STATE OF WISCONSIN

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

DISTRICT I

Case No. 2014AP1873-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VAUGHN CARUTH GILMER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Timothy G. Dugan Presiding.

REPLY BRIEF

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ARGUMENT

I. Allowing the Marijuana to Go to the Jury Room for the Jurors to Consider the Smell Was Erroneous and Deprived Mr. Gilmer of a Fair Trial.

In this case, the circuit court erred by allowing marijuana to go to the jury room for the jurors to consider the smell. As set forth in Mr. Gilmer's brief (at 8-9), there was no testimony in the record that the smell of the marijuana at the time of the trial was the same as the smell at the time of the incident. The jury never heard any testimony as to how the smell of the marijuana changed over time or how the storage conditions, such as the type of container, air quality, or temperature, may have altered the smell.

The State argues that sending the marijuana into the jury room was appropriate because it provided the jury with an opportunity to "test the validity of the testimony establishing that marijuana has a distinct odor, and the validity of the testimony establishing that there was some weight to the black plastic bag that Gilmer allegedly discarded." (State's Br. at 3-4). However, whether the marijuana had a "distinctive" odor making it expensive and more likely to be consistent with "street sales," was not in dispute. Nor was the weight of the marijuana in dispute. Both parties stipulated that the marijuana weighed 135.09 grams. (49:84). Rather, what was in dispute was whether the strength of the smell linked Mr. Gilmer to the black plastic bag containing marijuana. The State argued in closing that:

> Got to ask yourself in this situation, what are they smelling? What makes more sense? Are they smelling a half a gram of marijuana that's in his pocket? Or are they

> smelling 135 grams of marijuana that he's pulling out of a pocket or out of his waistband?
>
> Now, both officers say it was the strong smell of fresh marijuana. What is going to be stronger, 135 grams or a half a gram? They're smelling that 135 grams that's on him that he's pulling out and dropping to the side.

(50:31-32; Appellant's Br. App. 104-105).

Consequently, given that there was no testimony in the record regarding whether the strength of the smell of the marijuana was the same as at the time of the incident, and the fact that the jury was *not* given the half a gram of marijuana from Mr. Gilmer's pocket to compare, allowing the jurors to consider the smell of the marijuana was improper, misleading, and prejudicial. *See* ***State v. Hines***, 173 Wis. 2d 850, 860, 496 N.W.2d 720 (Ct. App. 1993).

Moreover, as set forth in Mr. Gilmer's brief (at 10-12), allowing the marijuana to go to the jury room for the jurors to consider the smell effectively produced new off-the-record evidence. Smell is an individual and subjective determination and some people have a better sense of smell than others. Individuals also have differing backgrounds and experiences with the odor of marijuana. In addition, the jurors may have conducted various experiments or investigation that was not done in court, such as smelling the marijuana from multiple distances. Such experiments or investigation could easily be done in a "brief" or minimal amount of time. (*See* State's Br. at 4-5).

The State argues that the fact that the marijuana was sent into the room "with the bailiff" suggests that the bailiff maintained control over the marijuana. (State's Br. at 4). However, just because the bailiff brought the marijuana into the jury room does not establish what happened next. The

bailiff could have handed the bag of marijuana to the jurors and simply observed the jurors to make sure that the marijuana was not damaged, taken, or consumed.

The State also argues that the marijuana "did not readily lend itself to manipulation as it was within a sealed evidence bag." (State's Br. at 4). However, the State does not explain how a sealed evidence bag would prevent the jurors from conducting experimentation or investigation such as smelling the marijuana at multiple distances. At trial, the State made clear during closing arguments that the marijuana smelled despite being in a bag. The State asserted "…you can smell it. It's strong. Gave me a headache while it was under my desk." (50:33; Appellant's Br. App. 106). In addition, the fact that the marijuana was in an evidence bag versus the original black plastic bag is part of the problem. It is unknown how the type of packing altered the smell.

Therefore, the circuit court erred by allowing the marijuana to go to the jury room for the jurors to consider the smell, and a new trial should be granted.

II. Allowing the Marijuana to Go to the Jury Room for the Jurors to Consider the Smell Was Not Harmless.

In order for an error to be harmless, the State, as the party benefiting from the error, must prove that it is "clear beyond a reasonable doubt that a rational jury *would* have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶ 46, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted) (emphasis added).

Here, allowing the marijuana to go into the jury room for the jurors to consider the smell was not harmless. (State's Br. at 5-6). In this case, as noted above, the key dispute at trial was whether Mr. Gilmer possessed the black plastic bag

containing the marijuana. (50:51). At trial, the State "made a big deal" about the smell of marijuana coming from Mr. Gilmer. (*See* 50:44). The State asserted that Mr. Gilmer must have possessed the black plastic bag of marijuana because the smell of marijuana was so "strong" as he was chased by officers. (50:31-32; Appellant's Br. App. 104-105). Thus, the strength of the smell of the marijuana was important to the State's case and allowing the marijuana to go into the jury room for the jurors to consider the smell of the marijuana was improper, misleading, and prejudicial. As discussed above, the jury never heard testimony as to how the smell of the marijuana changes over time, the impact of the packing on the smell, or the impact of the location on the smell. Smelling marijuana outdoors while running is surely different from smelling marijuana in a closed presumably small jury room. Additionally, the jurors were not given the half a gram of marijuana from Mr. Gilmer's pocket to compare.

Moreover, as the State acknowledges (at 6), there were no fingerprints linking Mr. Gilmer to the black plastic bag despite the fact that he was alleged to possess and handle it. (49:82). The State notes that the jury heard testimony about fingerprints, including that there is "only a 40% probability that any fingerprint would be recovered from a substance like a plastic bag." (State's Br. at 6). However, significantly, here there was a fingerprint recovered from the plastic bag—Officer Peter Hauser's fingerprint. (49:82-83).

Further, as trial counsel asserted in closing arguments, the officers' testimony was "questionable." (50:51). While Officer Dettman testified that he saw Mr. Gilmer discard the black plastic bag from ten feet away (49:40-42), it was dark outside and Dettman was running at a fast speed and jumping over fences. (49:55-56, 59-61). As trial counsel noted, "…how well-lit is a neighborhood at 8:43 when it's dark

outside?" (50:46-47). In addition, Officer Garcia, who was 25 feet away, did not see Mr. Gilmer discard a bag (49:69, 72, 73), and as trial counsel pointed out "25 feet is not that far if 10 feet is not that far." (50:47).

The States notes that "flight" is "circumstantial evidence of consciousness of guilt and thus of guilt itself." (State's Br. at 5). However, Mr. Gilmer testified that that evening, due to reports of crime in the area, he went outside to move his mother's car into the garage for her. (50:5-6). While he was walking he heard "some noises" and fled because he was afraid that something was going to happen to him. (50:5-7). Mr. Gilmer testified that as he ran he heard yelling, but did not know it was the police. (50:8). Mr. Gilmer stopped once he saw that it was an officer chasing him. (*Id.*).

Lastly, the State alleges that the fact that the "jury weighed the evidence over a prolonged period of time" after the marijuana was removed "supports the conclusion that the jury would have found Gilmer guilty absent the error." (State's Br. at 6). However, the removal of the marijuana from the room does not mean that the jurors stopped talking about it and any experimentation or investigation that was done. If anything, the fact that the jury weighed the evidence "over a prolonged period of time" indicates that this was not an "open and shut" case.

Therefore, the State cannot prove beyond a reasonable doubt that a rational jury would have found Mr. Gilmer guilty absent the error, and a new trial should be granted.

CONCLUSION

For the reasons stated, Mr. Gilmer respectfully requests a new trial.

Dated this 6th day of March, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 1,512 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 6th day of March, 2015.

Signed:

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