STATE OF WISCONSIN

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

DISTRICT I

Case No. 2015AP001645-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ISIAH O. SMITH,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Ellen R. Brostrom, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

The State introduced video evidence reflecting that Mr. Smith and his co-defendant were let into an apartment building by a third man. The video showed Mr. Smith and his co-defendant running out of the apartment building shortly thereafter, with the co-defendant now holding a gun in his hand (which was not in sight when they entered the building). The video further showed Mr. Smith and his co-defendant run to a car which had its headlights on. The third man was shot and killed, though the video did not capture the actual act. The State presented no other evidence to establish what, if anything, Mr. Smith knew about what would occur on that day.

I. Did the State Present Sufficient Evidence for the Jury to Conclude that Mr. Smith was Guilty of Second Degree Reckless Homicide as Party to a Crime?

The jury convicted Mr. Smith of a lesser-included offense of Second Degree Reckless Homicide as Party to a Crime, rejecting a conviction for either First Degree Reckless Homicide as Party to a Crime or Felony Murder, and further acquitting him of Attempted Armed Robbery as Party to a Crime. (70). The circuit court denied Mr. Smith's post-conviction challenge for a judgment of acquittal on grounds of insufficient evidence. (51;App.105-109).

Defense counsel asked the court to read to the jury an instruction derived from a Seventh Circuit pattern instruction, which would have provided: "If a defendant performed acts that advanced the crime but

had no knowledge that the crime was being or about to be committed, those acts are not sufficient by themselves to establish the defendant's guilt."

II. Did the Circuit Court Err in Denying the Defense Request for a "Mere Presence" Jury Instruction?

The circuit court denied the defense request, concluding that there was not "any evidence in the record to support the proposition that Mr. Smith had no knowledge that the crime was being committed or about to be committed." (66:13-24;App.150-161). The circuit court post-conviction reaffirmed its decision denying the requested instruction. (51;App.105-109).

During deliberations, it was brought to the court's attention that one of the jurors had been discussing with his mother his fear of retaliation for a guilty verdict from persons in the courtroom who he believed to be Mr. Smith's family. The juror's mother in turn had been communicating about this during the trial with an Assistant District Attorney with whom she was friends. Following a colloquy of the juror and the Assistant District Attorney who was communicating with the juror's mother, defense counsel did not object to the juror remaining on the jury.

III. Was Mr. Smith Denied the Effective Assistance of Counsel Where His Attorney Did Not Object to the Juror—Who Feared Retaliation from Persons He Believed to be Mr. Smith's Family—Remaining on the Jury?

The circuit court denied Mr. Smith's post-conviction motion for a new trial without an evidentiary hearing. (51;App.105-109).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Smith would welcome oral argument should this Court find it helpful. Publication may be warranted to develop the law concerning a challenge to the sufficiency of the evidence when the defendant has been charged as party to a crime.

STATEMENT OF THE CASE AND FACTS

A. Procedural History

Mr. Smith faced trial for two counts stemming from the same incident: one count of First Degree Reckless Homicide with Use of a Dangerous Weapon, as Party to a Crime, and one count of Attempted Armed Robbery, Use of Force, as Party to a Crime. (2;7;14). The complaint alleged that a man was shot and killed in the hallway of his apartment building, and that video surveillance showed Mr. Smith and co-actor Unquail Kennedy enter the apartment building and, moments later, leaving the building. (2). The complaint further alleged that when they left, Mr. Kennedy had a cell phone in one hand and a gun in the other, and that Mr. Smith followed Mr. Kennedy out of the building, with a cell phone in his hand. (2).[1]

The case proceeded to trial, with the Honorable Ellen R. Brostrom presiding.[2] During trial, the circuit court granted

[1] The complaint only charged Mr. Smith with the Reckless Homicide count; the State added the count of Attempted Armed Robbery, Use of Force, as a Party of Crime in the Amended Information. (2;14).

[2] Mr. Smith's co-defendant, Mr. Kennedy, had a separate trial. (59:14).

the State's motion to dismiss the weapons enhancer component of the Reckless Homicide charge. (61:3-6).

At trial, the defense argued that the State could not prove that Mr. Smith had any knowledge of what Mr. Kennedy would do to the victim. (*See, e.g.,* 62:35-37). The circuit court denied the defense request to include a jury instruction derived from a Seventh Circuit pattern instruction, clarifying that if "a defendant performed acts that advanced the crime but had no knowledge that the crime was being committed or was about to be committed, those acts are not sufficient by themselves to establish the defendant's guilt." (47:12-14;66:17-24;App.139-141,154-161).[3]

During deliberations, after two of the fourteen original jurors had been dismissed, the State brought to the circuit court's attention that an assistant district attorney (not the attorney representing the State at trial) had, during trial, been in contact with one of the juror's mothers; that she had been text-messaging back and forth with the juror's mother (a friend of this assistant district attorney) after the juror's mother contacted her when her son told her that he was worried about retaliation for a guilty verdict from persons in the courtroom whom he believed to be Mr. Smith's family. (69:1-13;App.162-165). The circuit court questioned both the assistant district attorney and the juror; after this questioning, defense counsel agreed to continue with this juror on the panel. (69:13-36;App.165-171).

The jury found Mr. Smith guilty of the lesser-included offense of Second Degree Reckless Homicide as Party to a

[3] The defense's requested instruction is attached to the State's response to Mr. Smith's post-conviction motion. (*See* 47:12-14;App.139-141).

Crime and not guilty of Attempted Armed Robbery as Party to a Crime. (70).

Mr. Smith filed a post-conviction motion, seeking a judgment of acquittal on grounds of insufficient evidence, or, should that request be denied, a new trial on grounds that (1) the circuit court erred in denying the defense request for a "mere presence" instruction and (2) he was denied the effective assistance of counsel, as his attorney failed to move to exclude a juror who violated the circuit court's orders and expressed fear of retaliation from persons whom he believed to be Mr. Smith's family. (45;App.110-127). He sought a ***Machner***[4] evidentiary hearing on his claim of ineffective assistance of counsel. (45:1,17-18;App.110,126-127).

Following post-conviction briefing, the circuit court denied Mr. Smith's motions without a ***Machner*** hearing. (46;47;48;51;App.105-109,128-148). With regard to his sufficiency challenge, the court acknowledged that "[t]here is no question that the evidence relative to the shooting was circumstantial," but nevertheless concluded that the evidence was sufficient to allow the jury to find Mr. Smith guilty of Second Degree Reckless Homicide as Party to a Crime. (51:2;App.106). The court further concluded that it "stands by its ruling" refusing to give the "mere presence" jury instruction. (51:3;App.107). With regard to Mr. Smith's argument that he was denied the effective assistance of counsel, the court concluded that Mr. Smith's arguments were "wholly speculative" and found that there was "nothing to support a finding that counsel's performance was either deficient or prejudicial." (51:5;App.109).

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[4] ***State v. Machner***, 92 Wis. 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Mr. Smith filed a notice of appeal, (52), and now appeals to this Court.

B. The Evidence Presented at Trial

The State called a total of fifteen witnesses at trial; the defense did not call any witnesses. Police witnesses testified that they responded to the scene of a shooting, and that the shooting victim, M.A., was unable to say who shot him and was taken to the hospital. (62:39-58). Police testified that a bullet cartridge was found at the scene, and the medical examiner testified that M.A. died from a single gunshot wound. (64:33-44,54-77).

The victim's girlfriend, Tashawna, testified that M.A. had his friend Kalop and two other men over to their apartment that afternoon and were playing video games. (62:58-62). She acknowledged that M.A. sold marijuana. (62:62).

She testified that she and her son were asleep at the time of the shooting that evening. (62:63-65). She explained that by this point, the two men other than Kalop and M.A. had left. (62:63-65). At approximately 10:20pm, Kalop ran into her room and said that M.A. had been shot. (62:63-65). She ran into the hallway of the apartment building and stayed with M.A. until police arrived. (62:65-66).

Tashawna testified that M.A. told her that the "n*ggers off 38th" shot him, and that she took this to mean people who represent that area. (62:95). She further testified that she had known both Mr. Smith and Mr. Kennedy for years and considered them her friends; further, she said that she was not aware of any bad blood between Mr. Smith and M.A. (62:67-68,78). She also identified them in the surveillance video.

(62:72-76).[5] Tashawna further testified that she knew that Mr. Smith and Mr. Kennedy were from the area of "30th and Wright," but believed that they would "hang" at 38th Street. (62:69;95).

The landlord of the apartment complex testified that he provided video surveillance to the police, which was then played to the jury. (62:99-134;63:7-55).[6]

Detective Lewandowski testified to the contents of what appeared on the surveillance videos. (62:103-134;63:7-55). She testified that the videos—which captured activity on the outside of the building and in the entryway to the building—showed the following: Mr. Smith and Mr. Kennedy appeared in the motion-sensored video feed after an "Explorer type" truck arrived at the alley by the apartment building, (63:16); they walked up to a gate outside of the apartment building, (63:16-17); Mr. Smith left the gated area and walked almost halfway back to the truck until Mr. Kennedy said something to him and he returned, (63:17); M.A. came to the door, opened the gate, and let Mr. Smith and Mr. Kennedy into the building, (62:129-130;63:17); Mr. Smith left the gate open, (63:22); and the video then jumped from a timestamp of 23:36 to 24:24 (a difference of 48 seconds) due to lack of motion activity, (62:128-129,133).

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[5] When reviewing the video during trial, Tashawna confirmed that she saw a gun in Mr. Kennedy's hand, but then also stated that she saw something in Mr. Smith's hand; when asked what she saw, she responded: "I think a gun." (62:75). She later, however, clarified that she was "guessing" and did not know what Mr. Smith had in his hand in the video (62:78).

[6] The surveillance videos shown to the jury are included in the record on appeal. (74:Trial Exhibit 28).

Detective Lewandowski further testified that the videos reflected that: Mr. Kennedy then left the apartment building with a gun in his hand right hand and a cell phone in his left hand, (62:133); Mr. Smith followed with what appeared to be a cell phone in his hand, and with the hood of his jacket, which upon entry was down, now up, (62:130-134); they both ran to the truck, which now had its brake lights and headlights on, (63:24-25); Mr. Kennedy got into the rear driver's side door, and Mr. Smith got into the passenger side, though she could not tell whether he got into the front seat or back seat, (63:24). There was no video showing the hallway where the shooting occurred. (*See generally* 62:103-134;63:7-55).

Larrisha M. testified that she had known Mr. Smith, who she called Zele[7], since February of 2013. (63:67-69). She also stated that she owned a 2002 green Ford Explorer. (63:69). The State asked her if she knew where her Explorer was at about 10pm on the evening of the homicide, and she said she did not know as she was not home. (63:70-71). When asked whether she ever allowed Mr. Smith to drive her car, she answered: "He don't drive my car." (63:71). She explained that she went out to eat that evening with her sister and her sister's children, but did not remember whether her Explorer was at her home when she returned. (63:74-75). However, she remembered telling police that when she got home her car was no longer where she had parked it. (63:75). She explained that she was staying at her cousin's home, fell asleep, and woke up to Mr. Smith calling her name from outside. (63:76-78).

[7] Tashawna testified that she also knew Mr. Smith by this nickname. (62:70).

Larrisha M. testified that she remembered telling police that on the date of the homicide she and Mr. Smith went to her cousin's house to watch movies and hang out, and that she believes that Mr. Smith was still at her cousin's house when she left to go to dinner. (64:12-13). She explained that she would leave her car with her cousin, and on that day she left the keys to her car at her cousin's house. (64:15-16). She denied telling police that Mr. Smith asked to use the Explorer that day. (64:17). She explained that when she returned home from dinner, neither her cousin nor Mr. Smith were there. (64:18). She stated that she did not remember what time Mr. Smith came back, and denied telling police that it was around 11:30pm or midnight. (64:19-20). She stated that in the middle of the night she went to the bathroom and saw that her car was outside. (64:20). She further testified that she asked Mr. Smith why he had not called her, and he said either that he lost or broke his phone. (64:21).

She denied performing any Google searches about the homicide on her phone two days later; however, Detective Doreen Ducharme testified that Google searches concerning a March 4th Milwaukee shooting were performed on that phone two days after the shooting. (64:27-28;109-112). Larrisha confirmed Mr. Smith's telephone number at the time. (64:27-28). Larrisha also testified that she was hiding in a closet at the address where Mr. Smith was subsequently arrested, and that Mr. Smith did not run anywhere when police arrived on that date. (64:31).

Police Officer Eric Dillman testified that Mr. Smith and Mr. Kennedy were arrested at Mr. Smith's mother's residence nine days after the shooting, and that Mr. Smith was cooperative and that no gun was found. (64:44-54).

Detective Erik Gulbrandson testified that he interviewed Larrisha after the shooting and that she informed police that on March 4th, Mr. Smith told her that he did not call her because he had lost his phone at a concert; that she normally allowed Mr. Smith to use her car as needed; and that when he woke her up yelling to come in from outside she noticed that her car was there. (64:85-93).

Police testified that no evidence was found in the Explorer. (64:88,93-100). Lastly, police presented evidence reflecting that Mr. Smith's cell phone was found in the hallway of the apartment complex where M.A. was shot. (64:100-114;65:39-58).

The defense presented no evidence at trial. (66:13;App.150).[8]

Mr. Smith will present further facts relevant to particular issues in Argument.

ARGUMENT

I. The State Presented Insufficient Circumstantial Evidence to Meet its Burden to Prove that Mr. Smith was Guilty of Second Degree Reckless Homicide as Party to a Crime.

A. Relevant case law and standards of review

A conviction that is based upon insufficient evidence cannot constitutionally stand. ***Jackson v. Virginia***, 443 U.S.

[8] Both of the August 1, 2013 transcripts are listed as "AM" transcripts. (65;66). The 68-page transcript, however, recounts the afternoon session. (66). These transcripts are in the correct chronological order in the appellate record index.

307 (1979). The due process clause of the United States and Wisconsin constitutions provide individuals with protection from conviction in a criminal case except "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship,*** 397 U.S. 358, 365 (1970); *accord* ***State v. (Bonnie) Smith,*** 117 Wis. 2d 399, 415, 344 N.W.2d 711 (Ct. App. 1983). The evidence must be "sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 502, 451 N.W.2d 752 (1990).

Further, jury verdicts must be based on evidence, not "conjecture and speculation." ***Herbst v. Wuennenberg***, 83 Wis. 2d 768, 774, 266 N.W.2d 391 (1978). While facts may be established by reasonable inferences as well as direct evidence, an inference is reasonable only if it can fairly be drawn from the facts in evidence. ***In re Paternity of A.M.C.***, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988). A proper inference is one drawn from logic and proper deduction. ***Id***. And while "a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation." ***Piaskowski v. Bett***, 256 F.3d 687, 693 (7th Cir. 2001); ***Yelk v. Seefeldt,*** 35 Wis. 2d 271, 280-81, 151 N.W.2d 4 (1967).

In Wisconsin, a criminal defendant may challenge the sufficiency of the evidence on appeal regardless of whether he specifically raised the issue at trial. ***State v. Hayes***, 2004 WI 80, ¶4, 273 Wis. 2d 1, 681 N.W.2d 203. An appellate court does not substitute its judgment for the fact-finder, but instead asks whether the evidence, viewed in the light most favorable to the State, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found

guilt beyond a reasonable doubt. ***Id.***, ¶56. If the reviewing court concludes the evidence was insufficient, the conviction must be reversed, with a remand to the circuit court for entry of a judgment of acquittal. ***State v. Wulff***, 207 Wis. 2d 143, 144-145, 557 N.W.2d 813 (1997 (citing ***Burks v. United States***, 437 U.S. 1, 18 (1978)).

"One of the elements of aiding and abetting is that the defendant engage in some conduct (either verbal or overt), that as a matter of objective fact aids another person in the execution of a crime." ***State v. Rundle***, 176 Wis. 2d 985, 1000, 500 NW.2d 916 (1993). A person who is merely present while a crime is being committed and fails to stop or report the activity is not a party to that crime. *See* ***id***. at 1008 (a parent who was present during the physical abuse of his child and failed to intervene, report the abuse, or tell medical personnel how the child was injured, did not aid and abet the abuser).

B. The State presented insufficient circumstantial evidence and instead asked the jury to draw inferences from speculation.

Here, the evidence was insufficient to establish beyond a reasonable doubt that Mr. Smith in any way *knew* that Mr. Kennedy intended to commit or was committing any particular crime, including the crime of reckless homicide. As the circuit court explained to the jury, in order to prove that Mr. Smith was guilty of the offense of Second Degree Reckless Homicide as Party to a Crime, the State had to be able to prove the following: (1) either the defendant or Mr. Kennedy caused the death of M.A.; (2) that either the defendant or Mr. Kennedy caused the death by criminally reckless conduct; (3) that either Mr. Smith directly committed the crime or he intentionally aided and abetted the

commission of the crime. (*See* 67:69-82). "A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either assists the person who commits the crime or is ready and willing to assist and the person who commits the crime knows of the willingness to assist." (67:71). As the circuit court explained, in this case that meant that "the defendant must know that another person is committing or intends to commit" reckless homicide "and have the purpose to assist the commission of that crime." (67:71); *see also* Wis. JI-CRIM 400.

The State presented no evidence to establish beyond a reasonable doubt that Mr. Smith shot M.A., or that Mr. Smith had any knowledge that Mr. Kennedy had a gun prior to the shooting. Indeed, the surveillance video did not show either Mr. Kennedy or Mr. Smith with a gun-in-hand when entering the building; and upon leaving, the evidence established that Mr. Kennedy, not Mr. Smith, was holding a gun. *See* (62:130-134). And there was no evidence presented to reflect what happened inside the apartment complex other than the State's evidence reflecting that Mr. Smith and Mr. Kennedy were seen entering the building and, shortly thereafter, running away from the building, and that M.A. was shot.

In its post-conviction response, the State listed evidence which, in its opinion, supported the jury's finding. (47:2-3;App.129-130). The circuit court relied on this list when concluding post-conviction that the evidence was sufficient. (51:2;App.106)("The summary of trial evidence as set forth by the State in its response brief (pp.2-3) supports the jury's findings"). The State's list, however, contains a crucial misstatement of the evidence.

In this list, the State notes that the evidence established that Mr. Kennedy (the co-defendant) was seen on the video leaving the apartment building with a gun in his hand, and that Mr. Smith "is carrying either a gun or a cell phone." (47:2;App.129). But there was no evidence presented to establish that Mr. Smith left holding a gun. Indeed, the State cites as support for this assertion Tashawna's testimony that, based on her review of the surveillance video, she *thought* she saw a gun in Mr. Smith's hand. (*See* 47:2;App.129;62:74-75). However, Tashawna later admitted that she was simply "guessing" and made clear that she did not know what Mr. Smith had in his hand in the video. (62:78). And indeed, Detective Lewandowski testified that the item in Mr. Smith's hand appeared to be a cell phone. (62:133-134).

The trial record is devoid of any direct evidence to establish that Mr. Smith had any knowledge that any homicide (or any criminal activity for that matter) would take place. The evidence was wholly circumstantial. The circuit court acknowledged this: "There is no question that the evidence relative to the shooting was circumstantial in this case." (51:2;App.106). The State presented circumstantial evidence reflecting that Mr. Smith ran away from the scene with Mr. Kennedy and did not turn himself into police after the incident; however, his after-the-fact actions did not establish beyond a reasonable doubt what he *knew* before or during Mr. Kennedy's actions.

The only possible piece of evidence the State presented in an attempt to argue that Mr. Smith had knowledge that a crime would occur was Detective Lewandowski's hypothesis from watching the video that there was a driver in the car:

> THE WITNESS: You see Unquail Kennedy getting into the driver's side passenger behind

> the driver which states to me there obviously was someone in that vehicle because Isiah Smith runs on the passenger side and I don't know if he gets into the front seat or the backseat but I can determine that Unquail Kennedy gets in the backseat behind the driver.
>
> BY MR. STINGL:
>
> Q: It appears from the fact the brake lights were on and where they enter?
>
> A: The headlights also come on.
>
> Q: And the headlights coming [sic] on before they get there?
>
> A: Correct.
>
> Q: That there may be someone else in that vehicle?
>
> A: Yes.
>
> Q: Driving?
>
> A: Driving.

(63:24-25).

This testimony, however, failed to establish beyond a reasonable doubt that Mr. Smith had knowledge that Mr. Kennedy would commit any crime at all, let alone a *homicide*. Mr. Smith recognizes that a jury is allowed to draw inferences from the evidence. Nevertheless, those inferences must be reasonable. And they must be reasonable inferences which, if drawn, could support the conclusion that the State proved Mr. Smith's guilt beyond a reasonable doubt.

For example, whether accurate or not, it would have been reasonable for the jury to infer from the presence of Mr. Smith's cell phone at the scene that Mr. Smith had been at the

scene. Here, however, the State asked the jury to draw inferences from speculation. Indeed, Detective Lewandowski—by her own testimony—could not even positively conclude that there in fact was someone else in the car; instead, she testified that there *may* have been someone else in the car. (63:24-25). So, the State failed to actually prove the single fact from which it asked the jury to draw such a significant inference.

But even if the State had indeed proven that there was a third person driving the car, it still would have been unreasonable for the jury to infer from that fact alone that Mr. Smith knew that Mr. Kennedy was going to commit any crime, let alone a homicide. Though the jury was not instructed to this point of law, the Wisconsin Supreme Court has held that that an "aider and abettor may be guilty not only of the particular crime that to his knowledge his confederates intend to commit, but also for different crimes committed that are a natural and probable consequence of the particular act that the defendant knowingly aided or encouraged." ***State v. Ivy***, 119 Wis. 2d 591, 596-597, 350 N.W.2d 622 (1984).[9] Even this standard, though, required the State to prove (1) what *particular* crime Mr. Kennedy was there to commit, if not homicide and (2) that Mr. Smith had any knowledge that Mr. Kennedy intended to commit that *particular* crime. *See* Wis. JI-CRIM 400, 406. The State failed to do so, as reflected by the jury's acquittal of Mr. Smith on the Attempted Armed Robbery as Party to a Crime charge and rejection of Felony

[9] There is a jury instruction which reflects this principle; however, this instruction was not read to the jury. Wis. JI-CRIM 406; (*see* 66:32-66;67:69-83).

Murder, in favor of the lesser-included offense of Second Degree Reckless Homicide as Party to a Crime.[10]

Stated simply: the State presented no evidence from which a jury could reasonably infer that Mr. Smith had knowledge or belief that Mr. Kennedy would be committing any particular crime, let alone a homicide. Without an ability to show what, if any, crime Mr. Kennedy intended to commit, and whether Mr. Smith had any knowledge whatsoever that any crime would be committed, the State instead asked the jury to draw inferences from speculation. As such, the State failed to present any evidence from which a jury could have reasonably concluded that it met its burden beyond a reasonable doubt.

II. The Circuit Court Erred in Denying the Defense Request to Read to the Jury the Seventh Circuit's "Mere Presence" Instruction.

Should this Court deny Mr. Smith's request to vacate his conviction based on insufficient evidence, he seeks a new trial on grounds that the circuit court erred in denying the defense request for a "mere presence" instruction.

A. Additional relevant facts

Defense counsel asked the circuit court to include an instruction derived from a Seventh Circuit pattern jury instruction, which would have provided: "If a defendant

[10] The jury was instructed to consider whether Mr. Smith was guilty of First Degree Reckless Homicide as Party to a Crime, and that if they could not unanimously agree on that charge, they should then consider whether he was guilty of Felony Murder. (67:74-75). They were further instructed that if they could not unanimously agree on that charge, they should consider Second Degree Reckless Homicide as Party to a Crime. (66:35-36;67:79).

performed acts that advanced the crime but had no knowledge that the crime was being committed or was about to be committed, those acts are not sufficient by themselves to establish the defendant's guilt." (47:12-14;65:8-14;App.139-141). The State objected to the request. (65:8-14).

The circuit court denied the defense request, concluding: "I don't think that there's any evidence in the record to support the proposition that Mr. Smith had no knowledge that the crime was being committed or about to be committed." (66:13-24;App.150-161). Defense counsel responded, noting that there was no evidence that Mr. Smith *did* have any knowledge of what would occur; however, the court determined that it "appear[ed] there was a getaway driver," and that Mr. Smith ran away from the scene. (66:15-16;App.152-153). The court considered these facts to be pieces of "circumstantial evidence from which the jury could infer the defendant's knowledge." (66:15-16;App.152-153). The court further noted that if the defense's position was correct, then it should grant the defense's request for a directed verdict, as "all the State has is his actions that he committed and that those who were with him committed." (66:17-18;App.154-155).

Over defense objection, the Court also instructed the jury on the lesser-included offenses of felony murder and second-degree reckless homicide. (66:4-5).

B. The circuit court erred in denying the defense request for the Seventh Circuit's "mere presence" instruction.

A defendant is entitled to a theory of defense instruction if it is timely requested and supported by credible evidence. ***State v. Bernal***, 111 Wis. 2d 280, 282, 330 N.W.2d 219, 220 (1983). A reviewing court considers the jury charge

in its entirety to determine whether the jury was fully and fairly instructed. ***McMahon v. Brown***, 125 Wis. 2d 351, 354, 371 N.W.2d 414, 416 (Ct. App. 1985). If the instructions adequately covered the law applicable to the facts, a reviewing court will not find error in the refusal of special instructions, even where the refused instructions themselves would not be erroneous. ***State v. Roubik***, 137 Wis. 2d 301, 308-09, 404 N.W.2d 105 (Ct. App. 1987).

The circuit court erred in denying the defense request for the "mere presence" instruction. As discussed above, there was no direct evidence that Mr. Smith had any knowledge that Mr. Kennedy would engage in any criminal action against M.A. As such, it was essential for the jury to fully understand what exactly would and would not be sufficient for the State to meet its burden to prove that Mr. Smith acted as party to a crime.

Mr. Smith recognizes that, as part of the circuit court's instruction on party to a crime liability, it stated to the jury that "a person does not aid and abet if he is only a bystander or spectator and does nothing to assist in the commission of a crime." (66:46; *see also* Wis. JI-CRIM 400). While in other cases this instruction may be adequate to explain that presence alone is insufficient to establish guilt as charged, in this case it was not.

Mr. Smith further acknowledges that in ***State v. Skaff***, 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989), this Court rejected a similar argument. There, the defendant was charged with possession of cocaine with intent to deliver as party to a crime. ***Id.*** at 50.[11] The defendant sought an instruction providing that his mere presence at the scene, even when

[11] The specific facts set forth at trial are not discussed in the opinion.

coupled with knowledge of the presence of cocaine at the scene, was insufficient to find him guilty of possession with intent to deliver. ***Id.*** at 59. Instead, the circuit court read the following instruction: "a person does not aid and abet if he is only a bystander or spectator, innocent of any unlawful intent, and does nothing to assist or encourage the commission of a crime." ***Id.*** The defendant argued that the circuit court erred in failing to give his requested instruction. This Court rejected this argument, noting that it was "hard pressed to find any essential difference between Skaff's requested charge and that submitted by the court." ***Id.*** at 60.

Here, unlike in ***Skaff***, important differences did exist between the requested instruction and the instruction provided. The language in the pattern—"bystander" and "spectator"—connote someone who is present at the scene by happenstance and not accompanying the direct actor.[12] The requested instruction, on the other hand, would have explained to the jury that even if the State established that Mr. Smith was present at the scene of the crime *with* Mr. Kennedy and even if he somehow performed acts which may have inadvertently advanced the crime, the State still had to establish that Mr. Smith *knew* that the specific crime was going to be or was being committed. Unlike the instruction provided, the requested instruction would have also explained to the jury that acts Mr. Smith may have taken after-the-fact

[12] The Merriam-Webster Dictionary defines a bystander as "a person who is standing near but not taking part in what it happening; one present but not taking part in a situation or event; a *chance spectator*." Merriam-Webster Dictionary, "Bystander", available online at http://merriam-webster.com/dictionary/bystander (last accessed 12/4/15)(emphasis added). It defines a spectator as "one who looks on or watches." Merriam-Webster Dictionary, "Spectator", available online at http://merriam-webster.com/dictionary/spectator (last accessed 12/4/15).

would not be sufficient to support guilt without evidence that he had knowledge that the crime would be or was being committed.

Even further, the circuit court's decision not to give the requested instruction rested on its conclusion that there had been no evidence to affirmatively establish that Mr. Smith did not know what Mr. Kennedy would do. But the burden was not on Mr. Smith to disprove knowledge; it was the *State's* burden to *prove* knowledge. And the evidence the State presented failed to demonstrate that Mr. Smith had any knowledge of what Mr. Kennedy would do or that he actively participated in Mr. Kennedy's intended actions in any way. The circuit court therefore erred in failing to offer the instruction that would have clarified for the jury exactly what the State had to establish through this circumstantial evidence to meet its burden. This Court should therefore remand this matter for a new trial.

III. Mr. Smith Was Denied the Effective Assistance of Counsel Where His Attorney Chose to Allow a Juror—Who Feared Retaliation from Persons He Believed to be Mr. Smith's Family—to Remain on the Jury.

A. Additional relevant facts

During opening instructions prior to testimony, the circuit court instructed the jury: "[d]o not discuss this case among yourselves or with anyone else until your final deliberations in the jury room." (62:6).

Once evidence had closed, prior to deliberations, this Court dismissed two of the fourteen jurors. (67:82-83

During deliberations, the jury asked to again see the surveillance videos from the exterior of the apartment building, which the court showed them. (68:1-8). The court then dismissed the jurors for the weekend. (68:9).

The following Monday, the court addressed an issue which had just come to its attention concerning one of the jurors. (69;App.162-172). Assistant District Attorney (hereinafter "ADA") Mark Williams (ADA Dennis Stingl represented the State at trial) explained to the court that then-ADA Janet Protasiewicz approached him and informed him that on the previous Tuesday, she received a text message from one of the juror's mothers, with whom she was friends, in which the juror's mother explained that the "family of the accused" was present in the courtroom and acting "inappropriately." (69:5-7;App.163-164). The juror's mother stated that her son, the juror, was worried that if there was a guilty verdict, the "family of the Defendant is going to go ballistic, and he is scared for retaliation." (69:5-7;App.163-164). ADA Williams noted that ADA Protasiewicz responded to the message. (69:6;App.164). Defense counsel noted that in fact it was not Mr. Smith's family—but the victim and co-defendant's families—who had been present in court. (69:9-10;App.164-165).

The court explained that it would proceed with this issue in the following way:

> First we need to ascertain whether or not Juror [] can remain and in fact is a fair and impartial juror. If it turns out he is not, then we have to ascertain whether the rest of the jury has been tainted. If it has not, now we have 11 competent jurors, then the Defense is going to have to decide will it stipulate to continuing with 11, will it stipulate to bringing back one of the alternates, and

> having the Court instruct the newly constituted 12 to begin deliberations anew, or is it going to seek a mistrial.

(69:12;App.165). It noted that the option of bringing back an alternate would only be possible if it could "ascertain that one of the two alternates has remained fair and impartial," and in fact "may not even be available as a matter of course" as the alternates in this case had already been dismissed. (69:12-13;App.165). It then heard testimony from ADA Protasiewicz and the juror.

ADA Protasiewicz testified that her friend sent her a text message the previous Tuesday, explaining that her son was worried about retaliation from people he believed to be the defendant's family, in light of their behavior in court. (69:15;App.166). The juror's mother noted that her son said that he had been identified by name numerous times in front of these people, and that her son was now concerned and she and her husband were both "panicked." (69:15-16;App.166). ADA Protasiewicz stated that she gave the following response: "There's nothing to worry about. They keep the jury list sealed. The family members cannot get the list with any information as to where you all live. Really nothing to worry about. I've been doing this a long time, and families go ballistic when I'm in court every single day. Don't worry about a thing." (69:16;App.166).

ADA Protasiewicz stated that the woman wrote back the next morning saying that her husband "is still panicked if it's a guilty verdict." (69:16;App.166). ADA Protasiewicz responded saying "[i]t will be fine"; the woman wrote back: "Been living in the suburbs too long. Smile. Have a great day;" and ADA Protasiewicz wrote back again Wednesday morning, stating: "It's no tea party down here. It can be rough and gritty, but no one has ever been hurt here. The courts are

very careful. It will be absolutely fine." (69:16-17;App.166). ADA Protasiewicz explained that she had no idea whether the woman communicated this information to her son. (69:18;App.167).

The circuit court expressed its "extreme displeasure" that ADA Protasiewicz had "received information that a juror on a homicide case was violating what you could have assumed was a standard order of the court, which is not to communicate with anyone during the course of the jury trial, clearly that he had been communicating, and the type of communication that was conveyed indicated at least the possibility that he might not be able to remain a fair and impartial juror." (69:19;App.167). The court noted that it had released two alternate jurors and was "absolutely floored" that ADA Protasiewicz had not brought this up sooner. (69:19;App.167).

The parties agreed that the court would inform the juror that there was no indication that the people he saw in the courtroom were members of Mr. Smith's family. (69:20-25;App.167-168). The court then conducted a colloquy with the juror. He acknowledged that he had concerns about retaliation and brought those concerns to his parents' attention. (69:25;App.168). "It was just like I don't know what might happen, whatever the verdict is, you know, what their reaction might be." (69:26;App.169). He said his parents were nervous but said everything should be fine. (69:26;App.169). He stated that he did not know that his mother had talked with ADA Protasiewicz and that his parents did not talk to him about this concern after that initial conversation. (69:26-27;App.169).

The juror, however, also stated he had this conversation with his parents on the previous Thursday; the

court noted that his testimony did not line up with the timing of the messages. (69:27-28;App.169). The juror stated that it "wasn't like a really true concern," and that he just wondered "if anything bad would happen if the verdict was whatever and if there would be a reaction from the audience." (69:29;App.169). He denied seeing anyone in the gallery that was acting loud or inappropriate during the trial. (69:31;App.170). The juror stated that he had not discussed his concerns with any other members of the jury. (69:31;App.170).

The court explained to the juror that it did not know who was in the audience and that those persons may be "associated with the trial on either side." (69:3;App.1700). It also explained that the jury list was sealed and private. (69:32;App.170). The juror stated that he believed he could be fair and impartial. (69:33;App.170).

Following the colloquy of the juror, defense counsel stated: "I conferred with Mr. Smith. I don't believe there's any problem, at least on this record, with this juror's impartiality. And so I'm asking that he be permitted to deliberate. I'm not requesting a mistrial. I'm not requesting that you take any action on this." (69:35;App.171). The State agreed. (69:35;App.171).

The Court, however, noted that it was concerned as it felt the juror "really minimized the communications that he must have had to generate the original text message" and had trouble remembering when the conversation occurred. (69:35;App.171). Nevertheless, it concluded that he did not appear to be afraid, seemed sincere that he could be fair and impartial, and seemed credible in his statement that this was a limited discussion. (69:35;App.171). Therefore, the court

concluded that "if everyone else is satisfied, I'm satisfied that he can continue as well." (69:36;App.171).

B. Relevant case law and standards of review

Both the United States and Wisconsin Constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Wis. Const. art. 1, § 7. "This right includes the right to effective assistance of counsel." ***State v. Roberson***, 2006 WI 80, ¶ 23, 292 Wis. 2d 280, 717 N.W.2d 111.

To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced his defense. ***State v. Artic***, 2010 WI 83, ¶ 24, 327 Wis. 2d 392, 768 N.W.2d 430. To prove deficient performance, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W. 2d 379 (1997) (citing ***Strickland***, 466 U.S. at 694).

A trial court must hold a ***Machner*** hearing if the defendant alleges facts which, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996) (emphasis added)(quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

In reviewing a claim of ineffective assistance of counsel, appellate courts "grant deference only to the circuit court's findings of historical fact." ***Roberson***, 2006 WI 80, ¶ 24 (quoting ***State v. Thiel***, 2003 WI 111, ¶ 24, 265 Wis. 2d 571, 665 N.W.2d 305. Nevertheless, "[w]hether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we [appellate courts] review de novo." ***Bentley***, 201 Wis. 2d at 310. Appellate courts also review de novo "the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding." ***Id.***

"Although discharge of a juror during jury deliberations is an infrequent event, its rare occurrence poses a very difficult question for the fair and efficient administration of justice." ***State v. Lehman***, 108 Wis. 2d 291, 307, 321 N.W.2d 212 (1982). "When a juror seeks to be excused, or a party seeks to have a juror discharged, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the juror." ***Id.*** at 300. The Wisconsin Supreme Court has held that "[u]nless there is express authorization permitting a circuit court to substitute an alternate juror during jury deliberations, the circuit court has only three options available to it if a regular juror is discharged after jury deliberations have begun: first, to obtain a stipulation by the parties to proceed with fewer than twelve jurors; second, to obtain a stipulation by the parties to substitute a juror; and third, to declare a mistrial." ***Id.*** at 313.

C. Deficient Performance

Mr. Smith has not and does not challenge trial counsel's decision not to seek a mistrial. He does, however, assert that trial counsel performed deficiently by allowing the fearful juror to remain on the jury. No apparent strategic reason exists for trial counsel's decision to do so. The juror's actions, ADA Protasiewicz's testimony, and the juror's answers to the circuit court's questions reflected that the juror was comfortable disregarding the court's order; specifically, the order that the jury not discuss the case with anyone else until deliberations, and further that the juror had specific negative beliefs about the people in the courtroom whom he presumed to be Mr. Smith's family—namely, that their behavior in court was reflective of persons who would then engage in violent behavior. And the circuit court itself noted that it was concerned that the juror was not being truthful when addressing its questions about the extent of his fears. (69:35;App.171).

As such, trial counsel performed deficiently by failing to ask the circuit court to remove the juror from the panel. Defense counsel had two options other than seeking a mistrial, both of which the circuit court explained: (1) stipulate to proceeding with eleven jurors; or (2) stipulate to proceeding with one of the two dismissed alternate jurors. (69:12;App.165). Mr. Smith agrees with the circuit court that, in order to proceed with the second option, the court would have had to colloquy the alternate jurors to ensure that they had not discussed this matter with others or researched it at all. While it may have been unlikely that the jurors would not have at that point done so—given that they had been dismissed on Friday, with this issue arising the following Monday—we do not know, as defense counsel did not ask that they be questioned. And even if those jurors were unavailable, the defense still could have agreed to proceed with eleven jurors.

Mr. Smith explained in his post-conviction motion that, at a hearing, he would testify that: (1) he simply went along with his attorney's recommendation to move forward with this juror on the panel; (2) his attorney did not discuss with him the possibility of moving forward with eleven jurors; and (3) he did not wish to have this juror on the panel, as he believed in light of what had been discussed that this juror would not evaluate the evidence in a fair manner. (45:16;App.125).

D. Prejudice

Further, there is a reasonable likelihood that counsel's deficiency prejudiced the outcome of Mr. Smith's case. This was a close case. The jury's verdicts—acquitting Mr. Smith of the attempted armed robbery charge and rejecting first-degree reckless homicide and felony murder in lieu of the lesser-included offense of second degree reckless homicide—reflect that the jury was not wholly persuaded by the State's evidence. Given the relative weakness of the State's evidence, the fact that counsel could have, but did not, move to remove a juror who violated a court order and expressed concern about retaliation for a guilty verdict prior to deliberations, undermines confidence that the outcome of this case would have been the same had that juror not remained on the jury panel.

And while it is nearly impossible to know for certain whether the removal or substitution of this juror would have resulted in a different verdict, the prejudice standard does not demand certainty; rather, the question is whether counsel's deficient performance is sufficient to *undermine confidence* in the outcome of Mr. Smith's trial. ***Smith***, 207 Wis. 2d at 276.

In ***State v. Carter***, 2002 WI App 55, 250 Wis. 2d 851, 641 N.W.2d 517, this Court addressed a claim of ineffective

assistance of counsel where the attorney failed to remove a subjectively biased juror from the jury. The defendant was charged with a sexual assault offense; during voir dire, the prospective juror indicated that his brother-in-law had been the victim of a sexual assault offense. ***Id.***, ¶¶ 1-3. The prospective juror was asked whether he felt "that that would influence or affect [his] ability to be fair and impartial" and he answered yes. ***Id.***, ¶ 3. The prospective juror was not asked any further questions on this issue and served on the jury. ***Id.***, ¶ 4.

This Court concluded that the defendant *had* met his burden to show that his trial attorney's failure to engage in further questioning and remove that juror from the panel prejudiced the outcome of his trial. ***Id.***, ¶ 15. This Court explained that a guilty verdict without "impartial jurors renders the outcome unreliable and fundamentally unfair." ***Id.*** "Consequently, counsel's failure to act to remove a biased juror who ultimately sat on the jury constitutes deficient performance resulting in prejudice to his client." ***Id.***

While the circumstances of ***Carter*** and this case differ in certain respects, ***Carter*** reflects that a defendant may meet his burden to show prejudice for trial counsel's failure to remove a juror from the jury without definitive proof of how the juror would have voted. Indeed, the juror in ***Carter*** was asked whether his relative having been the victim of a sexual assault would "influence or affect" his ability to be fair—he was not asked whether it would definitively cause him to vote guilty. Instead, ***Carter*** holds that a partial juror renders unreliable—or undermines confidence—in the outcome of the trial.

As Mr. Smith's post-conviction motion alleged facts which, if true, would entitle him to relief, the circuit court

erred in denying his post-conviction motion without an evidentiary hearing. He therefore asks this Court to reverse and remand this matter for a ***Machner*** hearing.

CONCLUSION

For these reasons, Mr. Smith requests that this Court enter an order reversing his conviction on grounds of insufficient evidence, and remanding this matter to the circuit court with directions to enter a judgment of acquittal. Should this Court deny that request, he asks that this Court reverse his conviction and remand this matter for a new trial on grounds that the circuit court erred in denying the defense request for a "mere presence" jury instruction. Should this Court deny that request, he asks that this Court enter an order remanding this matter for a ***Machner*** hearing to address Mr. Smith's claim of ineffective assistance of counsel.

Dated this 7th day of December, 2015.

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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 8,466 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 7th day of December, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 7th day of December, 2015.

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A P P E N D I X

I N D E X
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*The transcripts in this Appendix have been redacted for privacy purposes. The name of the homicide victim has been redacted to initials. The names of the fearful juror and his parents have also been redacted to initials. The name of the homicide victim's girlfriend, who testified at trial, has been redacted to first name and last initial.

**This transcript is labeled as the "AM" session when it was instead the afternoon session.