STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP1118-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY R. OWENS,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This court may resolve this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[1] Instead, the State will present additional facts, if necessary, in the argument portion of its brief.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY ADMITTED JAMAL PINKARD'S[2] STATEMENTS ABOUT WHO SHOT HIM AS DYING DECLARATIONS.

On August 19, 2013, Officer Derek Kitts responded to a reported shooting and arrived to find Jamal Pinkard suffering from a gunshot wound to his chest (52:7). Pinkard was "pale, almost ash-like, and gasping for air" (52:7). Officer Kitts helped hold a towel to Pinkard's chest and tried to talk with Pinkard about the shooting (52:7-8). Pinkard continued to gasp for breath, and he passed in and out of consciousness as Officer Kitts was talking to him (52:8). Officer Kitts had to yell at Pinkard and tap on his shoulder and chest to arouse him (52:8).

Officer Kitts asked Pinkard who shot him, and Pinkard eventually said "Anthony" (52:9). Around that time, Pinkard passed out again, and Officer Kitts shook him and yelled something like "Don't die on me. Look at me. Open

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[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

[2] Generally, Wis. Stat. § 809.86 requires that crime victims be not be identified by their full names in appellate briefs. For a number of reasons, homicide victims are exempt from that rule. *See* Wis. Stat. § 809.86(3). The State has elected to identify Jamal Pinkard by name in this brief out of respect for him and to acknowledge the tragic circumstances of his death.

your eyes" (52:11). Officer Kitts brought Pinkard around and asked for Anthony's street name, and Pinkard said "Lil Ant" (52:9). When Officer Kitts asked whether Pinkard meant the "Lit Ant" who was affiliated with the La Familia street gang, Pinkard said "no" and then said "Two One," indicating that "Lil Ant" was part of the 2-1 street gang (52:10). Pinkard also managed to tell Officer Kitts where Lil Ant lived (52:10).

Citing *State v. Beauchamp*, 2010 WI App 42, 324 Wis. 2d 162, 781 N.W.2d 254, the circuit court ruled that Pinkard's statements were admissible at Owens' trial as dying declarations (52:23-26).[3] The circuit court's decision was correct.

A dying declaration is an exception to the general rule against the admission of hearsay statements to prove the truth of the matter asserted. Whether a statement is admissible as a dying declaration falls within the circuit court's discretion. *Beauchamp*, 324 Wis. 2d 162, ¶ 7 (citations omitted). A reviewing court will uphold an evidentiary ruling as long as the lower court examined the relevant facts, applied an appropriate legal standard, and used a rational process to come to a conclusion that a reasonable judge could reach. *Id.* (citation omitted).

A dying declaration is

> A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

Wis. Stat. § 908.045(3). The person who made the statement to be admitted into evidence does not have to say specifically that he believed his death was imminent: "Rather, belief of

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[3] The circuit court confirmed that it also relied on *Beauchamp* in rejecting Owens' additional argument that the statements were inadmissible because they violated his right of confrontation (52:26).

impending death may be inferred from the fact of death and circumstances such as the nature of the wound." *Beauchamp*, 324 Wis. 2d 162, ¶ 8 (citations and internal quotation marks omitted).

Before he died, the victim in *Beauchamp* repeatedly identified the man who shot him to emergency medical personnel and law enforcement. *Beauchamp*, 324 Wis. 2d 162, ¶¶ 3-6. On scene, the victim asked one of the emergency medical technicians not to let him die, and the technician assured him they would not let that happen. *Id.* ¶ 3. In the ambulance, the victim asked why they had passed one hospital to go on to another. *Id.* ¶ 4. He also complained of pain and that he "couldn't breathe." *Id.* ¶ 5.

This court upheld the circuit court's determination that the victim's statements about who shot him were admissible as dying declarations based on: "the circumstances surrounding [his] injuries, his frantic concern that he not die as expressed to [the EMT], his being upset when the ambulance passed one hospital on its way to another, and his significant pain and breathing difficulties, coupled with his spontaneous repeated assertions as to who shot him[.]" *Beauchamp*, 324 Wis. 2d 162, ¶ 9. This court also held that the admission of the victim's statements did not violate the defendant's right to confrontation because exceptions to the confrontation right, including dying declarations, were recognized at the time the right was founded (52:26). *Id.* ¶¶ 11 & 12 (discussing *Giles v. California*, 554 U.S. 353, 357 (2008) and *Crawford v. Washington*, 541 U.S. 36 (2004)).[4]

The circuit court properly reached the same conclusions in this case. Officer Kitts found Pinkard laying on the ground and suffering from a gunshot wound that ended his life just a short time later (52:7). Pinkard was

[4] This court also observed that "we are unaware of any post-*Crawford* court rejecting what *Giles* recognized as the dying declaration exception to the confrontation clause." *Beauchamp*, 324 Wis. 2d 162, ¶ 12.

"pale, almost ash-like, and gasping for air" (52:7), and Officer Kitts had to shake and yell at Pinkard to get him to regain consciousness and respond to questions about who shot him (52:8-11). At one point, Officer Kitts yelled "Don't die on me. Look at me. Open your eyes" (52:9, 11). Pinkard's condition got worse while Officer Kitts questioned him (52:9, 11), and he didn't even make it to the hospital before he died (63:30). There is nothing in the record to suggest that Jamal Pinkard was somehow unable to understand the blatantly obvious – that he had been shot in the chest, and the injury was life-threatening.

Being shot in the chest would cause any rational adult (and even many children) to fear imminent death. The very nature of the injury *by itself* can and does permit the inference that Pinkard believed he was going to die. *Beauchamp*, 324 Wis. 2d 162, ¶ 8. That inference is all the more compelling given that Pinkard was ashen, gasping for breath, and falling in and out of consciousness. He didn't specifically comment on whether he thought he was going to die, but he didn't have to. *Id*. The circuit court properly exercised its discretion when it concluded that Pinkard's statements about who shot him were admissible as dying declarations (52:23-26).

II. THE EVIDENCE WAS SUFFICIENT TO CONVICT OWENS OF SHOOTING PINKARD

Owens claims that the evidence against him was insufficient to support his convictions for first-degree reckless homicide and felon in possession of a firearm for essentially one reason: several of the State's witnesses gave trial testimony that was inconsistent with their early statements to law enforcement. If that alone meant that the testimony at issue was insufficient to support a guilty verdict, few if any convictions would stand. Not surprisingly, the governing standard of law provides for a much different analysis.

Criminal defendants who challenge the sufficiency of the evidence underlying their convictions bear a heavy burden. *See State v. Schwebke*, 2002 WI 55, ¶ 40, 253 Wis. 2d 1, 644 N.W.2d 666; *see also State v. Wachsmuth*, 166 Wis. 2d 1014, 1022-23, 480 N.W.2d 842 (Ct. App. 1992). The test for sufficiency of the evidence to convict is highly deferential. Appellate courts may not reverse a conviction 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). 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, the court may not overturn the verdict. *State v. Shanks*, 2002 WI App 93, ¶24, 253 Wis. 2d 600, 644 N.W.2d 275. The evidence presented in this case easily meets this standard.

Before he died, Jamal Pinkard identified Owens as the man who shot him (63:23-30; 65:41). Jamal was with his cousin, Juiquin Pinkard, who also saw Owens holding and then firing a gun at Jamal (65:53-55, 57-62). Juiquin provided a comprehensive account of how the shooting occurred, and he never wavered in his identification of Owens as the shooter (65:39-86). On the stand, Juiquin acknowledged that his trial testimony was different from his previous statements with respect to things like when he learned that his cousin also had a gun, how many people he had seen with Owens leading up the shooting (two instead of one), and whether he'd seen his cousin fall down after being shot (65:55-62). As Juiquin explained when the prosecutor asked him about one of these inconsistencies: "Like it's – it's been – it's almost been a year. And I remember exactly everything – how it exactly – it's kind of impossible, but, you know. If I said it when you first interviewed me, that's what happened" (65:62). Juiquin's inability to recall such relatively inconsequential details is neither uncommon nor fatal to his credibility as a witness. A reasonable jury easily

could – and did – believe Juiquin's version of events and find Owens guilty as charged.

Based on Juiquin's testimony alone, the jury could have convicted Owens. The remaining witnesses he complains about were almost unnecessary. That said, the inconsistencies in their testimony did not prohibit the jury from finding Owens guilty. James Warfield, another cousin of Jamal and Juiquin, testified at trial that he saw some of the shooting incident after first hearing gunfire while inside his father's house (63:102-11). Warfield also testified that he heard someone say "This is Ant doing this to you all" (63:107). The detective who interviewed Warfield just after the shooting took the stand to explain that Warfield told the detective that he heard both gunfire and someone yell "This is Ant doing this to you[,]" but that he did not actually witness any part of the gun fight (63:121-25).[5] Aside from

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[5] In Owens' brief, he claims that "the officer said that Warfield never told him that he had heard anyone make a remark about this being "Ant" doing this" (Owens Br. 24-25). In support of that claim, Owens cites to the following exchange:

> Q: … I'm just going to really focus on your interview with Mr. Warfield. So Mr. Warfield never told you I saw this male individual say, "This is Ant doing this to you?"
>
> A: Saw, no. He did not.
>
> Q: He never gave you a description of the individual that he said "This is Ant doing this to you"?
>
> A: No.
>
> Q: Because he didn't tell you he saw anybody?
>
> A: Correct.

(63:129). Owens' claim clearly takes this testimony out of context and misrepresents the trial record. The detective was being asked whether Warfield reported that he *saw* the person who made the statement about Ant, not whether he *heard* the statement (*see also* 63:125). The detective clearly testified *twice* that Warfield said he had heard someone say "This is Ant doing [this] to you" (63:121, 124).

these inconsistencies in Warfield's testimony, he did corroborate, however, the remaining evidence at trial. Believing some or even none of Warfield's testimony, the jury still had ample evidence to find Owens guilty.

The same is true for the other two witnesses that Owens discusses in his brief, Edgar Maisonet and Christina Deberry. Maisonet initially told the police that leading up the shooting, he had been trying to mediate a dispute between Owens and Juiquin Pinkard (65:8). Maisonet reported that he had called Owens at Pinkard's request to arrange for Owens to come to the area to fight with Pinkard and resolve the dispute (over Deberry) (65:7-8). At trial, Maisonet denied serving as a go-between for Pinkard and Owens, and said he did not remember telling the police otherwise (64:86-110).[6] Although the State likely called Maisonet to provide some context for the shooting, it really wasn't necessary. Deberry contributed even less to the trial, as the single paragraph in Owens' brief demonstrates (see Owens Br. 25-26). That, of course, has no bearing on the sufficiency of the remaining trial evidence.

The evidence against Owens, viewed most favorably to the State and his convictions, clearly 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 him guilty beyond a reasonable doubt. *Poellinger*, 153 Wis. 2d 493 at 501.

[6] Oddly, Owens argues that Maisonet's trial testimony should be discounted as "an absolute lie" even though it was arguably more favorable to him than Maisonet's original statement to the police (Owens Br. 25).

III. OWENS' SENTENCES ARE NOT UNDULY HARSH.

Sentencing falls within the discretion of the circuit court, and appellate review is limited to a determination of whether the circuit court erroneously exercised that discretion. *McCleary v. State*, 49 Wis. 2d 263, 277-78, 182 N.W.2d 512 (1971); *see also State v. Gallion*, 2004 WI 42, ¶ 68, 270 Wis. 2d 535, 678 N.W.2d 197. In its exercise of discretion, the circuit court is to identify the objectives of its sentence, which include but are not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Gallion*, 270 Wis. 2d 535, ¶ 40. In determining the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See State v. Harris*, 2010 WI 79, ¶ 28, 326 Wis. 2d 685, 786 N.W.2d 409; *see also* Wis. Stat. § 973.017.

The weight assigned to the various factors is left to the circuit court's discretion, *Harris*, 326 Wis. 2d 685, ¶ 28, and the amount of explanation required for a sentence varies from case to case. *Gallion*, 270 Wis. 2d 535, ¶ 39. As long as the circuit court "has considered the proper factors, explained its rationale for the overall sentence it imposes, and the sentence is not unreasonable, the court does not erroneously exercise its discretion simply by failing to separately explain its rationale for each and every facet of the sentence imposed." *State v. Matke*, 2005 WI App 4, ¶ 19, 278 Wis. 2d 403, 692 N.W.2d 265.

Owens argues that his sentences are unduly harsh because the circuit court improperly gave short shrift to his rehabilitative needs by "fail[ing] to state why the extremely lengthy sentence was required to rehabilitate [him]" (Owens Br. 30). Owens misses the point. The circuit court was not required to place any significant emphasis or make extensive remarks about his rehabilitation, especially given his

history, the severity of his current offenses, and the circuit court's stated sentencing objectives.

When the court sentenced Owens, the court noted that the homicide was "evil" (68:19), and that Owens' prior correctional experience had not served to change his criminal behavior (68:19-20). The court considered Owens' criminal record as well as his vocational and employment, but concluded that "The crime is the most serious. You took the life of another person" (68:21). The court went to explain that because Owens had killed someone, he "had to be punished" (68:22). The court also wanted Owens' sentence to serve both "as a specific deterrence" to him and as a "general deterrence to others" (68:22). Then, before pronouncing sentence, the circuit court explained:

> So there needs to be a need to protect the public and punish you for your criminal behavior because of the legacy of sadness that you left behind and on the onslaught of this horrific offense.
>
> So confinement is necessary and a long term confinement based upon your criminal history and strictly as a punitive nature of this sentencing.

(68:22-23). Because of Owens' "callous attitude towards human life," the court sentenced him to a total of thirty-nine years initial confinement and fourteen years of extended supervision (68:23).

Ultimately, the circuit court felt that the overriding sentencing factors in this case were the severity of the offenses and the related need to punish Owens and protect the community from him, especially given his failure to discontinue his criminal behavior despite an extensive history in the criminal justice system. Giving more weight to these factors was well within the circuit court's discretion. *Ocanas v. State,* 70 Wis. 2d 179, 185, 233 N.W. 2d 457 (1975). Given the circuit court's stated sentencing objectives, it's neither surprising nor improper that it didn't specifically discuss rehabilitation. The court was not required to do so, and based on Owens' record of continued

and increasingly violent criminal conduct, there was little point.

Owens' sentence in this case was not so "excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas,* 70 Wis. 2d at 185. Based on his crimes, many judges and lay people alike would be shocked if Owens did not receive a long prison sentence. Owens' sentences should be upheld.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's decision denying Anthony Owens' request for postconviction relief.

Dated this 20th day of November, 2015.

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 2,939 words.

_____
Nancy A. Noet
Assistant Attorney General

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 20th day of November, 2015.

_____
Nancy A. Noet
Assistant Attorney General