STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP1111-CR

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, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the briefs of the parties are adequate and the issues presented can be resolved by application of established legal principles to the facts of record.

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF A TEN-YEAR HISTORY OF PEACEABLE DRUG DEALS BETWEEN RABE AND POWELL.

The State's theory of the crimes was that Rabe called Powell to purchase cocaine from him. They met in a dark, secluded location in the early morning hours. Rabe got into the passenger seat of Powell's SUV and Powell handed him the cocaine. Powell then told Rabe to give him his money or he would cut Rabe's throat. They exited the vehicle and had a physical altercation and Rabe was knocked down on the ground. Powell got into his SUV and ran over Rabe's head as he sped from the scene with his headlights off. Powell returned to the scene moments later, slit Rabe's throat with a knife, stole Rabe's cash, and broke the cell phone of Rabe's friend, who was talking to 911. Subsequently, in an interview with the police from his hospital bed, Rabe identified a picture of Powell as his assailant from a sequential photo line-up (1; 34:3; 112:17-48).

The State charged Powell with first degree reckless injury for running over Rabe with his SUV, attempted first degree intentional homicide for slitting Rabe's throat, and armed robbery for stealing his cash. Prior to trial, the State filed a motion in limine to admit evidence that Rabe had a ten-year history of buying drugs from Powell without violence or incident (34:3). The trial court ruled the history of past peaceable drug deals between Rabe and Powell was admissible to give context to the case, so the jury would understand why the parties were meeting in a dark, secluded place in the wee hours, to explain the relationship between the parties, and as relevant to identification (34:3; 110:46-47).

A trial court's failure to go through the *Sullivan*[1] analysis and fully articulate its reasoning on the record is not grounds for reversal of a criminal conviction. The decision to admit other acts evidence is left to the sound discretion of the trial court, and the appellate court will not find an erroneous exercise of discretion if there is a reasonable basis in the record for the trial court's decision. *State v. Hunt*, 2003 WI 81, ¶ 42, 263 Wis. 2d 1, 666 N.W.2d 771.

The appellate court must independently review the record and must uphold the trial court's decision if the record contains facts that would support the trial court's decision if the trial court had fully exercised its discretion. *Hunt*, 263 Wis. 2d 1, ¶¶ 44-45; *State v. Pharr*, 115 Wis. 2d 334, 345, 340 N.W.2d 498 (1983).

Three questions must be answered affirmatively for other acts evidence to be admissible:

> (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 probable or less probable than it would be 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

[1] *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

> misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* Wis. Stat. § (Rule) 904.03.

State v. Sullivan, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) (footnote omitted). The party offering the other acts evidence bears the burden of establishing the first two prongs by a preponderance of the evidence and then the burden shifts to the party opposing admission of the evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399.

Rabe's history of purchasing drugs from Powell for a period of ten years was admissible for acceptable purposes under Wis. Stat. § (Rule) 904.04(2). Other acts evidence is admissible to show the context of the crime and to provide a complete explanation of the case. *Hunt*, 263 Wis. 2d 1, ¶ 58. Other acts evidence is also admissible on the issue of identification. Context was necessary in this case for the jury to understand why Rabe would go to meet Powell in a dark, secluded place in the early morning hours. The evidence was relevant to identification for the jury to understand why Rabe could confidently identify Powell as the man who attacked and injured him, even though the crimes occurred in a dark, secluded place.

Evidence that Rabe had been purchasing drugs from Powell for ten years without incidence or violence was probative for these purposes even though drug dealing per se is not similar to the charged acts of violence. Moreover, similarity was shown, because there was evidence that it was not unusual for Rabe to meet Powell in a dark, secluded place to purchase drugs (113:164). Powell contends the evidence was not probative of identity because Rabe identified Powell from a photo line-up prior to trial and in court. Powell misses the point. The State had the burden to prove to the jury that Rabe's identification of Powell as his assailant was accurate and true. The fact that Rabe had known Powell

and purchased drugs from him under similar circumstances for a period of ten years made it more probable than it would otherwise be that Rabe had correctly identified Powell. Powell did testify at trial, admitted he was at the scene, and gave an exculpatory version of events. But, until he actually so testified, identity was a contested issue. Moreover, the State has the obligation -- and the right -- to prove all necessary parts of its case.

Powell contends that even if the evidence was offered for proper purposes and was probative of those purposes, the evidence should have been excluded because of the risk of unfair prejudice that the jury would convict Powell to punish him for his ten years of uncharged drug dealing. The probative value of the evidence was not substantially outweighed by this risk of prejudice. The crimes on trial occurred during a drug deal that went bad. Powell implicitly recognizes there was no way to shield the jury from knowing that Powell sold drugs to Rabe. The fact that Powell had sold Rabe drugs before did not significantly add to the prejudice that was inherent in the facts of the charged crimes. The fact that Rabe had been buying drugs from Powell for ten years, as opposed to some arbitrary lesser period of time, did not add significantly to the risk of prejudice. The fact that Powell was a drug dealer paled by comparison to the horrendous facts of the crimes of violence on trial. It was unlikely the jury would convict Powell to punish him for drug dealing or because he was a bad man because he sold drugs. The risk of undue prejudice to Powell was significantly reduced because the drug dealing history, as the trial court recognized, reflected on both men (110:46-47).

The evidence was not unduly prejudicial because the trial court did not give a limiting instruction. Neither side wanted the limiting instruction given. Therefore, the trial court had no obligation to give it. The State will demonstrate in a separate section of this brief below that trial counsel's strategic decision to forgo the limiting

instruction did not constitute ineffective assistance of counsel.

It is unlikely the jury punished Powell for his uncharged drug dealing because the jury acquitted him of the more serious offenses of attempted first degree intentional homicide and armed robbery, and convicted him only of first degree reckless injury based on the undisputed fact that he ran over Rabe with his SUV. *Sullivan*, upon which Powell relies, is distinguishable. In *Sullivan*, the defendant's character traits inferred from the bad acts evidence were more pertinent to the offense for which he was convicted than the offenses of which he was acquitted. *Sullivan*, 216 Wis. 2d at 790. Here, the same cannot be said. If the history of drug dealing was unduly prejudicial in this case, there is no reason it would not have influenced the jury equally on all three charges.

Even if the history of drug dealing between Rabe and Powell should not have been admitted, the error was harmless beyond a reasonable doubt. Error is harmless if the reviewing court can determine beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Neder v. United States*, 527 U.S. 1, 18 (1999); *State v. Harvey*, 2002 WI 93, ¶¶ 46-49, 254 Wis. 2d 442, 647 N.W.2d 189.

The evidence of prior drug dealing was reasonably brief and unembellished. It was used by both parties only to show that there was no reason for either party to expect trouble at the crime scene because there had never been any problems between Powell and Rabe during their prior dealings. Both parties were culpable of drug involvement, so there was no reason the jury would find either party more or less sympathetic than the other based on their drug dealing history. The other act evidence was not gruesome or horrifying, unlike the actual facts of the charged crimes. The State's case on the offense of which Powell was convicted was strong: there was no dispute that Powell ran over Rabe with his SUV when he sped from the dark scene with his headlights out. For all of

these reasons, any error was harmless beyond a reasonable doubt.

II. POWELL'S CHALLENGE TO THE SUPPLEMENTAL INSTRUCTION SHOULD BE REVIEWED UNDER THE RUBRIC OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Powell seeks reversal of his conviction based on his claim that the supplemental jury instruction on utter disregard, given in response to a question the jury submitted during deliberations, misstated the law and created a mandatory presumption. However, at trial, he did not object to the supplemental instruction. Indeed, he expressly endorsed it (115:234-36). Under these circumstances, he is not entitled to review of right of the alleged error because he did not timely preserve that claim by making a contemporaneous objection in the trial court.

There are strong policy reasons underlying the forfeiture rule which demonstrate why it should be enforced.[2] It is a poor use of judicial resources to address claims on appeal that could have been raised and resolved at trial. *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). Adherence to the contemporaneous objection rule contributes to the finality of litigation and encourages parties to view the trial itself as a significant event that should be kept as error free as possible. *State v. Davis*, 199 Wis. 2d 513, 518, 545 N.W.2d 244 (Ct. App. 1996). Moreover, "the rule prevents attorneys from 'sandbagging' errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727.

[2] The Wisconsin Supreme Court now uses the nomenclature forfeit and forfeiture instead of waive or waiver for claims, including constitutional claims, not timely raised or preserved at trial. *State v. Ndina*, 2009 WI 21, ¶¶ 25-26, 315 Wis. 2d 653, 761 N.W.2d 612. Prior case law using the former terminology is still good law.

For these reasons, the Wisconsin Supreme Court has directed that the normal procedure in criminal cases is to address unpreserved claims within the rubric of ineffective assistance of counsel. *Erickson*, 227 Wis. 2d at 766. Ordinarily, a criminal defendant who did not preserve a claim of error with a timely objection or request at trial can obtain relief only by showing the failure to object or make the request constituted ineffective assistance of counsel. *State v. Koller*, 2001 WI App 253, ¶ 44, 248 Wis. 2d 259, 635 N.W.2d 838.

Powell offers absolutely no reason why this normal procedure should not be used in his case.

Accordingly, the State will address Powell's claim only under the rubric of ineffective assistance of counsel.

III. TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL

A. Controlling Legal Standards And Standard Of Appellate Review.

A criminal defendant alleging ineffective assistance of trial counsel bears the burden of proving that trial counsel's performance was constitutionally deficient and that, as a result, he suffered actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985); *Koller*, 248 Wis. 2d 259, ¶ 7.

There is a strong presumption that the defendant received adequate assistance and that all of counsel's decisions could be justified in the exercise of reasonable professional judgment. *See State v. Kimbrough*, 2001 WI App 138, ¶¶ 31-35, 246 Wis. 2d 648, 630 N.W.2d 752. An attorney's performance is not deficient unless the defendant proves the attorney's challenged acts or omissions were objectively unreasonable under all of the circumstances of the case. *State v. Oswald*, 2000 WI App

2, ¶ 49, 232 Wis. 2d 62, 606 N.W.2d 207; *Koller*, 248 Wis. 2d 259, ¶ 8; *Kimbrough*, 246 Wis. 2d 648, ¶¶ 31-35.

The question is whether, under the circumstances of the case as they existed at the time of trial, the challenged conduct or failure to act could have been justified by an attorney exercising reasonable professional judgment. If so, there is no deficient performance. *See Koller*, 248 Wis. 2d 259, ¶ 8; *Kimbrough*, 246 Wis. 2d 648, ¶¶ 31-35. The test for deficient performance is whether counsel's conduct was objectively reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. *Pitsch*, 124 Wis. 2d at 636-37. Judicial review of counsel's performance is highly deferential and may not be based on hindsight. *Strickland*, 466 U.S. at 687; *State v. Robinson*, 177 Wis. 2d 46, 55-56, 501 N.W.2d 831 (Ct. App. 1993). The fact that the defendant was convicted does not render a reasonable strategic decision by counsel unreasonable. *State v. Maloney*, 2005 WI 74, ¶¶ 43-44, 281 Wis. 2d 595, 698 N.W.2d 583. Trial counsel's strategic choices that were made after thorough consideration of the options in light of the relevant facts and law are virtually unchallengeable. *Strickland*, 466 U.S. at 690-91. The reviewing court will second-guess counsel's strategic or tactical decision only if it is shown to be an irrational trial tactic or if it was based upon caprice rather than upon judgment. *State v. Felton*, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983).

The defendant must also prove counsel's challenged acts or omissions actually prejudiced the defense to the degree that defendant was deprived of a fair trial that yielded a reliable result. *Oswald*, 232 Wis. 2d 62, ¶ 50. To meet this burden, the defendant must prove there is a reasonable probability that the verdict would have been different, but for counsel's error. *Koller*, 248 Wis. 2d 259, ¶ 9.

On appellate review, the circumstances of the case, counsel's strategy choices, the acts counsel did or failed to do, and the reasons for counsel's decisions, acts and omissions are matters of historical and evidentiary fact. The appellate court is bound by the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. *State v. Leighton*, 2000 WI App 156, ¶ 33, 237 Wis. 2d 709, 616 N.W.2d 126; *State v. Jones*, 181 Wis. 2d 194, 199, 510 N.W.2d 784 (Ct. App. 1993).

The appellate court determines de novo whether, under those facts, the defendant has proven deficient performance and prejudice. *Koller*, 248 Wis. 2d 259, ¶ 10. The reviewing court need not address both prejudice and deficient performance prongs if the defendant fails to prove either one of the prongs. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

B. Trial Counsel Did Not Render Ineffective Assistance In Regards To The Evidence Of Victim Rabe's Ten-Year History Of Buying Drugs From Powell.

Powell asserts trial counsel performed deficiently because he "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." Powell's brief at 31, and he should have asked for a limiting instruction.

The State filed a pre-trial motion to admit evidence that the victim, Rabe, had a ten-year history of buying drugs from Powell (34), Powell objected, and the trial court ruled the evidence admissible, without waiting for the State to orally supplement its motion (110:46-47). As the State demonstrated in Argument I, *supra*, even if the trial court did not specifically refer to the *Sullivan* analysis or fully articulate its reasoning, this court must affirm because the record contains facts that would support the

ruling if the trial court had fully exercised its discretion. *Hunt*, 263 Wis. 2d 1, ¶¶ 44-45. Accordingly, any alleged failure of trial counsel in arguing the motion was neither deficient nor prejudicial. Furthermore, Powell utterly fails to show that trial counsel could have done anything to control the trial court's decision process.

Trial counsel elected not to have the trial court give the other acts limiting instruction, Wis. JI-Criminal 275 (115:122-24). At the postconviction hearing, trial counsel thoroughly explained his reasons for handling the other acts evidence as he did:

> Q You did not ask for the jury to be instructed that other acts evidence should be considered with caution?
>
> A Correct.
>
> Q You didn't ask for that instruction?
>
> A Correct.
>
> Q Okay. Was there a reason behind that?
>
> . . . .
>
> A . . . .
>
> And so basically what that instruction does is it focuses the bad act onto the defendant. It says consider this to determine not defendant's bad character, but his -- some smaller relevant issues, such as identity or motive or something like that.
>
> And I didn't want that in. I didn't want the ten-year drug dealing history to be focused on Mr. Powell. I wanted it in to focus it on Mr. Rabe. So the instruction would have been counter to my purpose. I wanted that evidence in to basically impeach Mr. Rabe's credibility.
>
> As I said on direct, Mr. Rabe had indicated, oh, he had drugs a few times, he bought drugs a

> few times from Mr. Powell. And that was dishonest. And so I had Mr. Powell testify, "No, I sold him drugs a lot. You know, we went way back." And that gave him credibility.
>
> So to have the jury instruction then come back and say, well, you know, that's only for you to determine some aspects relevant to Mr. Powell, that's -- that completely focuses it in the wrong direction. I wanted the jury to know that Mr. Rabe was lying, that Mr. Rabe was a drug user. I wanted them to think about Mr. Rabe in a negative light, generally as a bad person, and specifically as having no credibility. So the jury instruction wasn't useful for establishing any of that.

(142:40-41).

Powell makes no attempt to demonstrate that trial counsel's strategic decisions about how to handle the other acts evidence were objectively unreasonable, nor does the record support such a claim. Powell has utterly failed to prove that trial counsel's handling of the other acts evidence constituted deficient performance.

Powell has utterly failed to prove there is a reasonable probability that the jury would have acquitted but for trial counsel's alleged errors regarding the other acts evidence. As the State demonstrated in Argument I, *supra*, any error in admitting evidence of Rabe's ten-year history of buying drugs from Powell was harmless beyond a reasonable doubt. Accordingly, Powell cannot and has not shown that any error of trial counsel regarding the evidence was prejudicial.

C. Trial Counsel's Strategic Decision To Endorse The Supplemental Instruction Did Not Constitute Deficient Performance And It Was Not Prejudicial.

Powell was charged and convicted by a jury of first degree reckless injury for running over Rabe with his SUV, as he sped with his headlights out, from the scene of the drug deal gone bad. A tire of the SUV ran over Rabe's head, breaking virtually every bone in his face; Rabe was dragged under the SUV for some distance, and suffered significant bruising, road rash, broken ribs, and a broken vertebrae among other injuries. Powell was also charged with attempted first degree intentional homicide for returning to the scene and slitting Rabe's throat with a knife, as Rabe lay on the ground, bleeding from the injuries he suffered from being run over by the SUV. Powell also grabbed the cell phone that Rabe's friend Ryckman was using to call 911 to the scene and broke it; Powell was charged with armed robbery for taking Rabe's cash during the episode. Powell was acquitted of the attempted first degree intentional homicide and armed robbery charges (112:77, 82, 128, 139-40; 113:47, 94-95, 145-52; 114:271-74, 278; 115:21-26, 237).

The jury was properly instructed on the elements of first degree reckless injury as follows:

> First degree reckless injury, as defined in Section 940.23(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to another human being under circumstances that show utter disregard for human life.
>
> Before you may find the defendant guilty of first degree reckless injury, the State must prove evidence which satisfies you beyond a reasonable doubt that the following three elements are present:

> First, that the defendant caused great bodily harm to Robert Rabe.
>
> Cause means the defendant's act was a substantial factor in producing great bodily harm.
>
> Great bodily harm means serious bodily injury. Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.
>
> Second, that the defendant caused great bodily harm by criminally reckless conduct.
>
> Criminally reckless conduct means: The conduct created a risk of death or great bodily harm to another person; and the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.
>
> The third element of first degree reckless injury is that the circumstances of the defendant's conduct showed utter disregard for human life.
>
> In determining whether the conduct showed utter disregard for human life, you should consider these factors: What the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and all other facts and circumstances relating to the conduct.
>
> If you are satisfied beyond a reasonable doubt that all three elements of this offense were present, you should find the defendant guilty.

(115:216-18).

During deliberations, the jury submitted a note asking, "'Is there a time element associated with the utter

disregard,' and then it has in parens, 'before, during, and after'" (115:234). The trial court stated:

> THE COURT: All right. And then on the second one relating to the time element, off the record we came up with the answer to the jury question as follows: In this case, the crime of first degree reckless injury involves the period of time while Mr. Powell is engaged in conduct related to operating his motor vehicle, period. It does not include conduct by Mr. Powell after Mr. Rabe had been run over.
>
> Is that acceptable to the State?
>
> MS. RUSCH: Yes, Judge.
>
> THE COURT: And is that acceptable to defense, Mr. Cohen?
>
> MR. COHEN: Yes, Your Honor.

(115:235-36).

Following conviction, Powell submitted a postconviction motion in which he alleged trial counsel was ineffective for failing to object to the supplemental instruction on first degree reckless injury because the instruction misstated the law and created a mandatory presumption (127). Powell makes the same assertion on appeal.

At the evidentiary hearing on the postconviction motion, trial counsel explained why he did not object:

> A Yeah. I actually recall, um, feeling a little surprised that the court limited it that much. And I was sort of expecting the Court to say, um, you know, just look at the entire scenario and, um, you know, and consider all the circumstances. But the Court actually limited it to just the period when Mr. Powell was inside the car. And I felt that was favorable to Mr. Powell.
>
> Q [MS. RUSCH, PROSECUTOR:] So you didn't object?

A I didn't object. I liked it because it had the effect of limiting it so the jury wouldn't be able to consider anything outside the car. It was only when he was in the car, which is really as limited as you can get.

Q And you had quite an uphill battle with that knife issue, didn't you, Mr. Cohen, in terms of defending against an attempted murder weapon that had the victim's source DNA on the blade and the defendant's DNA on the handle; correct?

A Yeah. That was a challenge.

Q And you successfully defended that; didn't you?

A Yes.

. . . .

A I would say that I was very pleased with the answer because I felt it was more limiting than it had to be, and so I felt it benefited Mr. Powell.

Q [MS. EDWARDS, APPELLATE DEFENSE COUNSEL:] So you don't feel that what occurred before and after Mr. Powell operated his vehicle was something that the jury should consider according to the original jury instruction?

A I wouldn't want them to. We're talking about reckless injury here. And certainly after the vehicle was operated, Mr. Rabe suffered a cut from ear to ear, and so I didn't want them to, you know, the jury to deliberate and say, well, you know, because of that injury, I think this charge would be appropriate. So I was pleased that it was limited only to the point when he's driving 'cause I felt that was the most defensible part of the case and, um, you know, and it was limiting, not -- you know, to his favor.

Q Okay. So limited to his favor?

. . . .

A . . . .

> And I would just add that, um, also before -- before he got in the car, there was also -- there was a fist fight. There was a time when it was alleged Mr. Powell had kicked open the door and knocked Mr. Rabe down. So, again, none of that was really, according to the Court's answer, was in play. So that's why I liked it 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 the vehicle, I felt that was the best possible result for Mr. Powell.

(142:36-37, 45-46).

Based on trial counsel's undisputed testimony, the trial court concluded that trial counsel did not render ineffective assistance regarding the supplemental instruction, stating:

> A supplemental jury instruction was provided to the jury in a specific response to a question from the jury after some period of time of deliberating, and both counsel and the court worked on that, discussed it, and then the instruction was sent back to the jury. My belief is that when the jury is asking for guidance when it is proper to do so and if it is in accord with the law, that is proper to instruct the jury, and that was what was done here. The way the case went in, the first degree reckless, the way the state was arguing it, basically had to be well, he was driving the vehicle. The state was arguing that there was an attempted first degree murder with regard to what they believe was the knife. So the way the case went in, to have them consider that did not seem appropriate and no one was arguing that Mr. Powell was reckless for not calling an ambulance or something like that, for example. So to have expanded the period of time they were considering would be detrimental to Mr. Powell, not advantageous to him, which Mr. Cohen mentions in his testimony that he felt it was helpful to have the time period restricted. So I don't believe that Mr. -- and I don't find that Mr. Cohen was ineffective for failing to object to that jury instruction. Quite the

> contrary, I think it was probably helpful to Mr. Powell to have it restricted to that time period even though he ended up being convicted of it.

(143:19-20).

The supplemental instruction was exceedingly favorable to Powell. In determining whether the circumstances of Powell's conduct of running over Rabe with his SUV showed utter disregard for human life, the instruction prevented the jury from considering the evidence that Powell demanded all of Rabe's money, threatened him with a knife and fought with him before he ran over him with his SUV. It was exceedingly favorable to Powell because it prevented the jury from considering evidence that after Powell ran over Rabe, he returned to the scene, and instead of getting help for the severely injured Rabe, he grabbed the cell phone from the person who was calling 911, and broke it. It was exceedingly favorable to Powell because it prevented the jury from considering evidence that when Powell returned to the scene, instead of getting help for Rabe, he slit his throat with knife. It was exceedingly favorable to Powell because it prevented the jury from considering evidence that Powell took all of Rabe's cash.

It was objectively reasonable for trial counsel to endorse an instruction that prevented the jury from considering this negative evidence. Powell utterly fails to demonstrate that trial counsel's strategic decision was not reasonable under the facts of this case. The State does not concede that the instruction as given misstated the law, but this court need not determine that issue. Even if it is ordinarily appropriate to instruct the jury that in determining the utter disregard of human life element it should consider the totality of the circumstances including all relevant evidence of a defendant's conduct before,

during and after the crime,[3] it was objectively reasonable for trial counsel to forgo that instruction when the instruction would be harmful, rather than helpful, to the defendant.[4]

Even if this court could somehow conclude that trial counsel's strategic decision was objectively unreasonable, Powell has failed to prove prejudice. He has not argued or demonstrated that if the jury had considered all of this negative evidence in determining the utter disregard for human life element, there is a reasonable probability it would have found Powell not guilty of first degree reckless injury, nor would such an argument have merit.

Powell asserts that trial counsel was ineffective for failing to object to the supplemental instruction on the ground that the instruction created a mandatory presumption. At the postconviction motion hearing, however, Powell never asked trial counsel any questions about this aspect of the instruction. He never asked trial counsel why he did not object on the ground that the instruction created a mandatory presumption. By forgoing the opportunity to question trial counsel about this claim, Powell has forfeited the right to argue ineffective assistance on this ground. *State v. Elm*, 201 Wis. 2d 452, 463, 549 N.W.2d 471 (Ct. App. 1996).

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[3] Powell relies on *State v. Burris*, 2011 WI 32, ¶ 12, 333 Wis. 2d 87, 797 N.W.2d 430, for this proposition. *Burris* was not decided until after the trial in this case, and thus the parties and the trial court did not have the benefit of that decision at the time of trial.

[4] Of course, at the time the jury asked the question during deliberations and trial counsel made his strategic decision to endorse the favorable supplemental instruction rather than object to it, the jury had not yet returned its verdicts. Trial counsel could not have known at that time that the jury would acquit Powell of attempted first degree intentional homicide and armed robbery. The reasonableness of trial counsel's strategic decisions at trial cannot be evaluated on the basis of hindsight.

Powell is wrong on the merits. The supplemental language contains no language that creates a mandatory presumption, or that could be reasonably understood to create a mandatory presumption. It did not tell the jury that if it found a certain fact, it must find an elemental fact. The trial court properly referenced first degree reckless injury in its answer to the question because only first degree reckless injury contains the utter disregard of human life element, which was the subject of the jury's question. By referring to that offense, the trial court did not in any way inform, direct or signal to the jury that Powell was guilty of that offense. Powell has failed to argue or demonstrate that if the supplemental instruction had not referenced first degree reckless injury, there is a reasonable probability that the jury would have acquitted Powell of that offense.

For all of these reasons, Powell has failed to prove that trial counsel's strategic decision to endorse, and not object to, the supplemental instruction constituted ineffective assistance.

D. Powell Is Not Entitled To A New Trial In The Interest Of Justice.

Powell also requests a new trial in the interest of justice based on the supplemental instruction the trial court gave in response to a question the jury asked during deliberations, which instruction Powell endorsed at the time of trial.

He does no more than repeat his previous arguments. Relabeling them adds nothing. "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

The real controversy in this case was fully tried, and Powell is not entitled to relief.

IV. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE DEFENSE OF MISTAKE.

A criminal defendant is entitled to a jury instruction on a theory of defense if the defense is adequately supported by the evidence; the defense relates to a legal theory of defense rather than an interpretation of the evidence; and the defense is not adequately covered by other instructions. *State v. Coleman*, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996) (and authority cited therein which is omitted here). Powell's request for an instruction on the defense of mistake failed on all three prongs, and thus the trial court properly refused to instruct the jury on the defense of mistake.

Powell asserts that his "defense was that his driving over Rabe was inadvertent because Rabe was not where Powell had seen him last" and that "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." Powell's brief at 25.

Powell does not cite to any place in the record where he so testified, and the State has found no such testimony by Powell in the record. At trial, Powell never testified that he drove over Rabe with his SUV because Rabe was not where Powell had seen him last or that he thought Rabe was not in the way because he was still at the side of the vehicle where Powell had seen him last.

Rather, Powell testified when he was unable to get control of the knife during his altercation with Rabe outside his SUV, he took off (114:270). He gave the following description of what happened then:

> A I jumped in my car, slammed the door, slammed it right in gear.

Q And let me I guess review with you the details of how you left. Was the car running or had you turned it off?

A I didn't have time to do nothing. It was still running.

Q And were the doors, one or both doors open?

A The two front doors were open.

Q How come they were left open?

A We were just in an altercation. I don't think neither one of us was thinking about shutting the door.

Q And were the headlights on or off?

A They were off.

Q When you hopped in the car, which door did you hop into?

A I ran back around and got in the driver's side.

Q Did you shut the door?

A Yes, right behind me.

Q And you said you took off. Did you also shut the passenger side door?

A No, I didn't have time, and I wouldn't be able to reach over to it.

Q And so as a result, I guess, what happened to the dome light when you leave the passenger side door open?

A The dome light stays on.

Q What was your vision like then at that moment? Can you describe that?

A It was still blurry from the altercation.

Q Did you feel like you could see pretty well or not?

A I didn't think about that.

Q What was your main concern?

A To get out of there from getting any more hurt.

Q So you said -- I forgot your words. Did you say you got out of there or how did you -- I guess if you could, describe the manner of your driving.

A It was fast, in a hurry.

Q Just stepped on the accelerator?

A Just threw it in gear. I don't know if it was first, second, or third. I just threw it in gear and just drove right out of there.

Q Did the force of the vehicle shut the passenger side door?

A No.

Q And I guess where were you trying to go with the vehicle so fast?

A Just out of from right there.

Q And were you able to do that?

A Yes.

Q Did anything unusual happen as you were getting out of there?

A Yes. As I'm getting -- right when I'm getting out of there, I hear or feel like a bump and right away I thought I had went in a ditch or then my other thought was like, did I just run somebody over?

Q Did you ever go backwards and forwards or anything like that?

A No. It was a straight shot.

Q No extreme turning with the wheel or anything?

A No, just hitting the gas. The only thing I was thinking about was hitting the gas.

Q And I guess the way you left the car parked initially, did you have to turn the wheel to find the direction or --

A No. I was parked already at an angle.

Q And as you were driving, did you manage to get the headlights back on?

A Not as I was pulling out of there, no.

Q Did you see Mr. Rabe before the vehicle hit him?

A No.

Q Did your vehicle in fact hit him?

A I assume it did.

Q Did you try to hit him?

A No.

Q Did you keep going?

A Yes.

Q Where did you end up going?

A Not that far.

Q Well, where?

A I continued down the road for, I'd say, what, about ten, twenty seconds, and turned around.

(114:270-74).

Powell was not entitled to a defense of mistake instruction because that defense was not adequately supported by the evidence. Powell never testified at trial to the claimed mistake of fact, and no other evidence was presented that would have supported that theory.

As the trial court properly ruled, Powell was not entitled to a defense of mistake instruction because his claimed mistake of fact did not meet the requirements of that statutory defense (115:137-40). Wisconsin Stat. § 939.43(1) provides that "[a]n honest error, whether of fact or of the law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime."

The mistake of fact defense relieves a person of criminal liability where intent is a necessary element of the offense. *State v. Bougneit*, 97 Wis. 2d 687, 691, 294 N.W.2d 675 (Ct. App. 1980). As this court explained, "Thus, if a person is mistaken in his perception of the facts and performs an act based on this misperception, he cannot be guilty of a crime because his mental impressions make it impossible to have formed a criminal intent." *Id.*

Reckless first degree injury, however, does not contain the element of intent. There is no intent element for the mistake of fact to negative. In *State v. Verhasselt*, 83 Wis. 2d 647, 666, 266 N.W.2d 342 (1978), the Wisconsin Supreme Court held that the defendant was not entitled to an instruction on the defense of intoxication, which requires that the intoxication negatives the existence of a state of mind essential to the defense, because the crime of injury by conduct regardless of life does not require the existence of any specific state of mind in the actor. The same is true for present first degree reckless injury, which is comparable to the former crime of injury by conduct regardless of life. The element of the former crime, conduct evincing a depraved mind, has been replaced by the language that the circumstances of the defendant's conduct show utter disregard for human life.

State v. Jensen, 2000 WI 84, ¶¶ 18-20, 236 Wis. 2d 521, 613 N.W.2d 170. Because the crime of first degree reckless injury contains no element of an actual state of mind, there is no state of mind element for the defense of mistake to negative, and thus, Powell was not entitled to an instruction on that defense.

Powell was not entitled to a defense of mistake instruction, even if he had testified that when he sped from the scene in his SUV with his headlights off, he believed Rabe was safely out of the way at the side of the vehicle, and even if that mistaken belief negated a state of mind essential to the crime of first degree reckless injury. He was not entitled to the instruction because, like the defendant in *Bougneit*, his mistake was not a mistake of fact. It was a mistake of judgment. When he sped from the scene in his SUV, Powell apparently assumed Rabe would remain where he was when Powell had last seen him, before Powell got back into his SUV. He assumed wrong. *See Bougneit*, 97 Wis. 2d at 694-95.

Finally, the trial court properly declined to instruct the jury on the defense of mistake because Powell's general defense, that running over Rabe with his SUV was an unfortunate accident rather than a crime, was adequately covered by other instructions. *See Coleman*, 206 Wis. 2d at 213. Powell conveniently neglects to mention that the trial court did instruct the jury on the defense of accident:

> With respect to both first degree reckless injury and second degree reckless injury, the defendant contends that he did not act recklessly, but rather that what happened was an accident.
>
> If the defendant did not act with the awareness of the risk required for a crime, the defendant is not guilty of that crime.
>
> Before you may find the defendant guilty of either first or second degree reckless injury, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant caused great

> bodily harm to Robert Rabe by criminally reckless conduct.

(115:220-21).

This instruction on the defense of accident adequately covered Powell's theory of defense.

For all of these reasons, this court should hold that the trial court properly refused to instruct the jury on the defense of mistake of fact.

V. THE EVIDENCE WAS SUFFICIENT TO PROVE POWELL GUILTY BEYOND A REASONABLE DOUBT OF FIRST DEGREE RECKLESS INJURY.

A criminal conviction cannot be reversed on the ground of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990); *see also Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

Credibility of the witnesses and the weight of the evidence are for the trier of fact to determine. *Poellinger*, 153 Wis. 2d at 503-04. If more than one reasonable inference can be drawn from the facts presented at trial, the reviewing court will accept the inference drawn by the trier of fact, even if other inferences could also be drawn. *Id.* at 506-07. The reviewing court must uphold the conviction if there is any reasonable hypothesis that supports it. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410.

In reviewing the sufficiency of the evidence, the appellate court views the evidence in the light most

favorable to the conviction. *Poellinger*, 153 Wis. 2d at 501.

Because the trier of fact has the great advantage of being present at the trial, the appellate court may substitute its judgment for the trier of fact only when the evidence that the trier of fact relied upon is inherently or patently incredible. *Gauthier v. State*, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965). Inherently or patently incredible evidence is limited to evidence that is in conflict with nature or in conflict with fully established or conceded facts. *Day v. State*, 92 Wis. 2d 392, 400, 284 N.W.2d 666 (1979).

The jury convicted Powell of first degree reckless injury based on the undisputed fact that he ran over Rabe with his SUV as he left the scene of their drug deal gone bad at high speed, with his headlights off. On appeal, Powell concedes the evidence was sufficient to prove the first two elements of the offense, that he caused great bodily harm to Rabe and that he did so by criminally reckless conduct. He argues only that the evidence was insufficient on the third element: that the circumstances of his conduct showed utter disregard for human life (*see* 115:217-18).

The present statutory language of utter disregard for human life means the same thing as the "conduct evincing a depraved mind, regardless of human life" element in previous statutes. *Jensen*, 236 Wis. 2d 521, ¶ 19. Utter disregard is not an actual state of mind, but refers to conduct and circumstances surrounding the conduct that evince utter disregard, that is devoid of regard for both the safety and life of another, lacking a moral sense and an appreciation of life, unreasonable and lacking judgment, without regard for the moral or social duties of a human being. *State v. Miller*, 2009 WI App 111, ¶ 33, 320 Wis. 2d 724, 772 N.W.2d 188. Whether the circumstances of the defendant's conduct showed utter disregard for human life is an objective analysis, resting on what a reasonable person in the defendant's position

would have known. *State v. Burris*, 2011 WI 32, ¶ 31, 333 Wis. 2d 87, 797 N.W.2d 430.

As the supreme court set forth in *Jensen*:

> In evaluating the proof of utter disregard for human life, the factfinder is to consider "all the factors relating to the conduct . . . includ[ing] . . . 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." Wis. JI-Criminal, 1250. In *Edmunds*, the court of appeals put it this way:
>
> "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 that was 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."
>
> [*State v.*] *Edmunds*, 229 Wis. 2d [67,] 77, 598 N.W.2d 290 [(Ct. App. 1999)] (citation omitted).

Jensen, 236 Wis. 2d 521, ¶ 24; also *quoted in Miller*, 320 Wis. 2d 724, ¶ 34.

Powell's entire argument attacking the sufficiency of the evidence is premised on his exculpatory testimony at trial. Powell testified that when he gave Rabe the cocaine, Rabe suddenly, without warning or provocation of any kind, hit him right in the nose; the altercation continued outside Powell's SUV, with Rabe refusing to give back the drugs or pay for them; Rabe kicked Powell while he was down; Rabe pulled a knife on Powell; when Powell could not get the knife away from Rabe, he jumped back into the SUV, gunned the vehicle and drove away with his headlights out, to protect himself from further harm, not realizing that Rabe was near or under the vehicle, and he promptly came back, to see if he had run

over Rabe and if so, whether help was being summoned. Powell's brief at 35; (*see* 114:248-78; 115:14-30, 48-49).

The question, however, is not whether the evidence was sufficient under the defendant's exculpatory version of events. Rather, the question is whether the evidence was sufficient under the view of the evidence most favorable to the conviction. *Poellinger*, 153 Wis. 2d at 501. As the United States Supreme Court has reiterated:

> An "appellate court's reversal for insufficiency of the evidence is in effect a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal." *Lockhart v. Nelson*, 488 U.S. 33, 39, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988).

McDaniel v. Brown, 558 U.S. 120, 131 (2010).

Here, the government's case was sufficient to prove the utter disregard for human life element beyond a reasonable doubt, based on the evidence presented by the State's witnesses, which the jury was entitled to find credible and believe. Powell does not contend otherwise, and therefore should be held to have conceded that under the view of the evidence most favorable to the conviction, the evidence was sufficient to prove the utter disregard element beyond a reasonable doubt.

Nonetheless, in order to avoid any suggestion that it conceded the point, the State will briefly summarize the evidence. Viewing the evidence most favorably to the verdict, based on testimony the jury was entitled to find credible and believe, accepting the weight the jury was entitled to give various pieces of evidence, and accepting all reasonable inferences the jury was entitled to draw, this court can only conclude that the evidence was sufficient to prove beyond a reasonable doubt that Powell acted with utter disregard for human life when he recklessly caused great bodily harm to Rabe by running over him with his SUV.

Rabe's testimony at trial, and prior information he had conveyed to the police shortly after the incident, testimony of Rabe's friend, Ryckman, who was present at the scene, and testimony of various investigators and a reconstruction expert, revealed the following version of events which the jury was entitled to find credible and believe. Rabe had been buying cocaine from Powell for ten years, without any violence or unpleasantness. Rabe had about $900 in cash on his person when he met Powell in a dark, secluded location to purchase cocaine on the night of the incident. Rabe's friend, Ryckman, was a passenger in Rabe's truck. Rabe and Ryckman had both been drinking malt liquor during the evening before the incident, which occurred in the early morning hours. Rabe got out of his truck, took his cash from his wallet and put it into his pocket, walked to Powell's SUV and got into the passenger seat (113:153-68). The SUV was running, with no lights on inside or out. Powell handed Rabe the cocaine and said "give me the money or I'm going to cut your throat" (113:169-70). Rabe did not take him seriously at first; Rabe opened the passenger door and put one foot on the ground so he could reach into his pocket for the money to pay for the cocaine; Powell threw the vehicle into gear, knocking Rabe to the ground. Powell got out of the SUV, and the two struggled, and scuffled. Rabe remembered being flat on the ground, looking up, and he saw the tire of the SUV coming at him, and it ran over his head (113:174-77).

Ryckman, who was present, testified that he saw a large vehicle run over Rabe; Rabe was like a rag doll rolling under the vehicle; Ryckman called 911 (112:128-31). Powell returned to the scene moments after he left it (although Ryckman did not know who Powell was). While Ryckman was on the cell phone talking to 911, trying to get emergency help for Rabe, Powell shoved Ryckman, took the cell phone and broke it, then drove away from the scene again (112:137-43, 190). Ryckman told the police at the scene that his perception was that the person who ran over Rabe did so intentionally, he got into his SUV and drove directly over Rabe (112:82, 188-94).

Rabe suffered significant injuries. Virtually every bone in his face was broken. He would have died if the arterial bleeding in his neck had not been stopped in time in the emergency room. He suffered broken ribs, a broken spine, bruises, and road rash (113:39-47, 55, 145-52). Physical crime scene evidence indicated Rabe was run over and dragged underneath the vehicle for some distance (113:74-96). The area was very dark (112:76). The cash Rabe had when he went to the scene of the drug deal was never recovered. Ryckman testified that he did not take it.

Based on all of this evidence, that the jury was entitled to believe, the jury could have rejected Powell's exculpatory story and found beyond a reasonable doubt that Powell caused great bodily harm to Rabe by reckless conduct under circumstances showing utter disregard for human life.

VI. THE TRIAL COURT PROPERLY DENIED POWELL'S REQUEST TO RETURN SOME OF THE BAIL MONEY.

Wisconsin Stat. § 969.03(1)(d), (4) and (5) provide:

> (1)(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).
>
> . . . .
>
> (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).

Id.

Powell was charged and tried by a jury on one count of attempted first degree intentional homicide, one count of first degree reckless injury and one count of armed robbery. He was convicted of first degree reckless injury and acquitted of the other two felonies. Cash bail of $30,000 had been imposed by the court commissioner and posted by others on behalf of Powell. Powell asked the trial court to return $20,000 of the $30,000, because he was acquitted of two out of the three felonies (55; 66). The State and the victim opposed Powell's request (59; 60; 62; 117; 130).[5] The trial court denied Powell's request that two-thirds of the money be returned to him (93; 117).

The trial court properly ruled that the bail money should be applied to restitution, and the trial court properly declined to return two-thirds of the money because Powell was acquitted of two of the three felonies for which he was tried. Wisconsin Stat. § 969.03(4) refers to "a" judgment of conviction in "a prosecution." The statute does not refer to a count or a charge. The statute does not authorize a return of some of the money if a defendant is acquitted of some counts in multi-count information. A judgment of conviction was entered in the prosecution against Powell, and therefore the statute

[5] When bail money is deposited, it is conclusively presumed to be the property of the defendant, even if the money was deposited by others, and may therefore be used for payment of fines or other obligations as provided by statute. *State v. Iglesias*, 185 Wis. 2d 117, 139-141, 517 N.W.2d 175 (1994). Accordingly, the State refers to the return of the money to Powell, even though he was not the direct depositor.

applies and the whole deposit, absent bond costs, was required to be used for restitution.

Wisconsin Stat. § 969.03(5) provides that if the complaint against the defendant has been dismissed or the defendant has been acquitted, the entire sum shall be returned. Here, the complaint against Powell was not dismissed, and he was not acquitted of all counts. He was convicted of a serious felony, first degree reckless injury, which caused great bodily harm to his victim.

Powell's argument is premised on the fact that when the court commissioner set bail at the initial appearance, he stated, "The lowest bail that I would be willing to consider [is] . . . $10,000 on each of the three counts, for a total of $30,000" (102:6), and when the bail receipts were issued they listed specific counts (A-Ap. 101-19). The statutes, however, do not authorize bail for specific counts. The unique ministerial designation in the bail paperwork does not trump the statute. The obvious purpose of the statutory provision requiring bail deposits to be used for restitution when a defendant has been convicted is to make the victim as whole as possible from the harm and loss caused by the defendant's acts. That purpose is not served by returning some of the money to the defendant, when the defendant is convicted of some but not all crimes for which he was tried.

As the trial court explained, the purpose of bail is to make sure the defendant appears in court, so "it makes no sense to set it per count because either they show up or they don't right? They can't show up on Counts 1 and 3 but not on 4 and 6. I mean, that makes no sense" (117:12). The statutory language refers to the prosecution, and conviction or acquittal, as a whole, not broken into individual counts. The trial court explained that, as this court held in *State v. Iglesias*, 185 Wis. 2d 117, 141, 517 N.W.2d 175 (1994), Wis. Stat. § 969.03(4) does not involve a use of bail, it simply allows the government to lay claim to money that is legally presumed to belong to the defendant, pursuant to a judgment (117:19).

Interpretation of Wis. Stat. § 969.03(5) to allow return of part of the bail money when a defendant is convicted of some, but not all, crimes charged, would be antithical to the purpose of the statute, which is to afford restoration to the victim through restitution (117:16-22).

For all of these reasons, this court should uphold the trial court's decision, denying Powell's request for return of some of the bail money deposited.

CONCLUSION

Based on the record and the legal theories and authorities presented, the State asks this court to affirm the judgment of conviction, sentence, and order denying postconviction relief entered below.

Dated this 4th day of November, 2013

Respectfully submitted,

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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 10,007 words.

Dated this 4th day of November, 2013.

_____
SALLY L. WELLMAN
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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 4th day of November, 2013.

_____
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