of First Degree Reckless Injury, requires more than a high degree of negligence or recklessness. *State v. Miller*, 320 Wis. 2d 724, 747, 772 N.W.2d 188 (Ct. App. 2009). To evince "utter disregard for human life," for purposes of offense of First Degree Reckless Injury, the mind must not only disregard the safety of another but be devoid of regard for the life of another; a depraved mind lacks a moral sense, an appreciation of life, is unreasonable and lacks judgment. A person acting with "utter disregard for human life," for purposes of offense of First Degree Reckless Injury, must possess a state of mind which has no regard for the moral or social duties of a human being. *Id*. *See also*, *State v. Weso*, 60 Wis. 2d 404, 210 N.W.2d 442 (1973).

Courts consider the totality of the circumstances when determining whether the defendant showed some regard for life, which may include conduct occurring, before, during, and after the commission of the criminally reckless act itself. *Miller*, 320 Wis. 2d at 749.

Whether a defendant acted with utter disregard for human life is an objective analysis, dependent upon what a reasonable person in the defendant's position would have known. This may be proven by evidence relating to the defendant's subjective state of mind, before, during, and after the crime or by evidence of heightened risk, such as special vulnerabilities of the victim, or evidence of a particularly obvious, potentially lethal danger. *State v. Jensen*, 2000 WI 84, ¶17, 236 Wis. 2d 521, 613 N.W.2d 170.

In evaluating the proof of utter disregard for human life, the fact finder is to consider: what the

defendant was doing; why he was doing it, how dangerous the conduct was, how obvious the danger was and whether the conduct showed any regard for human life. *Jensen*, 2000 WI 84 at ¶24; Wisconsin Jury Instruction – Criminal 1250.

This court in *State v. Edmunds*, 229 Wis. 2d 67, 598 N.W.2d 290 (Ct. App. 1999) elaborated stating:

> In conducting such an examination, we consider the type of act, its nature, why the perpetrator acted as he/she did, the extent of the victim's injuries and the degree of force required to cause those injuries. We also consider the type of victim, the victim's age, vulnerability, fragility, and relationship to the perpetrator, and finally, we consider whether the totality of the circumstances showed any regard for the victim's life. *Edmunds*, 229 Wis. 2d at 77.

Pointing a loaded gun at another is not conduct evincing a depraved mind (utter disregard) if it is "otherwise defensible," even if it is not privileged. *State v. Bernal*, 111 Wis. 2d 280, 330 N.W.2d 219 (Ct. App. 1983).

In *Miller*, this court applied the *Jensen* analysis, and observed that the type and nature of the act, the extent of the victim's injuries and the degree of force used support a conclusion that Miller acted with utter disregard. Miller fired a shotgun at a person from a range of sixteen to eighteen feet, causing great bodily harm to the victim and exposed the victim to an extreme risk that could have caused the victim's death. However, the remaining factors set forth in *Jensen,* including principally the reason for Miller's conduct, persuaded this court that the evidence was insufficient for a reasonable jury to conclude that Miller acted with utter disregard for human life. While Miller's conduct may have been reckless under Wis. Stat. §940.23, under no reasonable view did Miller's conduct evince an utter disregard for human life within the meaning of §940.23(1). *Miller*, 320 Wis. 2d at 750-751.

In analyzing the instant case, 1) there was no great disparity in size or age between Powell and Rabe, 2) Rabe was not particularly vulnerable or fragile, 3) Powell was not acting violently, rather he was attempting to flee from the altercation, 4) the risk of harm was not obvious, and 5) although Rabe's injuries were severe, it took little force other than the drive the vehicle forward to cause the injuries.

Powell's driving of the vehicle was in order to get away from an attack. He had already been hit twice in the face, kneed in the ribs, and threatened with a knife. Leaving the scene quickly in the dark, with no headlights on may have been reckless, but did not rise to the level of utter disregard for human life. From his standpoint, Rabe was still on the passenger side of the vehicle, standing. Powell drove straight ahead and did not know that Rabe may be near or under the vehicle.

Finally, Powell did show regard for Rabe's life by returning to the scene to see if he had indeed run Rabe over and to make sure help was being summoned. Powell is heard saying on the 911 recording, "[i]s he okay…," and "[d]id you call the police first…," and "[c]all the police." (R.47, R.48, A-Ap.123-124.) This conduct shows some regard for human life and thus it cannot be found that he acted with utter disregard for human life.

Likewise, because the supplemental jury instruction misstated the law, there was insufficient evidence to support the conviction. It is not clear beyond a reasonable doubt that the jury would have found Powell guilty of Count 2, had it been properly instructed, thus the error is not harmless. The conviction should be reversed.
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VI. WHETHER THE BAIL MONEY ON THE TWO ACQUITTED COUNTS SHOULD HAVE BEEN RETURNED TO THE POSTERS.

1. The Bail Money Should Have Been Returned On The Two Acquitted Counts.

An appellate court is not bound by a trial court's conclusions of law and decides the matter de novo. *City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).

Wisconsin Statutes §969.03 governs release of defendants charged with felonies. Certain subsections are relevant to the instant case.

> (1) A defendant charged with a felony may be released by the judge without bail or upon the execution of an unsecured appearance bond or the judge may in addition to requiring the execution of an appearance bond or in lieu thereof impose one or more of the following conditions which will assure appearance for trial:
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> --
>
> > (d) Require the execution of an appearance bond with sufficient solvent sureties, or the deposit of cash in lieu of sureties. If the judge requires a deposit of cash in lieu of sureties, the person making the cash deposit shall be given written notice of the requirements of sub. (4).
>
> (3) Once bail has been given and a charge is pending or is thereafter filed or transferred to another court, the latter court shall continue the original bail in that court subject to s. 969.08. A single bond form shall be utilized for all stages of the proceedings through conviction and sentencing or the granting of probation.
>
> (4) If a judgment of conviction is entered in a prosecution in which a deposit had been made in accordance with sub.(1) (d), the balance of the deposit, after deduction of the bond costs, shall be applied first to the payment of any restitution ordered under s. 973.20 and then, if ordered restitution is satisfied in full, to the payment of the judgment.

> (5) If the complaint against the defendant has been dismissed or if the defendant has been acquitted, the entire sum deposited shall be returned. A deposit under sub. (1) (d) shall be returned to the person who made the deposit, his or her heirs or assigns, subject to sub. (4).

Powell was released from custody after two sureties, Freida Brown and Karen Garcia, signed seventeen bond receipts. Each bond receipt contains the surety certification which twice uses the phrase "this bond." The bond receipts lists the particular offense charged and a unique offense number for each count. Nowhere does it state that the bond the surety is signing for is for any other charge or offense. (R.135, A-Ap.103-119.)

It appears therefore, that the money being posted is particular to the offense alleged, not the case as a whole, albeit the case number is listed on the face of the bond receipt.

A bail bond agreement is a contract between two parties: the government and the surety on behalf of the criminal defendant. *U.S. v. Santiago*, 826 F.2d 499, 502. (7th Cir. 1987). A reasonable interpretation of the surety certification is that the surety is bound to the particular bond being signed and not for any other bonds the defendant may have.

Wisconsin Statute §969.03(5) states unambiguously that if the defendant is acquitted, the entire sum deposited shall be returned to the person who made the deposit subject to §969.03(4). Subsection 4 states that if a judgment of conviction is entered in which a deposit has been made, the balance after deductions for bond costs shall be applied first to the payment of restitution. However, what the statute does not say is where multiple deposits are made toward particular counts in a complaint that the entire amount of cash posted on behalf of the defendant shall be applied towards restitution.

There is no provision limiting on how a judge sets bail whether it is per count or per case. The circuit court specifically revoked bail on Count 2 alone. Having specifically stated bond was revoked on the convicted count, the circuit court lost jurisdiction over the cash posted on the two acquitted counts.

Therefore, Powell's posters should have received refunds of the cash posted for acquitted counts 1 and 3.

CONCLUSION

WHEREFORE, for the reasons explained above, Defendant-Appellant Jimmy L. Powell respectfully requests the Court of Appeals reverse the order of the Circuit Court denying postconviction relief, vacate the conviction, and order a new trial. Further, that the Court of Appeals find that the bail money on Counts 1 and 3 was erroneously paid to the victim and order the bail money returned to the posters.

Dated: July ___, 2013

Respectfully submitted,

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BRIEF CERTIFICATION

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

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,977 words.

Dated: July ___, 2013

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. §809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant circuit court record entries;

(3) the findings or opinion of the circuit court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I additionally certify that the electronic version of the appendix is identical to the printed version.

Dated: July ___, 2013

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CERTIFICATE OF MAILING

STATE OF WISCONSIN)
IOWA COUNTY)

I, Suzanne Edwards, a licensed Wisconsin attorney, hereby certify that copies Defendant-Appellant's Brief and Appendix in Appeal No 2013AP1111 CR were placed in the U.S. Mail, with proper postage affixed this ___ day of July, 2013, addressed to the following as indicated below:

Clerk of the Wisconsin Court of Appeals (10)
PO BOX 1688
Madison WI 53701-1688

AAG Gregory M. Weber (3)
Wisconsin Department of Justice
PO BOX 7857
Madison, WI 53707-7857

Dated: July ___, 2013

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ELECTRONIC SUBMISSION CERTIFICATION

I hereby certify that the electronic version of the brief and appendix in Case No. 2013AP1111 CR is identical to the printed version.

DATED: July ___, 2013

_____

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2013AP1111 CR
Circuit Court Case No. 2009CF792

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JIMMY L. POWELL,
Defendant-Appellant.

APPEAL FROM THE CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN DANE COUNTY CIRCUIT COURT, HON. STEPHEN E. EHLKE, PRESIDING.

APPENDIX OF DEFENDANT-APPELLANT

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