STATE OF WISCONSIN

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

District I

Case No. 2014AP000285-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

GABRIEL BOGAN,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON JULY 3, 2012, THE HONORABLE RICHARD SANKOVITZ
PRESIDING, AND THE DECISION AND ORDER DENYING MOTION FOR
POSTCONVICTION RELIEF ENTERED ON JANUARY 31, 2014,
THE HONORABLE JEFFREY WAGNER PRESIDING,
BOTH ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF THE APPELLANT

ARGUMENT

I. THE RESPONDENT'S BRIEF MISINTERPRETS AND MISSTATES THE FACTUAL CIRCUMSTANCES PRESENTED AT THE JURY TRIAL. ALSO, DEFENDANT DID NOT NEED TO TESTIFY TO ESTABLISH THE DEFENSE. FURTHERMORE, THIS BRIEF'S CASE LAW DOES NOT ASSIST THE STATE IN THE PRESENT SITUATION.

A. The Respondent's Brief Misinterprets and Misstates the Factual Circumstances Presented at the Jury Trial.

The Respondent in its Brief essentially indicates that Defendant was not part of the original group with Leroy Newman when Defendant shot at Young and Burgess. (Resp. Brf. Pge 9). Although that may be true, the situation at the time of the shooting was that Jefferson's group was hunting Newman's group. As indicated in the Appellant's Brief and at trial, after Newman's group had fled from Jefferson's group after Jefferson had shown his gun, Jefferson's group had chased after them, eventually splitting up. Jefferson's group was essentially a large armed mob comprised of several individuals. Jefferson had flashed his armed weapon at Newman's group. This, regardless of Jefferson claiming that the weapon was unloaded. Hence, even though Defendant was not part of this original group, he was still reasonably protecting Newman from an armed mob. Defendant, at the time of the shooting, was reasonably acting in Newman's defense. Hence, regardless of whether or not Young or Burgess were personally armed, they were part of a visibly armed mob, hunting Newman and his group.

Furthermore, the Respondent's Brief misstates the evidence when it claims that "whatever confrontation had occurred was

already over when Bogan shot Young and Burgess...” (Resp. Brf. Pge 9). There is no indication in the record that the confrontation was “over” when the shooting had occurred. Jefferson’s armed group was still chasing Newman’s group. Clearly, the facts at trial differ completely from the State’s version. As indicated in Appellant’s Brief and at the trial, after Newman’s group had fled after Jefferson had shown his weapon, Jefferson’s group gave chase, eventually splitting up to corner Newman’s group. There is no indication in the record that this chase had ended by the time of Defendant’s shooting of Young and Burgess. As discussed further in this Reply Brief, the confrontation and the chase had clearly not ended by the time of the shooting. Hence, the Respondent’s Brief completely misstates the evidence as related to this chase.

The Respondent’s Brief also misstates the evidence when it states that “Newman’s group gave Jefferson’s group chase before the parties lost one another and became discombobulated.” (Resp. Brf. Pge 10). The exact opposite had occurred. As indicated in Appellant’s Brief and at the trial, Jefferson’s group chased Newman’s group after Jefferson had shown his gun. All of the State’s eyewitnesses had testified as to such. Jefferson testified that his group chased after Newman’s group. Jefferson’s group split up looking for Leroy’s group. (58:26-27). Amari Burgess testified that he was part of Jefferson’s group and that his group chased the other group. Yvontae was with Burgess’s group. (58:47-49). Keanen

Mills testified that he was with Amari Burgess when Burgess received the phone call from Jefferson. (58:83-84). His group crossed the street to confront the other group. He did not see anyone in the other group with a gun. When his group had crossed the street, the different other group ran. (58:87-88). Furthermore, Burgess's testimony was that his group split up not because things were "discombobulated," but because his group wanted to find Newman's group. His two groups were trying to cut off the different group in an angle and "hem them in." (58:89-92). Finally, Tavares Morgan testified that the little guy's group chased Newman's group. This was a continuous chase. Morgan was ducking and diving. He saw Leroy in the alley with a couple of people. (60:69-74). Clearly, the confrontation had never ended by the time of the shooting.

Detective Marco Salaam had testified that Morgan had told him that Jefferson was the little guy. (61:56-58).

Clearly, based upon the foregoing, the Respondent misstates the trial evidence. All of the trial witnesses testified that Jefferson's group had chased Newman's group. Newman's group only wanted to escape. This was a continuous chase by a clearly armed mob. Jefferson had flashed his gun prior to the chase. The only reason that this mob had split up was to expedite the process of finding Newman's group by "hemming them in" and cutting off the angle. The confrontation had never ended by the time of the shooting. Even though Burgess and Young were not armed, Defendant

only knew that the mob was armed. Under the circumstances, Defendant had reasonably protected Newman from imminent death or great bodily harm. Jefferson's dispute was with Newman.

B. The State Incorrectly Indicates that Defendant's Testimony was Necessary at Trial in Order to Assert the Defense. Furthermore, the State's Own Case Law Assists the Defense in this Entire Matter.

The Respondent's Brief also indicates that Defendant did not testify at the trial. (Resp. Brf. Pge 15). However, the Respondent has not presented any law, either case law or statutory, to support any conclusion that Defendants must testify in order to establish defense of others. The case law simply indicates that the trial evidence must support such a defense. See e.g. State vs. Gonzalez, 328 Wis.2d 182, 789 N.W.2d 365 (Ct.App. 2010); State vs. Schumann, 226 Wis.2d 398, 595 N.W.2d 86 (Ct.App. 1999). Here, the State's own witnesses, as described in both this Reply Brief as well as Appellant's Brief, had provided ample evidence that the defense of others instruction was appropriate and necessary.

Furthermore, in determining whether the circuit court should have given the defense of others instruction, the Court of Appeals must view the evidence in the light most favorable to the Defendant. Furthermore, the judge is not to weigh the evidence, accepting one version of the facts and rejecting another. This is the province of the jury. State vs. Mendoza, 80 Wis.2d 122, 258 N.W.2d 260 (1977). The State's own cited case of State vs. Jones,

147 Wis.2d 806, 434 N.W.2d 380 (1989) cites this case law. (Resp. Brf. Pges 11-14).

As indicated, Defendant's testimony at trial was not necessary in order to raise defense of others as a defense and a provided jury instruction. Here, the State had presented a number of eyewitnesses whose testimony had provided sufficient evidence for defense of others. As discussed, four State's witnesses had provided sufficient evidence that Defendant was acting reasonably in Newman's defense during this chase by an armed mob. The mob had split up to "hem in" and corner Newman's group. The confrontation had never ended by the time of the shooting. The threat of imminent death or great bodily harm had not passed by the time of the shooting. Id., at 147 Wis.2d 806 at 815 citing Thomas vs. State, 53 Wis.2d 483, 488, 192 N.W.2d 864 (1972).

The State also cites State vs. Giminski, 247 Wis.2d 750, 634 N.w.2d 604 (2001) to support its position. However, this case materially differs factually from the present situation. In that case, Secret Service agents came to seize two of Giminski's vehicles. The agents had a warrant for that seizure. However, when one of Giminski's daughters attempted to leave in one of the vehicles, one of the agents used his own vehicle to stop Giminski's daughter's vehicle. Then, a different agent, agent Hirt, attempted to pull that daughter out of that vehicle. During this process, Giminski pointed the gun at the agent who then grabbed the gun. The

gun discharged several more times. Id. at 247 Wis.2d 750 at 754.

In Giminski, the trial court found unreasonable Giminski's conduct of pointing a gun at a Secret Service agent's head. The Court of Appeals agreed. Id. at 755-756, 763.

Here, clearly, Giminski materially differs from that of the present situation. In Giminski, a police officer was exercising his lawful authority in removing the daughter from the seized car. A law enforcement officer's pointing a gun at a suspect in the course of making a lawful arrest is not excessive force. The general principles governing the law of self-defense and defense of others must accommodate a citizen's duty to accede to lawful government authority and the special protection due federal officials discharging official duties. Id. at 763.

In the present situation, no police officer was acting under lawful authority or while discharging official duties. This present situation was simply an armed mob chasing, and attempting to corner, another unarmed group. This, after the unarmed group had attempted to flee the armed mob. Hence, Giminski is factually irrelevant to the present situation.

Interestingly, Giminski also cites Mendoza and Jones for the holding that the Court must view the evidence in the light most favorable to him and the giving of the instruction. Id. at 757.

II. CONTRARY TO THE STATE, TRIAL COUNSEL'S TRIAL STRATEGY WAS UNREASONABLE.

The Respondent's Brief states that trial counsel's strategy was reasonable. However, Appellant's Brief has amply rebutted this assertion. A large number of witnesses testified at trial that Defendant was the shooter. Tavares Morgan identified the Defendant as having been the shooter. Furthermore, three separate and independent jail witnesses had testified that Defendant had bragged to them that he was the shooter. There was no evidence that these three witnesses had conspired to "point the finger" at the Defendant. Each informant's contact with the Defendant was independent and distinct from the other informants' contacts. (App. Brf. Pges 21-27). So, to conclude that all three of these independent witnesses, with no known contacts with each other, having somehow conveniently all arriving at the same "story" simply to catch a break on their own cases, is clearly unreasonable.

CONCLUSION

As indicated within this Reply Brief and within Appellant's original Brief, the trial court had erred in denying Defendant's Postconviction Motion. Defendant had met the standard for defense of others and the providing of the appropriate jury instruction as to this defense. Furthermore, trial counsel's trial strategy was unreasonable, under the circumstances.

Based upon this present Reply Brief, and the arguments raised in Appellant's Brief, Defendant respectfully requests that this Court reverse the Order Denying Postconviction Motion. Defendant requests that this Court enter all appropriate decision(s) consistent with the issue(s) that Defendant had raised in these Briefs. This would include an evidentiary postconviction motion hearing.

Dated this 18th day of June, 2014.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Gabriel Bogan, 2014AP000285 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is nine (9) pages.

Dated this 18th day of June, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Gabriel Bogan, Case No. 2014AP000285 CR is identical to the text of the paper brief in this same case.

Dated this 18th day of June, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant